Nov/Dec 2017 Police Stops Access to Justice Conflict of Interest

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TOP 5 LEGAL QUESTIONS

42-2: Top Five Legal Questions

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What Do I Have to Tell the Police if They Stop Me?

By Charles Davison

In attempting to narrow the scope of this article, I have settled upon three questions which arise most frequently for many people who do not usually come into contact with the police. These questions involve the intersection of our rights as Canadian citizens to live our lives without intrusion or interference from state agencies and officers.

1. DO I HAVE TO STOP FOR THE POLICE?

It depends. It depends upon why the police are asking you to stop, and upon whether you are driving a motor vehicle, or travelling on foot.

Canadian society is founded upon the basic principle that we are free to be left alone by the government and government officials, including the police, except as permitted under the law. In Canada, a police officer does not have the authority to randomly require an individual to stop and identify themselves or to answer police questions.

To require compliance with a demand, a police officer must first have a legal basis for the request. If the officer has reasonable grounds to believe the person in question has committed an offence, the officer may arrest her. If arrested, the person is considered to be in the lawful custody of the officer and must remain as directed (often she will be handcuffed and placed into a police vehicle). If the officer does not have reasonable grounds to believe the person has committed a criminal offence, but is investigating an allegation along these lines, the officer may temporarily require her to remain with the officer under what has become known as “investigative detention.” In both situations – arrest and investigative detention – the police are required to explain, and the citizen has the right to know, why she is being held.

Absent one of those situations, however, the police have no right to detain people at random. Someone facing a general police demand to stop and speak with them is entitled to not comply and continue on his or her way.

However, the situation is quite different once that same individual is behind the wheel of a motor vehicle. Because driving is a privilege only (it is not a right) and because of the need for and nature of

the regulation of motor vehicles and their use, the police have an almost unrestricted power to stop motor vehicles and obtain certain information from drivers. Police have the legal authority to carry out random checks to ensure vehicles are roadworthy; to check drivers for their licenses; and to ensure vehicles are properly registered and insured. And of course, if a police officer has reason to believe the vehicle has been involved in a traffic violation (or a criminal offence) he or she will have grounds to stop the vehicle. Failing to stop a vehicle as directed by a police officer is a provincial and territorial traffic violation, but in more serious cases the *Criminal Code* charge of "criminal flight from the police" can be laid. Conviction for that offence – which often involves high speed police chases – usually leads to imprisonment.

2. DO I HAVE TO SPEAK WITH THE POLICE?

In general, "no".

Another of our basic legal principles is the right of every person to refuse to assist the state to prosecute himself. The main illustration of this concept is the well-known right to remain silent (sometimes called the protection against self-incrimination). An individual who is suspected or accused of committing a crime has the unequivocal right to refuse to say anything to the police and cannot be punished for refusing to do so. Even witnesses are entitled to refuse to speak with the police if they wish. Witnesses may have a moral duty to assist police investigating an incident, but that is not the same as a legal duty. The right to remain silent is so important that the police are required to tell anyone being arrested that they have that right and if they give up the right to remain silent, anything they say can be used in court.

However, the police are entitled to try to persuade the individual to speak, including by way of continuing to ask their questions even as the individual continues to insist that he or she wishes to say nothing. The Supreme Court of Canada has said that the right to remain silent only means the individual has the right to be silent, but it does not mean the authorities cannot speak to him or her (although if, after many hours of remaining silent, the individual does answer to the allegations or questions, there might be good arguments against allowing the state to make use of any such statements obtained only after "wearing down" the person being interrogated).

There are at least a couple of small exceptions to the right to remain silent.

One exception is in relation to the identification of a suspect or accused person. Strictly speaking, the right to remain silent includes confirming one's identity and basic personal information (mainly, date of birth) to the police. However, in many situations involving relatively minor offences, the police are not permitted to arrest the accused but instead, issue legal documents requiring that individual to come to court to answer the charges and then let the person go on their way. In such cases, if the person does not identify themselves, the police have the power to arrest in order to establish their identity, usually through fingerprinting.

Another example of an exception of the right to remain silent also arises in the area of motor vehicles. Just as the police have the power to require motor vehicles to stop, they also have the power to demand the driver provide them with proof of registration and insurance, and allow them to inspect his personal driver's license. If the vehicle has been involved in an accident, in most jurisdictions the driver is also required to provide a statement as to what happened. Failure to comply with these duties is a provincial offence. However, this applies only to the driver of a motor vehicle; passengers are fully entitled to remain silent and do not have to identify themselves unless the police have proper legal grounds to ask them to do so.

3. DO I HAVE TO PROVIDE A SAMPLE OF MY BREATH TO THE POLICE?

This demand is almost exclusively made as part of impaired driving investigations, and the general answer is "yes".

Police officers who have reasonable suspicions that a driver has alcohol in her body have the power to demand that she provide a "roadside sample" of her breath into a hand-held unit the police carry with them. This device will indicate in very general terms whether the driver has alcohol in their system and roughly how much. The device analyzes the breath sample and provides readings of either "pass", "warn" or "fail". A driver who blows a "fail" will then be arrested for "impaired driving". The officer will then formally demand that the driver accompany the officer to an Intoxylizer device (usually back at the detachment) and provide samples of breath to be analyzed by that instrument. This machine will provide an actual scientific numerical result which tells the officer the amount of alcohol in the bloodstream of the driver. Anything over 80 milligrams of alcohol in 100 millitres of blood is against the law and a driver whose breath samples leads to such a result will then face a second charge, of "driving a motor vehicle with too much alcohol in his/her blood stream" (often referred to as "over 80").

Because of the concerns about the frequently tragic results of impaired driving shared throughout Canadian society, Parliament has decreed that failing to provide a breath sample as demanded either at the roadside and/or for the purposes of the Intoxylizer device, is also a criminal offence, to be punished in the same way as blowing a sample which is "over 80". A first offender will be fined a minimum of $1000 and will be prohibited from driving for a least one year. A second offence will lead to a minimum jail term of 30 days and a prohibition on driving for two or more years. A third or higher offence will lead to an automatic jail sentence of not less than 120 days and at least a three year driving prohibition.

What Do I Do with My Tenancy after I've Lost My Job?

By Aaida Peerani

I just got laid off and I can't afford my rent. Can I just move out?

No. If you have a fixed-term lease, you cannot leave before the lease ends or you risk paying damages to the landlord for breaching your lease agreement.

If you have a periodic tenancy (which has no fixed end date), you still have to give the landlord notice before you leave. If you have a monthly tenancy, you must give written notice to your landlord at least one tenancy month in advance of when you plan to move out. If you have a weekly tenancy, you must give one tenancy weeks' notice.

> PRO TIP
>
> Speak to your landlord as soon as possible if you think you'll need to move out. Offer to help your landlord find a new tenant by advertising the unit online or in local community hubs. Your landlord may be more willing to let you leave early if you help search for a new tenant.

How can I get out of my lease early?

Talk to your landlord about your situation. Find out if your landlord will allow you to break your lease early. Your landlord is under no obligation to agree to your request, but some landlords may be willing to do especially if your financial circumstances have changed.

If your landlord agrees to end your lease early, make sure any agreement you make is in writing and is signed by both you and your landlord.

If you can't break your lease, there are two other options to consider:

- Assigning your lease
- Subletting your property

What is assignment?

Assignment is when you find someone to take over your lease agreement. It is a good option if you don't plan on returning to your rental home.

How do I assign my lease?

If you find someone who wants to take over your lease agreement, you must get written permission from the landlord to assign your lease.

Your landlord can only refuse your request to assign your lease if there are reasonable grounds (i.e. the new tenant refuses to fill out an application form or cannot pay the rent). If your landlord refuses your request, written reasons for the refusal must be provided.

If you get permission to assign your lease, make sure to get a release from your landlord. A release is a new agreement that discharges you from all of your obligations to the landlord. For example, a signed release would protect you from having to pay rent if the new tenant doesn't pay it in the future.

The benefit of assignment is that you are no longer responsible for anything to do with the rental unit once the lease has been assigned and a release has been signed between you and your landlord.

What is subletting?

Subletting is when you move out of your rental property and someone new moves in, but the original lease stays in place. You remain legally responsible for all of the obligations under the lease and under the law. For example, if the person you find to sublet fails to pay rent, the landlord can come after you to collect the unpaid rent.

You can sublet your place for a fixed period of time (i.e. March 1 to June 30) or can make a periodic agreement (i.e. month-to-month, week-to-week). Subletting is a good option if you think you might want to return to your place in the future.

> PRO TIP
>
> If you don't hear from your landlord within 14 days of asking permission to sublet or assign your lease, the law says that you can assume the landlord has agreed to the sublet or assignment.

How do I sublet my place?

Like assignment, you need to get written permission from your landlord to sublet. Your landlord can only refuse your request if there are reasonable grounds and must provide written reasons for any refusal.

You should enter into a written, signed agreement with the person who sublets your place. The agreement should include all of the obligations from your original lease and any other extra terms you think are necessary, such as how and to whom the rent will be paid.

I just lost my job and I own my home. I want to rent a room to help pay my mortgage. What do I need to know?

Read CPLEA's free booklet *Renting Out a Room in Your Home*. Visit www.cplea.ca and click on Publications.

Where can I get more help?

- Laws for Landlords and Tenants in Alberta
- **Residential Tenancy Dispute Resolution Service**
  Toll free: 310-000, then 780-644-3000
  Calgary: 403-297-2669
  http://www.servicealberta.ca/rtdrs/

- **Lawyer Referral Service**
  1-800-661-1095 or (403) 228-1722 (Calgary)
  http://www.lawsociety.ab.ca/public/lawyer_referral.aspx
  The **first 30 minute consultation** with a lawyer through the Lawyer Referral Service is **free of charge**

- For a list of legal clinics, go to: www.pbla.ca/gethelp

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Police Record Checks – What Can They Disclose?

By Heather Forester

Police Record Checks are increasingly requested by employers and other entities, including volunteer, educational, licensing, adoption, foster care, and foreign travel organizations or authorities. It is important to understand that Police Record Checks can and do reveal information that goes far beyond records of criminal convictions. The most frequent call the Alberta Civil Liberties Research Centre receives is from people who are surprised and distraught that a "criminal record check" has revealed personal information about them that is unrelated to any criminal record they may or may not have. The information disclosed in a Police Record Check not only includes records of criminal convictions but can also include "non-conviction records" and "police contact records." The disclosure of this broader range of records can result in the subject of the Police Record Checks experiencing unfair treatment and humiliation. Police Record Checks also disproportionately affect people who have more contact with the police, such as people living in poverty or people with mental health or developmental disabilities. They may also negatively impact employers and other organizations that receive this information, if they collect, retain, use or disclose it in a manner that violates the law, including human rights, privacy and criminal laws.

The information revealed in a Police Record Check is collected by the police and stored in a number of police databases across the country. There is no Canada-wide legislation or uniform guidelines governing what information can be collected, how it should be used, stored, maintained and disclosed or how long it should be retained. However, the Uniform Law Conference of Canada Working Group on Criminal Record Checks is currently working on a uniform law (ULCCWG-Criminal Record Checks).

There are three basic types of Police Record Checks: Criminal Record Checks, Vulnerable Sector Checks, and Police Information Checks.

The Criminal Record Check is the narrowest type of Police Record Check. It discloses records of convictions or findings of guilt under criminal law statutes including the Canadian *Criminal Code* and the *Youth Criminal Justice Act*.

The Vulnerable Sector Check is the most in-depth type of Police Record Check. It discloses all the records disclosed under the Criminal Record Check and Police Information Check as well as information about

sexual and violent offences for which the offender has been pardoned (record suspension). The Vulnerable Sector Check is usually only requested when the subject of the check will be in a position of trust or authority over people who are more vulnerable than others because of their age, disability or other circumstances.

The Police Information Check raises the most significant concerns for both the subject of the check and the organization requesting this type of check. This is because it not only discloses information found in Criminal Record Checks and Vulnerable Sector Checks (if relevant) but also includes records of relevant provincial statute convictions as well as "non-conviction records" and "police contact records" (also referred to as "police history records"). Each police force has its own guidelines and policies respecting applications for and the contents of Police Record Checks. The foregoing and following information on Alberta police force Police Information Checks was obtained from the Calgary Police Service and Edmonton Police Service websites.

Non-conviction records include pending criminal or relevant provincial statute charges and orders, and Alberta and out-of-province outstanding warrants. They also include records of charges that were laid but did not result in a conviction including instances where the subject of the check was granted an absolute or conditional discharge, found not guilty, acquitted or found not criminally responsible by reason of mental disorder. Police Record Checks also disclose records of charges that were withdrawn or stayed.

Police contact records include information from local police databases and Alberta Provincial Court records. Police contact records disclose when the subject of the check merely had contact with the police and can include:

- records of complaints where charges were never laid;
- mental health apprehensions or calls during a mental health crisis;
- 911 calls;
- investigations and surveillance of 'persons of interest';
- calls to police by persons who are victims of crimes;
- witness investigations;
- domestic dispute investigations or calls;
- casual interactions with the police; and
- other "relevant occurrences" which may include records of any interaction with the police or records indicating a concern for public safety.

There are several concerns raised by Police Information Checks. First, most citizens are not aware that this information is being collected and retained. Second, the police have the discretion to decide what information will be disclosed and this discretion may be exercised differently by different police organizations. Third, there are no guidelines in respect of how long certain types of Police Information Check records should be retained and some are kept indefinitely. Fourth, the police will disclose Police

Information Check records if they believe the records will help an organization make a decision about how they will deal with an individual. Organizations may not be qualified to make that decision, which may result in the individual being unfairly stigmatized and as a result, rejected. Since individuals may never know why they were rejected, they will be unable to seek remedies for unfair treatment.

There are some limited protections for those who are concerned that they or others have or will be negatively impacted by the release of information obtained under Police Record Checks.

First, in most cases, the subject of a Police Record Check must consent to the performance of and disclosure of information in a Police Record Check, either directly or by consenting or agreeing to provide a Police Record Check to the individual or organization requesting it.

In addition, individuals can determine whether there is cause for concern regarding the information that will be divulged in a Police Record Check by requesting a detailed Police Record Check directly from the police services with which they have interacted or by filing a request for information under access to information or privacy legislation.

Furthermore, provincial/territorial and federal human rights legislation prohibits private individuals and organizations and the government from discriminating against individuals in respect of certain practices on specific grounds, including on grounds of mental or physical disability. A person who believes they have been the subject of discrimination, for example, by being denied employment because information in a Police Record Check divulged that they have a mental disability, can file a complaint with the relevant human rights commission alleging discrimination and seeking a remedy. The legislation that applies depends upon whether the individual, organization or government is provincial or federal. The *Alberta Human Rights Act*, RSA 2000, c A-25.5 (AHRA) applies to Alberta individuals and organizations and the Alberta government. The *Canadian Human Rights Act*, RSC 1985, c H-6 (CHRA) applies to federal organizations and the federal government. Federal human rights legislation and some provincial/territorial legislation also prohibit discrimination on the basis of a person's criminal record. However, the AHRA does not prohibit discrimination on this ground.

Privacy legislation also offers some protection. The federal *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (PIPEDA) and the Alberta *Personal Information Protection Act*, SA 2003, c P-6.5 (PIPA) govern how private sector organizations collect, use and disclose personal information in the course of commercial business. For example, both the federal and provincial privacy legislation prohibits a potential employer from asking a potential employee for more information than is reasonable or necessary to determine their suitability for the job. The Alberta *Freedom of Information and Protection of Privacy Act,* RSA 2000, c F-25 (FIPPA) and the federal *Privacy* Act, RSC 1985, c P-21 protect the privacy of an individual's personal information held by government institutions, which includes police forces, and provides individuals with a right of access to that information.

In an effort to bring a more standardized way of approaching Police Record Checks, the Ontario government recently passed the *Police Record Checks Reform Act,* SO 2015, c 30 (PRCRA) (not yet in

force). The PRCRA specifies the manner in which Police Record Checks must be requested and how the police or other providers of Police Record Checks must respond to such requests. Among other safeguards, it limits the disclosure of non-conviction records, police contact records and mental health information. It is time for other Canadian jurisdictions to follow Ontario's lead and pass legislation governing Police Record Checks, both to protect individuals from the negative consequences of the current Police Record Check regime and to direct police organizations, employers and other organizations on the proper methods for collecting, using, retaining, and disclosing this highly sensitive information.

What You Should Do If You Are Injured in a Car Accident

By Donald L. McFarlane

AT THE ACCIDENT SCENE

- Call the police (911) if anyone appears to been seriously injured or damage to all the vehicles appears to be in excess of $2000. EMS will be alerted if deemed necessary.
- Also call police if any of the drivers involved appears to be impaired by alcohol and or drugs.
- Wait for the police to arrive and provide a witness statement. Keep a copy of your statement for future reference. If the police do not attend the scene, go to the nearest district house and provide a statement. Don't forget to keep a copy.
- Get the names and contact information of any witnesses to the accident, as well as the insurance information of all parties involved in the accident.
- If possible, take photographs of the positions of the vehicles and any damage.
- Many lawyers offer free initial consultations and contingency fee arrangements (no upfront costs to you).

SAFETY ISSUES

- Do not move anyone with serious injuries as this may make things worse.
- Move away from the vehicles to exchange information with the other drivers at a safe location.
- In the absence of serious injury, move your vehicle to a safe location if possible.
- Do not move your vehicle if there are serious injuries or a suspected impaired driver, as the positions of the vehicles will play a part in any subsequent police investigations.
- All occupants of the vehicles should exit the vehicles and move to a safe place.
- Use hazard lights or other signal devices to make vehicles visible to other traffic.

SEEK MEDICAL CARE

- In the event of serious injury, you will likely be transported by ambulance (EMS) to the nearest emergency room for initial assessment and treatment. Family members will be notified of your situation.

- If you are uncertain as to the seriousness of any injury, have a friend or family member take you to the nearest hospital immediately for assessment of your injuries and treatment.
- Follow up with your family physician or primary healthcare provider as soon as possible following the accident to report your injuries and the cause. Following a diagnosis of your injuries, a treatment plan will be developed for you that may be modified during the course of your rehabilitation.
- Always keep your healthcare providers updated as to your condition and follow their instructions diligently.

NOTIFY YOUR INSURER(S)

- Contact your auto insurer and report the accident as soon as possible. They will require a statement and will provide you with advice regarding repair or replacement of your vehicle, medical benefits and disability benefits available under your policy.
- Complete the appropriate claims forms and submit them promptly to your insurer. Note: time restrictions typically apply, so confirm deadlines with your insurer and make sure the forms are completed and submitted on time.
- Note: some forms may require the assistance of an employer or healthcare provider. Review the forms carefully before submission to ensure they are filled out correctly and completely.
- Follow up with your insurer to confirm the status of your claim(s) and how benefits will be issued.
- Notify any other insurer with whom you have coverage and follow the same claims process. (ie. Blue Cross, insurance through employment or other private insurance).
- Confirm verbal conversations in writing and keep copies.

DEALING WITH THE INSURER OF THE AT-FAULT DRIVER

- Third party insurers may contact you on behalf of their insured driver following an accident. Do not discuss the accident or the nature of your injuries over the phone or provide any written statement to the caller. They do not have your best interests at heart and will attempt to settle any claims for a nominal amount in order to get rid of your claim as cheaply and quickly as possible. Seek assistance from your insurer or, better yet, a lawyer knowledgeable in the area of insurance law and personal injury law.

SEEK LEGAL ADVICE

- It is in your best interests to seek legal advice as soon as possible after the accident to protect your rights.
- Information gathering in the early stages following an accident is often critical to the success of any claims.
- Depending on the nature and severity of your injuries, a variety of financial compensation may be available to you. An experienced personal injury lawyer is required to get you full and fair compensation.

- Many lawyers offer free initial consultations and contingency fee arrangements (no upfront costs to you).
- You must file a Statement of Claim with the court within two years of the date of the accident or you will lose your rights to legal recovery for your injuries.
- Whether you decide to actually hire a lawyer or not, it is important to understand your legal rights in order to make informed decisions.

Can I Leave Someone Out Of My Will?

By Donna L. Gee

The short answer to the question is yes, depending on the circumstances. In this article, I will be discussing the relevant parts of the Alberta legislation that pertains to the writing of Wills: the *Wills and Succession Act*, SA 2010, c. W-12.2 (referred to after as "the Act"). I will be addressing the following:

- Who can make a Will;
- What are the formalities for making a Will;
- Who must be provided for in a Will; and
- Who may be excluded from a Will.

For the sake of simplicity, throughout this article the word "maker" means a person making a Will and applies to both genders. Also, the term Executor (the person who is appointed by the Will to carry out the instructions of the maker) applies to both genders and includes the term "personal representative".

Who can make a Will?

Anyone who is at least 18 years of age and who has mental capacity may make a Will that appoints an Executor. Although it is not required, it is wise to also name an alternative Executor in case the first person is unable or unwilling to act. The main duties of the Executor (who must also be at least 18 years old and have the mental capacity to act) will be to:

- liquidate and/or sell the maker's property;
- pay off debts and cover funeral expenses from the Estate; and
- distribute the assets of the Estate in accordance with the maker's instructions.

The Act does not define the mental capacity required to make a Will, so lawyers and judges have had to look to case law. The classic, leading case in the English-speaking world about the mental capacity to make a Will, (called by lawyers "testamentary capacity") is *Banks v Goodfellow* (1870), LR 5, QB 549. This 19th century decision from the United Kingdom stands for the proposition that an adult's freedom to give away their property after dying, as they deem fit while living, is of fundamental importance. The

test for whether a maker has testamentary capacity, though not an exact science, does include certain characteristics. The maker must understand what s/he is doing at the signing of the Will; must have at least a general idea of the nature of their assets and their value; and know who their beneficiaries are and their relationship to her/him.

There is an exception to the age requirement (but not to the requirement of testamentary capacity) for a person under 18 who is or was a spouse or is or was an adult interdependent partner of or was a member of Canada's military in active service at the time the Will was made.

What are the formalities for making a Will?

For the purposes of this article, the maker's testamentary capacity is assumed to not be in doubt. However, it is incumbent on a Wills and Estates lawyer (or anyone else who might be drafting a Will for somebody) to make relevant notes of the interview with the maker. These notes could address observations regarding the maker's knowledge of the nature, value and location of assets; who are their family members and friends; and what are their favourite charities, among other things. This is due diligence in any event, but becomes of even more critical importance if the maker is elderly and has capacity-related issues.

Assuming testamentary capacity, then, the essential formalities for a valid Will are:

1) the Will must be in writing;
2) the Will must be signed by the maker;
3) the maker's signature must be witnessed by two people having mental capacity who are present at the signing and who themselves must also sign the Will;
4) a witness cannot be a beneficiary of any portion of the Estate; and
5) if the maker is unable to sign because of age and/or infirmity, somebody may sign for her/him but that endorser cannot also sign as a witness.

There are limited exceptions to these essential formalities. In most Canadian provinces, including Alberta, a person may prepare a holographic Will; i.e. one that is literally in their own handwriting or printing (neither typed nor prepared by another person), is signed by the maker and dated. A holographic Will does not have to be witnessed. Also, a member of Canada's military on active service may also prepare a Will without the presence or signature of a witness or any other formality.

Who must be provided for in a Will?

Our legal system accords a high degree of respect for individual autonomy; which is the right of an adult to dispose of property after death as set out in her/his Will. If all the formalities for making a Will have been met, unless a person challenging a Will can establish through evidence that the maker lacked the mental capacity to make a Will and/or was subject to undue influence, the probate courts are loath to find a Will invalid in part or in whole. There is one major exception and that arises where a maker has failed to meet her/his legal obligations to make adequate provision for dependent family members.

These obligations have been codified in the Act under *Part 5: Family Maintenance and Support*. Should a maker leave a dependent family member out of her/his Will or fail to make adequate provision for that family member, the probate court, upon application by or on behalf of an aggrieved dependent family member, has the power to re-write or reconstruct the Will as necessary to make provision out of the Estate for that family member. The list of family members for whom adequate provision in a Will must be made is set out in section 72(b) of the Act; they are:

- the surviving spouse;
- a child of the deceased less than 18 years old;
- a child of the deceased at least 18 years old but unable to live independently because of mental and/or physical disability; and
- a child of the deceased 18-21 years old who is a full-time student.

Case law has established that "of the deceased" includes children from a previous marriage or marriages, step-children and adopted children. It must be stressed that the courts retain broad discretion to make orders that are just in the specific circumstances of a case. For example, if children from a previous marriage were estranged from a parent for whatever reason (alienation of affection by the former spouse immediately comes to mind), a court would probably take that into consideration in deciding what amount, if indeed anything, should be awarded from the Estate.

Who may be excluded from a Will?

There is nothing in the Act nor any precedent in case law that requires provision of any kind for a former spouse or independent adult child. Otherwise healthy deadbeat adults borrowing money for next month's rent or still living in mom or dad's basement, take note. Any claim you may think you have on any part of your deceased parent's Estate would be, at best, a moral claim and it would be an extremely tenuous one.

The Supreme Court of Canada in the case of *Tataryn v Tataryn Estate*, [1994] 2 SCR 807 set out a process for the courts to apply in deciding whether to vary a term of a Will on the application of a family member for adequate provision. The Supreme Court reviewed legislation from British Columbia similar in wording and effect to Alberta's. The *Tataryn* decision stands for the proposition that a probate court must weigh both a maker's legal obligations and moral obligations, with the legal obligations to dependent family members taking priority because of their higher status in law. The Supreme Court defined moral obligations as "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to community standards." Moral obligations themselves assumed a line-up of priority in the Supreme Court's reckoning, with the moral claim of an adult independent child falling lowest in priority.

In conclusion, though a person making a Will may exclude somebody from a Will, the maker should consult with a lawyer to decrease the chances of using offensive wording or having the Will overturned.

Defending the Court Challenges Program

By Institute for Research on Public Policy (IRPP)

After much anticipation, the federal government has announced the reinstatement of the Court Challenges Program. Set to cost $12 million over five years, the CCP will assist Canadians with legal challenges to advance and protect their *Charter* rights. The decision is a welcome one.

The program's history spans some 40 years. It was introduced in skeletal form in 1978, applying only to minority language rights. In 1985, Prime Minister Brian Mulroney extended it to equality rights challenges to federal laws. Mulroney ended the Program in 1992, but the Liberals under Jean Chrétien resurrected it two years later.

After coming to power in 2006, Prime Minister Stephen Harper could not end the Program fast enough. Given that his government was skeptical of the Charter, the move was unsurprising.

Some critics have claimed that it is illogical for the government to fund Canadians to sue it. That argument rests on a simplistic view of constitutional rights: that they represent an infringement on the government which it generally resists. Of course, any government is entitled to advance its policy goals, and is likely to vigorously defend its choices in court. But that hardly precludes government recognition of, and support for, the broader principle of judicial review. Recent events in the United States have demonstrated how critical that function is. We applaud the government's recognition that its role vis-à-vis the constitution is not purely defensive. Such recognition also counters the notion that taxpayers are unfairly footing the bill. Constitutional challenges are primarily directed to the public interest, and the government is right to support this initiative.

At least some of the earlier criticism of the Program can be traced to suspicion of so-called "judicial activism." On that count, the program eroded traditional democratic processes. Vulnerable groups used it to achieve social change by evading the appropriate venue for such change: the legislature. The legalization of same-sex marriage in 2005, for example, is viewed as the direct consequence of funding that was granted to LGBTQ organizations to pursue Charter challenges on the issue. This critique overlooks the fact that in a constitutional democracy, parliamentary sovereignty is necessarily limited. Democratic values are enriched, not threatened, when all members of society, especially those who lack political power, can hold the government to account.

One might also wonder why a government would admit the need for a Court Challenges Program at all. Shouldn't constitutional flaws be caught earlier in the process? We strongly support advance scrutiny of laws and policies. But it can be difficult to anticipate a law's effects. Or, a government may press ahead with a controversial law that it believes it can later defend. In such situations, Canadians should not be forced to depend on the pro bono services of lawyers and experts in order to vindicate their constitutional rights. The program has never funded anything close to the full cost of litigation. But it can provide crucial support in an environment where constitutional challenges are increasingly complex and expensive.

The program will face controversial choices, including possible applications related to medical aid in dying; the practice of solitary confinement in Canada's federal prisons; and religious freedom. This is, in part, because the government has decided to expand the program's funding from language and equality rights to include the Charter's fundamental freedoms, democratic rights, and life, liberty, and security of the person. That should diminish the charge that the program is "tilted" towards some Charter rights at the expense of others. It is true that expanding the program's scope may pose a challenge in cases featuring distinct, and competing, constitutional rights. Such decisions will require care, but in principle, there is no reason to deny funding simply because a case engages multiple Charter rights. Performed correctly, such an approach is likely to enhance the program's credibility.

In announcing the reinstatement, Justice Minister Jody Wilson-Raybould said that the government was seeking to give voice to Canadians. The program does just that. It demonstrates the value of a robust constitutional culture. Inclusive and optimistic, the Court Challenges Program is a powerful symbol of Canadians' commitment to our Constitution, and to each other.

Authors: Carissima Mathen, Kyle Kirkup

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Public Interest Law Clinic at the University of Calgary

By Christine Laing and Drew Yewchuk

The forces shaping the access to justice crisis are deeply connected to the forces shaping the future of legal practice and legal education. Marginalized people are chronically deprived of access to legal services. The expanding role of the administrative state has created opportunities for public engagement that have increased the need for individuals and organizations to access timely and affordable legal advice. For its part, the legal profession is grappling with technological and social changes that are challenging traditional practice models and the role those models play in perpetuating unmet needs. Leading law schools, in turn, are starting to adopt innovative educational models to better equip the next generation of lawyers to address these demands.

The Public Interest Law Clinic sits at the junction of those forces. It began as a University of Calgary Faculty of Law experiment to provide students with credit for hands-on file experience in environmental matters. The focus was narrow and files were only worked on through the fall and winter semesters. Thanks to a $1-million gift from the Peacock Family Foundation, that experiment became the Public Interest Law Clinic which is able to take a much broader range of files and operate year round.

Today, the clinic works on impact litigation files (strategic litigation intended to impact conditions for many people in similar situations) including judicial review applications and human rights claims. The clinic also assists clients seeking legislative reform to understand the legal framework and their options for pursuing reform. The clinic's course instructors are practicing lawyers who carry the clinic's files on a pro bono basis. Each year, a new group of law students joins the clinic to address public interest issues through a combination of theoretical course work and direct file work. Students encounter access to justice issues as they research, write, and advocate to advance cases for real clients.

The clinic has two main purposes:

- to provide access to justice; and
- to provide a practical education experience.

Access to Justice

From the clinic's perspective, the concept of access to justice can be divided into two broad projects: 1) closing the gap between people and the law; and 2) closing the gap between the law and justice. The first project involves addressing the way lawyers and courts operate to allow people to access the law. To an extent, the Public Interest Law Clinic deals with this issue by representing clients in court who might otherwise not be able to retain counsel. The clinic's primary focus is on the second project: to pursue systemic change that closes the gap between the law and justice by reforming laws that operate unjustly.

Advocating for systemic change in public law matters happens on a case by case, law by law, and client by client basis. The clinic recognizes the pitfalls of deciding for itself what constitutes "the public interest" and actively engages its students to reflect on and question the clinic's role in doing just that. When selecting cases, the clinic is guided by three principles: legality, democracy, and the rule of law.

The principle of legality underlies the belief that there should be a reasonable way to challenge government decisions for their compliance with the law. The immunization of government decisions, whether made by elected officials or administrative tribunals, is inconsistent with an accountable and transparent government. The clinic takes cases relating to legal standing before tribunals and courts to protect this principle.

The principle of democracy, is conceived as genuine participation, self-government and effective representation rather than mere majoritarian rule. It holds that people ought to have influence on the decisions that impact their lives and communities. For example, citizens may want a regulatory body to consider more than monetary value of an action or wrongdoing in their decisions so that civic interests are advanced and preserved. Therefore, the clinic pursues cases to protect and expand the participatory rights of Canadians before administrative bodies.

Finally, when a government shows a lack of good faith in implementing the law, neglects its legal duties, or acts arbitrarily, it strikes at the rule of law. Inaction or delay is an exercise of a public power as much as positive action. Since all exercises of public power should find their ultimate source in law, the clinic advances cases that seek to enforce a minister's obligation to implement the law as written.

The type of work done at the clinic under the three broad principles of the public interest has been varied. Last year, students:

- developed legislative proposals for reforming the Residential Tenancies Dispute Resolution Service;
- provided recommendations to the Canadian Food Inspection Agency to improve the regulations on the conditions of horses being transported internationally; and
- helped draft submissions for improving the environmental assessment process in national parks.

This year, clinic students are:

- supporting impact litigation to modify the way Alberta Environment and the Environmental Appeals Board interpret and apply their governing legislation;
- drafting materials for a Federal Court action to protect endangered fish in Alberta;
- advocating for the court to recognize that, when oil and gas companies can let go of environmental liabilities through the operation of bankruptcy and restructuring law, it has an enormous impact on Alberta farmers; and
- supporting a human rights commission complainant who wants health law to apply fairly to transgender patients.

In short, the broadest expression of public interest rests in developing a just society, free from arbitrary and unaccountable power.

Practical Education

The clinic also has a practical educational purpose. Canadian law schools, with the University of Calgary at the forefront, have been moving towards teaching performance-based skills and providing opportunities like those at the clinic. Law students learn from experience how to identify a public interest issue, find a public interest client, and take that public interest issue successfully to court. The clinic also encourages law students to think about the purpose of law and of lawyers. A law school teaches soon-to-be lawyers how to respond to emerging needs in the legal system, but should also encourage them to think about and shape what the legal system should look like in the future. Lawyers would often like to be involved in public interest cases, but lack the opportunity or skills to do so. Such opportunities rapidly become distant and unworkable once law students transition through articles and enter their first demanding years of practice. The clinic hopes to provide law students with the practical skills and theoretical knowledge needed to address public interest issues once they enter practice.

When a lawyer thinks back to their time at law school, they should remember the rules of court, limitation periods, and the rule against perpetuities; but far more than that, they should remember the guiding principles of our justice system: legality, democracy, and the rule of law.

Supreme Court of Canada Endorses A New Approach to Self-Represented Litigants

By Sean Sutherland and Cassie Richards

The steady rise in the number of self-represented litigants, individuals who are not represented by lawyers, presents challenges in the Canadian justice system. Generally, the justice system relies on lawyers to function efficiently. Individuals without lawyers often find it difficult to understand the customs and rules of court. However, the Supreme Court of Canada's recent endorsement of the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons* ("*Statement of Principles*") in the recent case of *Pintea v. Johns* sets a national standard of how the justice system deals with self-represented litigants.

The Context: The Rise of Self-Representation

Research by the University of Windsor's Professor Julie Macfarlane in a 2013 report for the Law Society of Upper Canada suggests that, in some courts, at least 40% of litigants in family cases and more than 70% of litigants in civil cases are self-represented. The prevalence of self-represented litigants is unlikely to change as the costs for hiring a lawyer often amount to hundreds of dollars per hour and are unaffordable for many Canadians.

Many self-represented litigants are unaware of the nuances of court processes and struggle to navigate the judicial system, leading many lawyers and legal commentators to ask how and whether courts operate efficiently and fairly in cases involving a self-represented litigant. Sometimes courts have expressed frustration as the Alberta Court of Appeal did in 2001 by saying of self-represented litigants: "[u]nrepresented litigants are entitled to justice, but they are not entitled to command disproportionate amounts of court resources to remedy their inability or unwillingness to retain counsel.

If they seek free lunch, they should not complain of the size of the helpings" (*Broda v Broda,* 2001 ABCA 151 para 4).

However, Courts must, and are beginning to, adapt and develop tools to ensure that self-represented litigants have the help they need to present their cases and are treated fairly. The Supreme Court of Canada's decision in *Pintea v. Johns* signals such a change in approach.

Pintea v. Johns

Valentin Pintea was injured in a motor vehicle accident that was not his fault. With the help of counsel, he commenced a proceeding to recover damages to compensate him for his losses and injuries. As the case progressed, he ended up as a self-represented litigant. Without a lawyer, Mr. Pintea struggled to manage the demands of the court process. Though he is well educated, Mr. Pintea is disabled and English is his second language. These obstacles impeded his ability to effectively represent himself.

In particular, Mr. Pintea did not inform the court or the defendants of a change in his address. As a result he did not receive notices that he was required to attend case management meetings, which are court hearings held prior to trial where a judge makes decisions that facilitate the efficient completion of pre-trial litigation steps. After he missed some case management meetings, a Queen's Bench Judge found Mr. Pintea in contempt of court, struck his claim, and awarded the defendants over $80,000 in costs.

The majority decision and dissenting opinion at the Court of Appeal reflect different approaches to the treatment of self-represented litigants.

The majority upheld the Queen's Bench decision, finding "[t]he fact that the appellant is a self-represented litigant in this appeal does not excuse his failure to comply with the *Rules of Court i*n respect of notifying both the court and opposing counsel of a change of his address for service" (*Pintea v Johns,* 2016 ABCA 99 para 20).

In contrast, as the dissenting judge put it, "… the consequences of dismissing this appeal are excessively punitive. We now know that the appellant's failure to attend the case management meetings was not an act of contempt; he was simply not aware of them. The appellant is a self-represented litigant, who we understand had no fault in the motor vehicle accident and who could reasonably have expected a significant award of damages for the injuries he suffered. Now instead, this disabled, unemployed man is saddled with a cost award of almost $83,000. In my respectful opinion, that is a significantly disproportionate consequence for failing to file a change of address with the court" (*Pintea v Johns,* 2016 ABCA 99 para 34).

The case proceeded to the Supreme Court of Canada, which issued a five-paragraph decision shortly after hearing oral argument. The Supreme Court found that Mr. Pintea could not be held in contempt,

restored Mr. Pintea's action, removed the costs award against Mr. Pintea and endorsed the *Statement of Principles*.

Statement of Principles

The *Statement of Principles* states:

> Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.
>
> Prior to the Supreme Court of Canada's endorsement, the *Statement of Principles* were not always referred to or applied by Canadian courts.

Accordingly, the Supreme Court of Canada's endorsement has the potential to mark an important step in addressing the challenges faced by self-represented litigants seeking justice. Will Canadian courts institute programs and processes to assist self-represented litigants? Will Canadian courts be more flexible and understanding with self-represented litigants? In some instances, this will require the courts to treat self-represented litigants differently. This begs the question of whether court procedural rules should be applied as strictly to self-represented litigants as they are to parties with the benefit of legal counsel.

Traditionally, Canadian courts have not answered this question uniformly. Some courts found that a strict application of court procedural rules should not be used to deny self-represented litigants the chance to present their case (*e.g.*, *Coleman v Pateman Farms Ltd.,* 2001 MBCA 75 para 14; *Cole v. British Columbia Nurses' Union*, 2014 BCCA 236 para 36). Others, such as the Court of Appeal majority in *Pintea*, applied procedural rules strictly against self-represented litigants.

Endorsement's Impact

Will the Supreme Court of Canada's endorsement of the *Statement of Principles* lead to a more flexible application of procedural rules to self-represented litigants? The early results suggest that it will.

In one recent Alberta Queen's Bench decision, the justice interpreted the Supreme Court of Canada's endorsement of the *Statement of Principles* as "a substantial rejection … of the traditional approach, that rules of procedure and evidence apply the same to everyone who appears before a Canadian court" (*1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 paras 45-46).

The Newfoundland and Labrador Court of Appeal similarly noted that the *Statement of Principles* require courts take "affirmative and non-prejudicial steps" to promote equal justice (*Young v Noble*, 2017 NLCA 48 para 34).

In Ontario, the Superior Court and Court of Appeal have recently noted and relied on the Supreme Court of Canada's endorsement in the family and criminal justice systems, respectively, to order new trials for self-represented litigants (*Gray v Gray*, 2017 ONSC 5028 paras 31-33; *R v Tossounian*, 2017 ONCA 618 paras 37-39).

Conclusion

The Supreme Court of Canada's endorsement of the *Statement of Principles* provides clear direction to lower courts that, in some cases, a strict application of court procedural rules against a self-represented litigant may lead to an injustice. However, the *Statement of Principles* on its own is no more than a flexible framework to promote access to justice and fair treatment of all litigants. It is in the application of that framework by all actors in Canada's justice system—judges, court officers, lawyers and self-represented litigants —that true procedural justice will be achieved.

The authors, Sean Sutherland and Cassie Richards, were members of the team that represented Mr. Pintea at the Supreme Court of Canada.

BenchPress – Vol 42-2

By Aaida Peerani

1. 'Til Law Do You Part

In a recent case, the Alberta Court of Queen's Bench had to determine if a marriage was legally valid. In 1997, the couple in question travelled from Canada to Vietnam (where both were born) to get married in a traditional Vietnamese ceremony. However, no paperwork was filed and the Record of Marriage document was unsigned. Upon return to Canada, the couple threw another traditional engagement and wedding ceremony, again without any formal paperwork.

Years later, the wife filed for divorce and requested division of the matrimonial property. The husband argued that the couple was never actually married: the wedding(s) were only for show for the family after they had discovered that the wife was pregnant. He pointed to the fact that they filed their tax returns as a common law couple.

Generally, a marriage in a foreign country is considered legally valid in Alberta if it is a legally valid marriage in the foreign country. The Court admitted it did not know what the law of marriages was in Vietnam in 1997 to determine on its own if the marriage was valid. However, the evidence demonstrated that many people in Vietnam, including local officials, considered the parties married under Vietnamese law. Moreover, the couple had children, lived together for over a decade and held themselves out to be married. Therefore, the Court found that the marriage was legally valid.

Vo v. Vo, 2017 ABQB 628

2. Hit and Run No More

The British Columbia Supreme Court handed down a record-setting punitive damages award to a driver in a hit and run case. In 2014, Veronica Howell was a 22 year old who was pursing a degree in English literature and was hoping to become a librarian. She was hit by a pick-up truck while crossing the street. The driver did not stop after striking her, leaving her unconscious and bleeding. He even accelerated onto oncoming traffic to get away. Due to the accident, Howell now has chronic pain, hearing problems, brain injury which impairs her cognition, and aggravated pre-existing conditions.

The owner of the car, Leon Machi, claimed that he was not driving at the time. The Court did not believe him based on his testimony and video evidence. The Court also added that even if he wasn't the driver, he lent his vehicle to many unnamed drivers, which would make him vicariously or indirectly liable.

Notably, the Court found that Howell was 25% liable because she was jaywalking at the time of the incident. Therefore, the Court reduced Machi's damages by 25%. The total value of damages awarded was approximately $1.6 million, of which $100,000 was provided for punitive damages. This is the largest amount for punitive damages awarded in Canadian legal history in a hit and run case.

Howell v Machi, 2017 BCSC 1806

3. No Reasonable Expectation of Privacy in Schools

In 2011, a high-school teacher in Ontario was caught red-handed making secret videos with a camera pen of female students, aged 14-18, and a female teacher . The footage had no nudity or sexual activity recorded, but focused on cleavage. The teacher was arrested and charged with voyeurism of a sexual purpose under the *Criminal Code*. At trial, the judge found that the recordings were not of a sexual purpose because there was no nudity or sexual activity and acquitted the teacher. On appeal, the Ontario Court of Appeal ("ONCA") found that the recordings were for a sexual purpose because of the focus on cleavage. However, the ONCA still dismissed the appeal, agreeing with the acquittal, because it found that the students did not have a reasonable expectation of privacy since the videos were taken in the public areas of the school.

R v Jarvis, 2017 ONCA 778

http://canliiconnects.org/en/summaries/46894

4. Deference to Trial Judge's Findings

The Supreme Court of Canada ("SCC") released a decision highlighting the deference given to trial judge's decisions even when an appeal judge dissents. At trial, the accused was found guilty of sexual assault for having non-consensual intercourse with his date after a party. The accused claimed it was consensual, but the trial judge found his date to be credible and that she had experienced genuine trauma. He also noted that the accused stated that he would not have likely taken "no" for an answer.

At the Alberta Court of Appeal, the majority found that the trial judge's analysis was not in error. The sole dissenting judge, Justice Berger, however, argued that the trial judge erred in his analysis and came to an "unreasonable verdict" according to Section 686(1)(a)(i) of the *Criminal Code*. He dissented to avoid a wrongful conviction. This C*riminal Code* provision states that an appeal court can allow an appeal of a trial judge's decision where the trial judge has reached an unreasonable verdict in convicting a person that is unfit to stand trial or not criminally responsible on account of mental disorder. His dissent opened the door for an "as-of-right" appeal. In an "as-of-right" appeal of criminal cases, the Crown can appeal to the SCC on a question of law where the judge disagrees or dissents.

At the SCC, the justices had to decide whether the trial judge erred in his analysis and if so, whether the errors justified Justice Berger to dissent. The SCC found that the trial judge did not err in his analysis in a very short and straightforward decision.

The SCC's response to this appeal sends the following message according to commentators:

- the high level of deference to the findings of trial judges is reinforced; and

- despite the straightforward nature of the case which did not raise substantive issues of law, the "as-of-right" process shows that fairness is highly valued in our criminal justice system where the stakes are high.

  R v. Bourgeois, 2017 SCC 49

Viewpoint 42-2: Elected Municipal Officials Must Be Careful About Conflicts of Interest

By Peter Bowal and Kyle Meema

Introduction

At the time we are writing this, the province of Alberta is in election campaign mode for all of its municipal leaders known as mayors, councilors and reeves. At the same time, the federal Minister of Finance is under the ethical spotlight for how he continues to hold his personal wealth while legislating in the economic and taxation realm and proposing reforms from which he might obtain personal advantage.

Ethics in Canadian political offices has largely been reduced to dealing with personal actual or perceived conflicts of interest in the carrying out of public responsibilities. These concerns arise when legislators could obtain disproportionate personal benefit from their decisions or actions. Federally, the regulation of legislators' conflicts of interest is generally left to the Ethics Commissioner who is an Officer of Parliament.

While there may be ethics advisors, commissioners and officers in the largest municipalities, provincial legislation strictly regulates elected municipal officials. They are prohibited from proposing, discussing or voting on any matter in which they may have a pecuniary interest. This is a first line of defence against corruption. It seeks to ensure that actions by government officials are made for the public benefit. Overall, it is a cornerstone of effective democratic governance.

Legislation

The Alberta *Municipal Government Act* (sections 169 through 179), and similar legislation in other provinces, guards against municipal councillors' conflicts of interest. It is the primary source of law for councillors' actions and can be broken into the following three analytical categories.

What constitutes an interest?

This is the first step in the analysis that must be established. A conflict of interest exists when a councillor, a councillor's family member, or a corporation for which a councillor is a director or an officer stands to monetarily benefit from a decision made by the municipal council.

For example, a councillor discussing and voting on a decision to award a public contract to a business one owns would be a clear conflict. The councillor would personally benefit monetarily from the profit such a contract would earn the business and the councillor. Foremost, the councillor must act in the best interests of the public, not one's own best interest. When one stands to gain personally, it is impossible to be properly focused on the best interests of one's constituents.

Identifying one's own potential conflict of interest is a very important step.

What must a councillor do when facing a potential conflict of interest?

A councillor must do two things when facing a conflict of interest. First, the councillor must disclose the personal interest before the matter is discussed. Second, one must leave the room until the discussion and voting on the matter has concluded. This ensures that the interested councilor does not discuss or influence anyone in any way, and does not vote on the matter.

There are some exceptions, but this is the general procedure that a councillor must follow. The purpose is to ensure the councillor's interest in the matter does not become a factor in the decision making process.

What happens when a councillor has acted in a conflict of interest?

Sometimes elected officials make errors in judgment out of ignorance, inadvertence or in good faith. Regardless of the motivation, if one fails to disclose one's interest in a matter at the outset and goes on to participate in the decision making, the *Act* stipulates that such a councillor must immediately resign.

If the non-compliant councillor refuses to resign, the council or any voter may apply to the Court for an order declaring the councillor to be disqualified and that seat on council to be deemed vacant. The rule is strict.

However, the judge deciding the matter possesses considerable discretion under the Act for these applications. If the judge believes that the conflict of interest process was violated inadvertently, or some other reason exists to excuse the councillor's misfeasance, the councillor might be allowed to remain in office. Courts will often be inclined to respect and support the democratic process even when a clear conflict of interest exists. The strict rule does not always lead to a councillor being removed. But who needs the grief of testing the rule in court?

The following three cases are instructive of this conflict of interest legislation as it applies to elected municipal officials.

Case Studies

Wainwright (Municipal District No. 61) v. Willerton

Willerton, a long time councillor in Wainwright, owned a business that supplied sporting goods. In 1999, the council voted to acquire golf carts for the municipal golf courses from Willerton's business. Willerton himself also participated in discussion and voted on this matter. It seemed to be a clear case of a conflict of interest.

The Alberta Court of Queen's Bench did *not* disqualify Willerton or vacate his council seat for several reasons. All those present at the meeting were aware that Willerton was one of the owners of the business supplying the golf carts. Willerton agreed that a legal opinion should be obtained regarding his participation in the meeting. Willerton did not acquire, much less use, any special information available to him as a councillor that gave his business any advantage in the tendering process. Finally, his business supplied the golf carts to the municipality at cost. There was no profit made on the contract.

On the disqualification application brought by the council, the Court held that Willerton's conflict of interest arose inadvertently and, despite technically being a conflict of interest, any benefit to Willerton was so insignificant as to be unworthy of justifying his disqualification. Willerton kept his seat and the council was ordered to fully indemnify him for his legal costs of the application.

Crowsnest Pass (Municipality of) v. Prince

John Prince was a councillor for the municipality of Crowsnest Pass. His wife, Diane Prince, rented out a hall owned by the municipality in order to hold a weekend market. The rent for the nine-day market totaled $1,650 plus a $250 damage deposit. John provided the damage deposit cheque. The rental fees were reduced to $850 because Diane cleaned the hall after the market.

But Diane refused to pay the rental fee. When municipality attempted to cash the $250 damage deposit cheque, it was denied due to insufficient funds. Diane demanded to appear before the council to state her case. Since John was a councillor, he was obligated to disclose that his wife was speaking, and abstain from discussing or voting on the matter. He should have left the room. Despite acknowledging that he should not have been speaking, he one of the most vocal councillors in the discussion. He actively advocated on behalf of Diane.

This was another clear case of a councillor who should have been disqualified. His interest was not remote or insignificant. Nor did it arise inadvertently. It was material and his involvement was deliberate. Yet the Court, exercising its discretion, allowed him to keep his council seat. His term as councillor had nearly expired. The Court thought it more appropriate to let the voting public decide whether he should continue as councillor in the upcoming election. Each side had to bear their own legal costs of this application.

Magder v. Ford

Since he was elected Toronto mayor in 2010, Rob Ford attracted controversy and notoriety. He used his public position to do some private fund-raising for his football charity. The municipal Integrity

Commissioner found this to be a breach of the *Code of Conduct*. The council ordered him to reimburse the donors the $3,150 raised, but he refused to do so.

Then in February 2012, Ford participated in the discussion. He voted on a motion to rescind council's adoption of the Integrity Commissioner's report which found he had violated the *Code of Conduct* and which had recommended Ford make the reimbursement. The motion he debated and voted on was successful.

At issue was not Ford's private fund-raising, but his participation and voting on a matter in which he had a pecuniary interest. His pecuniary interest was not a personal benefit from a commercial matter before the council, because he did not monetarily benefit from donations to his football charity. Rather the issue was the financial sanctions that arose from his breach of the *Code of Conduct* and in his efforts to avoid reimbursing the monies raised.

On application by a voter for Ford's removal from his public office (now mayor), the Ontario Superior Court of Justice found Ford had contravened section 5(1) of Ontario's *Municipal Conflict of Interest Act*. The judge ordered Ford disqualified and his seat on the council vacant. Ford's speaking and voting on the matter was not inadvertent nor mere oversight. It was a deliberate choice.

While the *Act* contemplates forgiveness for honest errors made in good faith and insignificant amounts of money, the Court was not prepared to give Ford the benefit of the doubt in this case. At the same time, the Court was critical of the all or nothing approach in the *Act.* There should be lesser penalties for minor infractions. Ford's breach of the *Code of Conduct* involved a modest amount of money raised for a legitimate charity.

Given this surprising and disruptive outcome, Ford returned to court and obtained a stay of the disqualification decision, pending his appeal. Two months later, the appellate court overruled the lower decision. The Integrity Commissioner had no jurisdiction under the *Code of Conduct* to impose the financial sanction of reimbursement. Accordingly, it should not have been put before council at all and the mayor would never have been in a position of conflict. Ford was restored to his position as Toronto mayor.

This had been a hard fought political skirmish involving a crowd of lawyers and the legal fees were . . . well, not charitable. Because he was successful in fending off the application, Ford asked for *partial* indemnity of his legal costs in the amount of over $116,000 (compare this to the original reimbursement request of $3,150) for the four court appearances. The court eventually ordered Ford to bear all of his own legal costs.

A further application for leave to appeal to the Supreme Court of Canada was dismissed in June 2013. This brought the matter to a legal end after sixteen months and hundreds of thousands of dollars of wrangling over $3,150 as well as politics and pride. Ford stepped down as mayor of Toronto a year later and died some sixteen months after that, prior to his 47th birthday.

Conclusion

Provincial legislation permits Municipal Affairs ministers to remove elected officials from office for reasons beyond conflicts of interest. These other reasons – unrelated to conflicts of interest – include incompetence, incessant bickering on council and ineffectiveness. The elected officials may apply for judicial review of these ministerial decisions on the basis of procedural fairness and councillors have occasionally been judicially reinstated.

The legislation that specifically governs conflicts of interest for elected municipal officials in Canada is strict, at least on paper. Elected officials will be expected to show diligence in the form of some effort to understand and appreciate their obligations as public, elected officials. Outright ignorance of the law will not suffice, nor will willful blindness.

However, as all three *Willerton*, *Prince* and *Ford* judicial decisions demonstrate, the courts are reluctant to disqualify democratically elected councillors who have been guilty of minor lapses of judgment and inadvertence where the financial stakes are nominal. Defending the disqualification application, and enduring the legal cost and emotional toll of it, will be the most significant risk of transgressing the technical conflict of interest rules.

New Resources at CPLEA – Vol. 42:2

By Aaida Peerani

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


FAMILIES & THE LAW **DOMESTIC VIOLENCE SERIES**

Leaving an abusive relationship... if you are not a Canadian citizen

What is abuse?

Leaving an Abusive Relationship… If you are not a Canadian citizen. This resource has been updated to include legislative changes enacted in April of 2017. Click **here** to view.

Leaving an Abusive Relationship is part of CPLEA's **Families and the Law: Domestic Violence Series**. Click **here** to view all publications in the series.

First Comes Trump Hat, Then Comes Racism

By Melody Izadi

Yet Another Incident from the Ontario Court of Justice Raises Concerns About Those Presiding.

A Justice of the Peace, presiding in Kenora, Ontario, decided that it was appropriate to make a racist remark, on the record, to an Aboriginal duty counsel in bail court this past August.

Yes, you read that correctly.

According to a court transcript, Justice of the Peace Robert McNally said the following in open court: "Sometimes I think we're in the middle of a Benny Hill set here. Nobody knows who Benny Hill is." Shannon McDunnough, who is Mi'kmaq and defence counsel from Legal Aid Ontario, responded by confirming that she knew who Benny Hill was.

Then, for reasons completely unknown or understood, McNally replied: "Your ancestors probably scalped him or something." Scalping, though possibly originating from Europe and Asia, is more widely associated with North American Aboriginals. Scalping involved removing the skin of the scalp from the skull of one's enemy, which often caused death.

Thankfully, McNally's shocking comments are the subject of a formal joint complaint filed by Nishnawbe-Aski Legal Services, Grand Council Treaty No. 3, and the Criminal Lawyers' Association. The complaint has been filed with the Justices of the Peace Review Council, requesting that McNally be removed from his position.

In a somewhat similar fashion, on November 9th, 2016, Justice Zabel who was also presiding in an Ontario Court, wore a "Make America Great Again" hat into open court and later said on the record: "brief appearance with the hat. Pissed off the rest of the judges because they all voted for Hillary, so I was the only Trump supporter up there, but that's okay." The hat remained perched on the edge of his courtroom desk, with the words facing towards the gallery for the entire day. Justice Zabel has since received a 30 day suspension without pay for his actions.

What's troubling about both Justice Zabel and JP McNally's comments is that they are meant to preside in court, with the pledge, responsibility and promise to remain impartial when adjudicating every case.

Justice Zabel and JP McNally make multiple decisions everyday that affect the lives of those they preside over. Flaunting and fearlessly exposing their beliefs that are problematic and rooted or connected to racist stereotypes and ideology is more than offensive when it comes out of the mouth of people who have been trusted to make some of the most important decisions in our lives. Yet nonetheless, both Justice Zabel and JP McNally chose to state their comments, in open court, without due regard for the awesome responsibility of neutrality that they've been tasked to convey— and represent.

But does condemning their public comments mean that we're content with these individuals going home and thinking the same things, as long as they don't say it out loud in the courtroom? Isn't this the real problem: that individuals who align themselves with a racist consciousness, either knowingly or ignorantly, are sitting quite literally on a pedestal and making life altering decisions for black and aboriginal people, and all other types of minorities that come before the court? While we certainly can't demand that Justice Zabel align his personal political views with what the left-wing public prefers, what we can do is question the integrity of the justice system when it's foremost players express concerning ideologies and sentiments that can affect their abilities to decide a case on their merits.

How can we even prevent JP McNally from having racist thoughts pass through his mind? Can we educate him to not think those things, or can we simply censor his stream of consciousness from being verbalized in the courtroom? Is he still not unqualified to adjudicate if he simply thinks these things but doesn't say them?

Only time will tell what the decision will be with regards to JP McNally. But if Justice Zabel can express his allegiance with one of the most sexist, racist and morally repugnant political figures in our history while presiding in open court, I'm not holding my breath that JP McNally's *joke* will be handled any more seriously. Hopefully I am wrong: because anything less than his removal is unacceptable.

Bad Behaviour 2.0: Part 2 – Employees Getting Away With . . .

By Peter Bowal and Lindsay Thorburn

Introduction

We looked through the judicial and arbitral decisions and found ten more random instances of appalling employee behaviour that Canadian courts and arbitrators excused. The first five cases can be found in Part 1 of this article. In these cases, the employer fired the employee, but the court or arbitrator found no legal basis to do so, and ordered the employer to pay damages for wrongful dismissal and court costs.

1. *Hendrickson Spring – Stratford Operations v United Steelworkers Local 8773*

Avey (20-year employee) and Illman (5-year employee) used very harsh, profane and demeaning remarks to a co-worker at work (such as "you are a nobody to me" and "Brian is a fag"). Avey was accused of throwing a helmet at him and threatening physical harm against him. In one outburst, Illman shrieked: "[y]ou are nothing but a fucking big baby and a whining cry baby. I will take you out you fucking asshole, any place, any time. I will kick the fucking shit out of you right here, right now, so keep your fucking mouth shut." They showed no remorse. After they were fired in 2015, the arbitrator considered their dismissal too severe and they were both reinstated.

2. *Ontario Nurses' Association v Sunnybrook Health Sciences Centre*

An unidentified registered nurse and was fired for stealing different narcotics from her hospital employer and related breaches of trust and professional standards. She even had them in her jacket when she was being investigated and interviewed by the hospital. She falsified patient records to cover up the thefts which took place over 3 years. Her union said she did it because she was addicted to the drugs. The arbitrator reinstated the nurse to her job. One is reminded of Elizabeth Wettlaufer who admitted to killing eight senior patients in her care between 2007 and 2014 by administering lethal doses of insulin.

3. *Kim v. International Triathlon Union*

Kim, in the sensitive position of communications manager for the headquarters (located in Vancouver) of world triathlon unleashed her inner frustrated voice a little too much and too often on social media. She was highly critical of her boss and went off on personal derogatory and defamatory outbursts which caused public relations problems for her employer. She continued to post and even acknowledged she could get in trouble for doing so. This case was the subject of an earlier tandem of *LawNow* columns (here and here). Kim's firing in 2012 was found to be wrongful two years later. Although she had worked less than 2 years, she was awarded 5 months of wages and benefits by way of damages, or about $30,000.

4. *Geluch v. Rosedale Golf Assn.*

Geluch, the General Manager of the Rosedale golf club, was accused of treating employees badly, abusing expenses and charging his employer for personal purchases. It was alleged he took a folding table, ski racks, cabinets and other items from his employer. He was fired in 1997 when he was earning $129,000 because the golf club claimed that he shouted at, berated and swore at staff, whose health was affected; he took food and liquor; he had employees do work for him personally, for which he didn't pay; he used the club's credit card for personal expenses; and there was improper recording of accounts receivable. The Ontario court in 2004 would have none of that and determined that Geluch was entitled to a 15 months of wages, benefits and other damages (subject to offset for mitigated earnings for the last 2 months) of $267,662.50.

5. *Emergis Inc. v. Doyle*

At an office Christmas party at a local restaurant in 2002, Doyle pointed to three female employees and said, "[o]ne of the new girls would have to show everyone their titties." Then he turned to one of them and said, "you're exempt dear because your titties are too small." At the same party, Doyle asked one of them "have you ever seen a plate come?" and upon seeing a male employee under the table near one of the women's shoes asked, "are your hands wet under there?" Two months earlier, Doyle told a female employee who had recently started work and who had recently undergone oral surgery, "…you know how you can take care of that, give your boyfriend some oral sex. If it doesn't reduce the swelling, it will certainly reduce his." On another occasion when some employees were talking about purchasing an exercise bike so that they could exercise instead of going outside to smoke cigarettes, Doyle said "we had a bike once, but she left."

Doyle was a senior manager. The arbitrator found his comments had created a poisoned work environment and his conduct was sexual harassment in law and under the employer's policy. One might think this would be enough to justify the employer firing Doyle. However, the arbitrator concluded in this case these actions alone did not warrant summary dismissal. The employer's harassment policy contemplated an alternative to dismissal and the employer did not have just cause to fire Doyle. The sexual harassment misconduct needed to be more serious than it actually was to justify dismissal. There was no "physical or criminal assault or threat of assault, no promise of advancement in return for sexual favours, no propositioning for sexual favours and no discussion or description of pornographic

materials." Doyle could be rehabilitated. The investigation of Doyle was flawed and employers must consider and propose an alternative to firing.

Doyle had seven years of service and was 43 years old, earning an annual salary of $113,000, when he was fired in 2002. Five years later, the Ontario Court of Justice upheld the arbitrator's original decision. Terminating Doyle's employment was without cause. Doyle was awarded ten months' notice and a further two months' notice to punish the employer for speaking to one of Doyle's prospective employers (interfering with a subsequent employment opportunity) for a total of $113,000 damages, plus $7,500 in costs (and perhaps more costs for earlier proceedings).

How Are Off Road Vehicles Regulated in Alberta?

By Jeff Surtees

You are thinking about spending a lot of money on a brand-new quad, dirt-bike, snowmobile or something similar. What are the rules? Who makes them? Where will you be able to use it?

Almost every human activity has the potential to affect the environment in some way. Regulating activities always creates perceived winners and losers. Nowhere is this more true than with the regulations which deal with off-highway vehicle ("OHV") use in Alberta. There is a lot of passionate debate in Alberta currently about where OHV use **should** be allowed. That may be the subject of a future column. In this column, I just want to look just at what the rules are right now and where they come from.

There is no single piece of legislation or government department that is responsible for regulating off-highway vehicle use in Alberta. Responsibility is divided between departments that regulate land use, forestry, the environment, agriculture and vehicles.

Rules about the vehicle and how it is operated:

Part 6 the Alberta *Traffic Safety Act* (the "Act") and the *Off-Highway Vehicle Regulation* (the "Regulations") passed under that Act set out the rules about machines themselves, registration requirements and general operation. Not many of these rules have anything to do with directly protecting the environment. Some of the important provisions are:

- if you operate an OHV on a highway (very broadly defined as anywhere people ordinarily operate vehicles), then all the rules that apply to vehicle operation apply to you;
- OHV operators must not drive carelessly, whether on public or private land;
- almost all OHV's must be registered and insured (there are exceptions for OHV's owned by farmers and used only on private land and for military vehicles);
- OHV operators are allowed to cross roads but must be careful and yield to other traffic;
- operators must stop when asked by a Peace Officer;
- municipalities can make some of their own rules about OHVs; and
- helmets must be worn, with exceptions for OHV's operated on Indian reserves, Metis settlements, farms and ranches.

The Regulations deal with details of how old you must be to drive on a highway (18, or between 14 and 18 if accompanied by someone 18 or older), and set out requirements for headlights, taillights, mufflers, serial numbers, license plates, helmets, registration and insurance.

Do any of these rules protect the environment? The answer is yes, although not always directly. The rules requiring mufflers of a certain standard help prevent fires since a machine without such a muffler can expel sparks which could cause a fire in the backcountry. The rules around registration, identification and stopping for Peace Officers may have indirect positive environmental effects. People who can be identified may be more likely to follow rules set out elsewhere.

Where can I ride?

This is where it gets interesting. The rules are not in one place and may change from time to time depending on local conditions.

Private land – There is a lot of private land in Alberta, most of it being farms and ranches. OHV use is almost always allowed on private land, so long as you have permission from the owner. As mentioned above, there are some special rules for farmers and ranchers operating their own OHVs on their own property or on other private property with permission. The same rules apply to public land that is leased to farmers or ranchers and under their control – permission must be sought.

Several non-profit conservation organizations, primarily Ducks Unlimited Canada, the Nature Conservancy of Canada, the Alberta Fish and Game Association and the Alberta Conservation Association privately own large tracts of land in Alberta. Recreational OHV use is not allowed by any of these organizations on their own property.

Public land – "Public" simply means the land is owned by a government. It does not mean that any member of the public can access it and use it however they please.

Most public land owned by the Canadian federal government in Alberta falls into one of three categories. First, there are five National Parks totalling 15.6 million acres. Use of OHV's in National Parks requires the permission of the park superintendent which is not likely to be given. Second, 140 Indian reserves total over two million acres. Public access to land on reserves to non-band members is under the control of local bands and is generally not permitted. Third, there are military lands located at Suffield, Wainwright and Cold Lake Alberta. OHV use is not permitted for obvious reasons.

Trying to understand how public lands owned by the Alberta provincial government are regulated is challenging. There are many different designations of land created under several pieces of legislation. OHV use is prohibited in Provincial Parks (76), Wilmore Wilderness Park, Wilderness Areas (3), Provincial Recreation Areas (208) and Ecological Reserves (15).

Limited OHV use on designated trails is permitted in some of the 31 Wildland Provincial Parks, subject to local management. On the two Heritage Rangelands which have been designated, OHV use depends on the management plan for the area. (Some OHV use has been allowed on one property on designated trails to allow users to pass through the property to another area.) Finally, OHV use in the 139 Natural Areas which have been designated is not strictly prohibited by legislation but is managed by Alberta Parks based on local conditions. Many of these Natural Areas are small and not suitable for OHV use. Where limited OHV use is permitted in any of these areas, signage will be put up by local authorities along trails.

Two other designations of land are important for OHV use. The Alberta *Public Lands Act* provides for the creation of "public land use zones" ("PLUZ"). There are currently 19 PLUZs in Alberta covering 2.77 million acres. Most PLUZs are in sensitive landscapes along the eastern slopes of the Canadian Rockies. OHV use in PLUZs is subject to some control. The default rule is that OHV use is not permitted. Permission may be granted, though, and has been granted in some form in 12 of the 19 PLUZ's. Only one PLUZ, the Maclean Creek Off Highway Vehicle Area, allows OHV use away from designated trails.

The final type of land is referred to as "vacant public land with no disposition". Under the public lands legislation in Alberta, vacant public land is available for recreational purposes, including OHV use, with riders facing significantly lower restrictions than elsewhere. There is, for example, generally no requirement to stay on trails. As with PLUZ's, much vacant public land is located along the eastern slopes of the Rockies and is sensitive environmentally.

There are other laws that apply to OHV riders. Regardless of the designation of the land, restrictions can be placed on OHV use under the Alberta *Forest and Prairie Protection Act* in times of high forest fire danger. Large areas were completely closed to OHV use during the summer of 2017 under this legislation. Also, under the *Public Lands Administration Regulation* it is an offence to operate an OHV in or near most waterbodies. Many species of fish in Alberta spawn in shallow, gravel bottomed streams. OHV use in those streams can easily destroy fish or their spawning habitat. It is illegal.

There. Is that all completely clear? The take-away points from this article are that if you are going to operate an OHV, you must always know where you are riding. It is your responsibility to determine whether access is allowed and seek permission when necessary. In many areas you must stay on designated trails. You always need to keep your "wheels out of the water" and obey signage which may be put up by local authorities due to changing conditions. The safest course of action is to assume that access is not allowed until you can positively determine otherwise. Government websites provide maps, geo-coordinates and contact numbers for the local authorities.

Conflict Between Parents, Part 3: More Strategies to Reduce Conflict, Active Listening and Looping

By John-Paul Boyd

In Part 1 of this article, I wrote about the effects conflict between parents can have on their children. In Part 2, I talked about a number of techniques to defuse or diminish conflict, including a few basic communication strategies. In this, the final part of the series, I'm going to talk about two more complicated, but very effective strategies: active listening and looping.

Active listening is a way of having a conversation, including really difficult conversations, in which you really listen to what the other parent is saying and check that you've understood the other parent. Active listening helps the other parent to feel genuinely heard and can significantly reduce the level of conflict. Looping is a way of having a conversation in which you work with the other parent to more fully understand what he or she is saying. Looping can slow the conversation down and usually calms high emotions in doing so. Looping also demonstrates your engagement in the conversation.

Although I discuss active listening and looping in the context of separated parentings, both strategies can be used whenever you're having a difficult conversation, for example, with a neighbour, an employer or a police officer.

Active Listening

The essential tools of active listening are *asking closed questions*, *asking open questions*, *paraphrasing* and *summarizing*. It usually helps to use all four tools, you'll see why in a bit, and it's usually best not to rely too much on a single tool.

Closed questions are used to quickly confirm something the other parent has said, to make sure you've got it. They give you *yes* or *no*, or other one-word answers, and rarely anything more. They also tend to suggest their answer.

> "Can you drop her off half an hour early?"
>
> "Do you still have a job?"

Open questions don't assume an answer, and ask for a lot more information as a result.

"When are you leaving for work?"

"What should we get him for his birthday?"

Open questions usually seem like requests for additional information and don't usually come across as strident or demanding. The trick in asking them is to seem, and actually be, genuinely curious about the answer.

Paraphrasing is about clarifying what the other parent has said by repeating what has been said in your own words. Paraphrasing often starts by saying something like "so what you're saying is …," "in other words …" and "if I understand correctly, you're saying that …" Paraphrasing helps the other parent feel that he or she has really been heard and that you are really making an effort to listen and understand. Paraphrasing does *not*, however, mean that you agree with what the other parent is saying! You're just trying to get more information. For example, one person might say:

> "I just don't know what to do. I'm pulling my hair out trying to deal with how mad the children are that they have to go to a new school. I'm crying all the time; I'm a wreck! This is so frustrating!"

One way of paraphrasing this is to say:

> "It sounds like the kids are having a lot of challenges adapting and that you're having a really hard time helping them."

Summarizing, the last item in the active listening toolbox, restates the important parts of what the other parent has said. It can be really useful to help sort out complicated conversations with lots of information. Summarizing often starts by saying something like "so you'll do … and you'd like me to …" or "let me check that I've got everything right, you've said that …" Summarizing gives the other parent the opportunity to clarify and correct your understanding. Like paraphrasing, summarizing does not mean that you agree! Here's an example of summarizing:

> "Look, there's one week left before school starts. The kids need a checkup and I need to get the school supply list. Oh, and we need to check that their vaccinations are up to date. I've got to return Angela's bike and you need to find the receipt. I think Angela is going to need new soccer shoes. She needs new shin guards too. Do you remember when the kids last saw Dr. Chen?"

The basic message here is that school and soccer are starting soon and the kids need to see the doctor. This might be summarized by saying:

"Okay, so we've got a bunch of stuff to do to get the kids ready for school. If I've understood right, we need to take the kids back to Dr. Chen for a checkup and to make sure that they've got their shots. We need to return Angela's bike. We also need to get Angela outfitted for her team, and you're going to take care of the kids' school supplies. Is that right?"

Active listening, when done correctly, is like verbal ninjutsu. It can be incredibly effective when used well. Here are some tips for good active listening:

- Be attentive and sincere. Be curious.
- Don't interrupt, except to ask closed questions, and don't criticize.
- Use a calm tone of voice.
- Don't ask too many closed questions in a row.
- Be careful of how you put open questions using "why," because *why* can come across as sarcastic or insincere.
- Don't paraphrase all the time. Mix it up with open questions, closed questions and summarizing.

Looping

Looping is useful when there's a misunderstanding you need to clear up. Looping follows a simple five-stage formula.

1. When the other parent has said something that you're confused or unsure about, summarize what that parent has said, and ask whether you've got it right.
2. The other parent will either confirm that you've got it right, or will clarify what you've got wrong.
3. You should then summarize what the other parent has said including the new information, and ask that parent to confirm you understand.
4. The other parent will either confirm that you understand or not.
5. If you do understand, consider asking for more information. If you don't understand, go back to stage one.

Here's an example:

You: “You’ve told me that you’re mad because the social worker went to the wrong school and missed the appointment with Peter’s teacher. Is that right?”

Other parent: “Yes, and she didn’t call me about the mess up.”

You: “You’re mad because she missed the appointment and she didn’t tell you.”

At this stage there are two possible answers, *yes* or *no*. If *yes,* you might ask a follow-up like “is there anything else that’s bothering you” or “what else happened?” If *no*, you might say:

You: “What am I missing? Can you help me understand?”

Then start the process again at stage one. Here are some tips for looping:

- Loop whenever there’s a misunderstanding that needs to be cleared up.
- Interrupt the other parent when necessary to explore something that’s causing confusion.
- Be alert to body language, as that can play a role in your understanding and be looped back to the other parent – “you just clenched your fists, are you feeling mad?”
- Remain calm even if the other parent is frustrated or mad.

There’s a lot more to be said about looping and active listening, of course. You can look for more information on the websites of organizations interested in conflict resolution, psychology and communication.

The effects of parental conflict on children can be damaging and result in serious long-term harm. Remember that every step that protects children from conflict helps, no matter how small it is or even if it’s just one parent making the effort.

Stinchcombe and Crown Disclosure of Criminal Evidence

By Peter Bowal and Thomas D. Brierton

The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.

R. v. Stinchcombe (1991) at para 12

Introduction

Rarely does a single prosecution so fundamentally alter legal practice in Canada as the *Stinchcombe* case. This criminal law decision from a unanimous Supreme Court of Canada does not involve the merits of guilt or innocence or the severity of sentencing. It deals only with the uncompromising legal duty of the Crown prosecutor to share all the evidence it has collected with the accused prior to the criminal trial. If the Crown does not do so, the charge may be stayed or a conviction overturned. This has resulted in delays, a massive expansion of prosecutorial resources and undoubtedly some people guilty of crimes walking free. This article tells the story of the landmark *Stinchcombe* case.

Facts

William (Bill) Stinchcombe, a Calgary lawyer, had utterly entangled legal representation and business venturing with his clients in the 1980s. He got into trouble when he could not repay money his clients had lent or invested with him. He was suspended as a lawyer by the Law Society of Alberta in September 1987. He was also charged with criminal breach of trust, theft and fraud for embezzling $1.6 million from a client.

His former secretary gave evidence at the preliminary inquiry for the Crown that tended to support Stinchcombe. When she later she gave statements to the police that contradicted and retracted her earlier evidence, the Crown decided not to use her statements in its case. It informed Stinchcombe about the statements but refused to share them. The secretary did not want to speak any more to Stinchcombe or his lawyer, although they could have called her as a witness. The trial went ahead in February 1989 without the secretary's evidence.

Stinchcombe was convicted and sentenced to nine years in prison. He spent almost one week in jail before seven friends helped raise the $150,000 bail to get him out.

Appeal to the Supreme Court of Canada

The Supreme Court of Canada concluded that, in criminal cases, the Crown has a constitutional duty to disclose to the defence all evidence in its possession and control that could be relevant to the case. This duty does not depend upon whether the Crown will call that evidence at trial, whether the Crown thinks a witness is not worthy of credit, or whether the evidence helps or hurts the Crown's case.

This disclosure duty derives from the right of an accused to make full answer and defence which has been entrenched in Section 7 of the *Charter of Rights and Freedoms*. At the time, a few wrongful convictions (such as the conviction of Donald Marshall) were circulating in the news and a full right of disclosure of evidence from the Crown was seen as an effective move to prevent these.

The Court quashed the conviction, and ordered Crown disclosure of all the secretary's evidence prior to a new trial. As it would turn out, this was the first of many fantastical excursions for Stinchcombe in the legal world he thought he knew.

Subsequent Trials and Other Legal Proceedings

Crown disclosure was a problem at the second trial because the tape and statement were missing. A brain tumor claimed the policeman who held them. His widow could not find the evidence. Eventually, the Crown produced a photocopy of the witness statement and transcript of the tape. Stinchcombe, savouring his momentum and perhaps sensing vulnerability of the Crown, insisted on receiving the physical tape recording to check whether the transcripts were accurate.

But the tape was gone, so the trial judge stayed the charges. This case also went to the Supreme Court of Canada which said in 1995: "the Crown produced a copy of the statement and a transcript of the tape and explained the absence of the originals. That explanation did not reveal any misconduct on the part of the Crown. In our opinion, the Crown had fulfilled its obligation to produce. The Crown can only produce what is in its possession or control. There is no absolute right to have originals produced." Then the tape was found and given to Stinchcombe.

At about the same time, Stinchcombe was also defending himself against two clients in civil cases. One client was the complainant in the $1.6 million criminal fraud case. It is not clear how much Stinchcombe had to account to this client who was also his business partner after the 1993 lawsuit. The other client in 1994 won a $400,000 claim and full indemnity costs. In both cases, the judges expressed serious concerns about Stinchcombe's credibility.

Meanwhile, when Stinchcombe was preparing for the third criminal trial, a Crown memo surfaced which vaguely implied the criminal complainant (Stinchcombe's client) might have lied about something. Further investigations produced nothing, but the new Crown prosecutor decided to tap

out. He thought disclosure of that seven year old memo was coming too late even though it had just come to his attention, it was only legally required to be disclosed four years earlier, and Stinchcombe was not being tried in the interim. On March 22, 1996, the Crown called no evidence and Stinchcombe was acquitted of the criminal charges.

All of this time, Stinchcombe was not able to practice law. According to one report, "he was forced to survive by working as a labourer, store clerk, armourer (i.e., someone who maintains firearms and supervises their use on movie sets), tutor, and tax preparer. He also worked as a horse trainer . . . He even spent nearly a year making donuts at Tim Hortons."

Delay also came to Stinchcombe's rescue in his fight against the Law Society. The Alberta Court of Appeal stayed all professional sanctions against him in 2002 on the grounds of delay and prejudice to his defense. He was reinstated as a lawyer in Alberta but he did not practice.

Stinchcombe moved to Australia. Then in 2003 he sued the Law Society of Alberta for $16 million. He said the Law Society's drawn out disciplinary proceedings prevented him from earning a living as a lawyer. Few steps were taken to advance that lawsuit. In late 2008, the Law Society moved for, and was granted by the Court of Queen's Bench, an order that Stinchcombe furnish security for costs in the amount of $630,000 as a pre-condition to continuing that lawsuit. This order to post costs appears to have brought this lawsuit to an end.

What Happened to Stinchcombe?

Very few people get their cases heard and decided by the Supreme Court of Canada. Stinchcombe joins Morgentaler and Keegstra as an even smaller club of people who had their cases heard at that court more than once.

Stinchcombe lost most of the civil lawsuits against him and appears to have left them unpaid when he quit Canada and moved to Australia shortly after 2001. Prosecutorial delay was invoked to toss out all criminal (seven years) and professional disciplinary charges (fourteen years) that had been brought against him. These charges were never decided on their merits. The tidal waves of litigation and suppressive legal process – much of it initiated by Stinchcombe – served to overwhelm and crush the allegations originally presented.

In the end, although Stinchcombe escaped criminal and regulatory conviction, any victory or termination of hostilities he did experience came at a high personal cost. He lost his income, friends, lifestyle, reputation, family and his estate. Now 73, he is listed as "Managing Law Clerk" in a small law firm that bears his name in Australia.

***Note:** The highlights of this significant Crown duty of disclosure which began with Stinchcombe will be the subject of the next Famous Cases column.*

Justice for Victims of Corrupt Foreign Officials Act: Canada Seeks to Hold Foreign Officials Accountable for Human Rights Abuses

By Linda McKay-Panos

On October 4, 2017, Minister of Foreign Affairs, Chrystia Freeland, announced that the House of Commons passed a Bill that originated in the Senate: the *Justice for Victims of Corrupt Foreign Officials Act* (*Sergei Magnitsky Law)* (as the "Magnitsky Act"). The Bill must be approved again by the Senate before it becomes law. It is said to be similar to legislation and other motions passed in other countries and jurisdictions: United States, European Parliament, the Netherlands, the UK, Italy, Poland and Estonia. The Magnitsky Act is named in memory of Russian whistle-blower Sergei Magnitsky, who accused Russian officials of tax fraud and was later beaten to death in 2009 in a Moscow prison. When debating the Bill at its second reading, Senator A. Raynell Andreychuk spoke at length about Canada's international human rights obligations and efforts to ensure that human rights laws are adhered to around the world (see online).

Canada's Magnitsky Act amends the *Special Economic Measures Act*, SC 1992, c 17 (*SEMA*) and the *Immigration and Refugee Protection Act*, SC 2001 c 27. The purpose of the Bill is "to provide for measures that can be taken against foreign nationals who have committed gross violations of internationally protected human rights" (Karine Azoulay and Robin MacKay, online). If a foreign national (an individual who is not a Canadian citizen or a permanent resident of Canada) is responsible for, or complicit in extrajudicial killings, torture or other gross violations of internationally recognized human rights against human rights advocates or other whistle-blowers, the Governor in Council of Canada can issue a number of orders relating to the foreign national's property. The Governor in Council can also issue orders that relate to a foreign national's property if that person is responsible for or complicit in directing "acts of significant corruption" (e.g., expropriation of private or public assets for gain, corruption of government contracts or the extraction of natural resources).

Further, the Governor in Council can prohibit individuals and entities in Canada, or any Canadian citizen or corporation outside of Canada, from entering into or assisting in financial transactions that relate to property held by a foreign national. Orders made under the Bill are in effect for five years and can be extended more than once.

Both federally and provincially regulated businesses (e.g., banks, credit unions, insurance companies, trust and loan companies, and investment managers) have a duty to determine on a continuing basis whether they are in possession or control of property that they have reason to believe is subject to an order or regulation under the Magnitsky. To allow for some protection for the Canadian businesses, there is a provision for the Minister of Foreign Affairs to grant certificates to people who claim not to be a foreign national subject to an order.

The current *SEMA* allows Canada to impose sanctions against other states, even where there is no United Nations Security Council resolution. These economic sanctions are allowed:

- where an international organization to which Canada belongs calls on its members to take economic measures against a foreign state; or
- where a grave breach of international peace and security has occurred and is likely to result in a serious international crisis.

When sanctions are imposed under *SEMA*, the names of listed persons are published in regulations, and names can be added to or removed from the list through an amendment to the regulations. These listed persons are generally subject to any of the imposed sanctions or restrictions.

The *Magnitsky Act* will amend *SEMA* to expand the grounds upon which the Governor in Council can seize or freeze assets or otherwise sequester property held by or on behalf of a foreign state. An order for seizure can be made where a foreign state is responsible for or complicit in gross human rights violations, including extrajudicial killings or violations of the human rights of whistle-blowers or human rights advocates who are exercising internationally recognized human rights, such as freedom of expression or the right to peacefully demonstrate .

Once Canada's Magnitsky Act comes into force, this new law and *SEMA* have to be reviewed within five years, and a report must be provided to Parliament. Also, any list of foreign nationals designated under the Magnitsky Act must be reviewed by Parliament and the Senate annually.

There are some concerns about the limitations of this law, however. First, none of the existing Canadian legislation related to sanctions provides Canada with the ability to take legal action against non-Canadians beyond our country's borders (Andrea Charron and Meredith Lilly, online). Canadian regulations can be used to seize the property and assets of individuals or states that are found in Canada, or the property of Canadians that is abroad, but the existing legislation cannot be used to target assets that are held by non-Canadians abroad. The new legislation does not permit any change to this situation. Since our current banking system is quite strong in the area of preventing money laundering or holding assets gained through foreign corruption, it is already likely that foreign human rights abusers are quite unwilling to keep their money or assets in Canada.

The second critique notes that Canada best contributes to fighting human rights abuses when we work with other states, such as the European Union and the United States. The *United Nations Act,* RSC 1985,

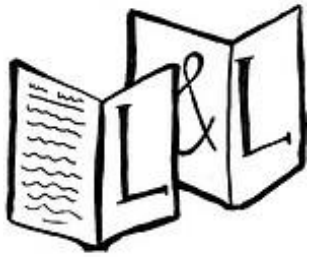
c U-2, and SEMA already allow Canada to target human rights abusers, particularly when the abuses are ”a grave breach of international peace and security” (Charron and Lilly). The new legislation would allow Canada to act alone even when there is no threat to global peace, which would mean that Canada is “volunteering to be the world’s police officer on human rights abuses” (Charron and Lilly). Charron and Lilly also argue that Canada lacks the resources to be effective in that role alone.

Third, the new legislation will place a great deal of administrative burden on our banks and private companies to comply with the regulations, without necessarily preventing human rights abuses. The rules are complex and difficult to interpret and companies must either take their chances and face hefty fines or must employ lawyers to advise them on how to meet the requirements. Parliament responded to some of the criticisms and amended the proposed legislation in an attempt to address some of the confusion (Cyndee Todgham Cherniak, online).

Canada has long maintained its desire to encourage respect for human rights and the rule of law. This legislation provides additional measures to hold violators to account and to discourage corrupt foreign officials. In particular, Canadian companies often engage in business in countries that demonstrate gross human rights abuses. It would be against our values to seek financial rewards while ignoring human rights abuses.

A Not Insignificant Death: The Grass is Singing

By Rob Normey



Doris Lessing left Africa – Southern Rhodesia to be precise, to journey by ship to England with the most meagre of personal possessions – a suitcase, a small sum of money and a manuscript. It was the manuscript which would transform the life of this fearless colonial from the margins of the fast-changing British Empire. In 1950, this deeply personal manuscript would be transformed into the novel *The Grass Is Singing*. Lessing's debut was an astonishing novel which must have been received by a number of British readers as an assault on their belief systems. *The Grass is Singing* opens in dramatic, albeit understated, fashion with a small news report indicating that Mary Turner, wife of the white British-Rhodesian farmer Dick Turner, had been found murdered on her front verandah. Her house boy, Moses, had confessed to the killing.

While the unsuspecting reader might believe that the novelist will probe the mystery inherent in the stark reality of a murder of a poor white woman by her black servant and at the very least the deeper motivations for the brutal act, Lessing defies conventional expectations. This tale of murder is far less an investigation into Moses' role than an investigation into why another white farmer and a neighbor of the Turners , Charlie Slatter, displays such open contempt for the dead woman. As an important representative of the white community in the region, Charlie's views reflect a widespread and overwhelming desire to cover up the most important facts of Mary's last days.

In the opening chapter, Charlie quickly condemns both Mary and Dick for their unconventional dealings with the black workers on their farm. Charlie attributes the violent attack to the failure of "the man" of the house, Dick, to take a firm hand with Moses and the other black servants. He asserts this as a principle which passes in this confined world as conventional wisdom. In the hypocritical world of these British colonials, it is vital to ensure that no thoughts of free and easy discourse by mere servants are able to emerge. There is no doubt that Charlie deals with his black servants and farm hands with an iron hand. The narrator makes this clear when informing us of the time Charlie actually became enraged by one of his native workers, striking and killing him. For this, he was fined 30 pounds! We might ponder the difference in treatment that the justice system provides to Charlie and to Moses, who will be hanged for his offence. The racial divide is illustrated further at various places in the book.

Lessing then introduces the character of Tony Marston, a young public school graduate who has come out to the colony from England. As an assistant on the farm, Tony has had the opportunity to closely

observe the relations between the Turners, their black farm workers and household help. Tony is truly bewildered by the lack of interest displayed by both Charlie and the investigating officer in determining what motivated Moses to commit the deed and what Mary did to place her in a dangerous relationship with him. In fact these men, and, one suspects, other key members of the white community of farmers and local officials, want to throw a heavy veil of silence around the entire act and the obvious fact that Mary had an intimate relationship with Moses (which might well have had a sexual component). She has violated an unwritten code and rather than honoring this long-suffering member of their community, all thought of her fate must be banished. As the narrator explains, it is as if she has breached the *esprit de corps* or the pride of the farming community. They can only proceed with confidence if the myth of white superiority if maintained and if a rigid colour bar is maintained at all times.

Tony, however, has not reached a point where he might have considered such attitudes normal and necessary to protect the well-being of the community. Since the murder occurred early during his temporary stay in Southern Africa, it is indeed strange and unnatural in his eyes. While Marston initially places his trust in the trial process to get to the bottom of this disturbing act, instead it becomes clear that both the prosecutor and the judge have conspired with others to prevent any probing. The narrator is left to conduct an inquiry into this event and the significance of Mary's death on the reader's behalf.

In *The Grass is Singing*, Lessing has drawn a haunting portrait of a marriage under extreme pressure. Lessing carefully traces the unique limitations in upbringing of the characters, especially of Mary's in a society where women are expected to comply as companions to their husband's social role. However, Lessing also highlights the damaging effects of the racial discrimination and oppression. Dick indeed is viewed by many as something of a fish out of water because he at times develops a free and open relationship with his black farm hands, treating some in comradely fashion. His neighbors expect him to be vigilant in stamping out all thought of independent action and to strictly discipline his black workers. In the Turner's rather unsuccessful and increasingly diminished social circumstances, Mary ends up taking out her frustrations on the Africans working in the home.

A critical point in the plot develops when Mary grasps that by giving stern orders, failing to allow for natural frailty, and prohibiting the staff to stop for breaks in the intense heat are leading to acts of rebellion. Mary actually brandishes a whip and slashes the face of one of the servants. Rather than realizing that she has developed a hateful domineering approach, she determines that greater use of threats is necessary. She then warns some of the workers that she will seek police assistance to ensure that they abide strictly by a contract they are supposed to have signed.
Under the laws of this Southern African state (not named), they can be compelled to return to work based on commitments forced from them because of a complete lack of bargaining power.

The arc of the novel will reverse shortly after this point and Mary will begin to unravel and increasingly become prone to mental instability. The novel will explode in the final chapters which depict her final disintegration in highly symbolic terms. The reader should know that the title of this work is taken from a line of T.S.Eliot's *The Waste Land*, and in particular the section "What the Thunder Said." This is a risky

strategy for Lessing and it largely works for me, despite her failure to provide sufficient details which would enable us to understand Moses' motivations better.

It is worth placing this novel in the context of the Nobel Prize winner's later work. Lessing treats her protagonists with a fair degree of compassion. They are inevitably tangled up in the racist foundations of African society in the years during and just after the Second World War. Yet we glimpse the capacity to respond in a positive manner to new opportunities. Dick in particular shows a true love of the soil and respect for the integrity of those who work the land, granting some dignity to his black farmhands. Mary's relationship with Moses reveals levels of intimacy which, while disturbing to other whites, nonetheless reveals the potential for a member of the white community to perceive the Africans as something other than second class citizens who are to be treated like beasts of burden.

Lessing goes on to make a case in a later work, African Voices, for the white farmers and their critical role in maintaining a viable economy in post- colonial South Rhodesia, renamed Zimbabwe. Long before many others in the West had given up on Mugabe for his human rights violations, she was an early critic of the dictatorial rule of Robert Mugabe. As a courageous truth-teller, Lessing did not hesitate to criticize the growing racism generated by Mugabe and his party, the ZUNAU-PF. Had the international community heeded her warnings, for example, the violent land seizure program of 2000, affecting thousands of white farmers and their families, might have been averted.

Charity Federal Regulatory Round-Up

By Peter Broder

As the charitable sector awaits an announcement from the federal government on when and how it will be responding to the Report to the Minister of National Revenue of the Consultation Panel on the Political Activities of Charities (the "Panel"), a couple of lower profile regulatory developments have come to the fore.

Consultation Panel on the Political Activities of Charities

Many readers may recall that the Panel was struck in the wake of an initiative by the previous government to more closely scrutinize and regulate registered charities' political activities and a commitment in the 2015 Liberal election platform to clarify the rules in this area.

While there is widespread agreement in the charitable sector on the need to address the political activities question, there is also significant support for more sweeping change. The need for such change was also reflected in the Liberal platform, which referenced modernization of charitable and not-for-profit sector regulation. This reference was picked up by the Panel in one of their recommendations calling for an update of the legislative framework governing the charitable sector. Still, the scope of what the government will do when it acts on this is uncertain.

In the meantime, there have been announcements of more routine developments in the Canada Revenue Agency's (the "CRA") administration of current federal charity law in the areas of Ineligible Individuals and disaster relief.

Ineligible Individuals

In 2011, Ineligible Individual provisions were added to the *Income Tax Act* registered charity legislation in an effort to prevent people with problematic tax abuse or criminal histories from being on the governance bodies or in senior leadership positions of charitable sector organizations. The legislation permits revocation and other sanctions against a charity or denial of registration of an applicant where such an individual is in a governance or key leadership role.

The measures were quite sweeping, and potentially caught a wide group of people beyond those who posed a genuine risk to the organizations with whom they were affiliated or more broadly to the reputation of the sector and integrity of the regulatory regime. In its guidance on how it would be

applying these provisions, however, the CRA indicated that the statutory language provided it with discretion and that it would allow organizations to take steps to dispute the designation of a particular person, or remove or manage the risk stemming from having the impugned individual hold a position in their group. It did not provide detailed information on how organizations could reconcile governance obligations or labour law concerns with removing someone who was offside. Nor did it fully explain how its administration of the measures would be discharged in accordance with privacy legislation.

In September, the CRA published a notice on its website, outlining its privacy practices with respect to those involved with registered charities or groups seeking registration. The notice indicates that the CRA has broad authority for extensive collection of personal information, to use that information for registration assessment, administrative and enforcement purposes, and to disclose certain of the information about charity officials for transparency purposes. It also flags the practice of sometimes sharing information within the CRA, within the federal government and even with other Canadian governments.

The document encourages groups to inform their officials that their personal information will be collected and disclosed and why**.** It goes on to state: "[t]his gives applicant organizations the chance to withdraw their application, and gives officials the chance to recuse themselves from an organization, if they do not wish to be subject to the rules and obligations of registration."

The notice advises that, beyond information provided through the registration process and regulatory filings, the CRA can seek personal information from other sources and that the scope of this information could include: **"**an individual's social insurance number, gender, language, marital status, citizenship status, personal tax information, financial information, bankruptcy and consumer insolvency information, credit history, biographical information, criminal checks, opinions or views about individuals and details of suspected non-compliance with CRA investigations or audits."

This additional information can be sought from "open-source internet searches, internal CRA systems, third parties such as financial institutions, third-party suppliers, beneficiaries, donors, informants, other qualified donees, and from other government departments and agencies."

While this publication can be seen as the government merely doing its privacy due diligence, the tone of the document is somewhat troubling and may have a chilling effect on director recruitment or decisions to apply for registration. Whether or not that happens, its dissemination of the document and anecdotal reports suggest that the CRA is now more actively pursuing application of the Ineligible Individual provisions.

Disaster Relief

In a different part of the regulatory landscape, the CRA has responded to questions raised during disaster relief efforts about permissible funding of recovery or restoration of for-profit small businesses

by amending its Community Economic Development guidance. The broad issue of when a charity's programs or support crosses the line into impermissible private benefit is always a difficult one.

In the wake of the devastation caused by events such as the Fort McMurray wildfire, the CRA has updated its discussion of relief to small business in the context of such events.

As well as recognizing that help to small business can be appropriate is such circumstances, the revised guidance usefully provides some conditions for when funding or supplying resources to small business will be incidental private benefit and some information on what would put such efforts offside (see Section E of the revised guidance, especially paragraphs 89-94).

So while some of the big answers in charity regulation may still be pending, on some smaller matters we have some idea where things are going.