

JAN/FEB 2018

Child Witnesses

Tax Reform

Age Discrimination

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Children in the Justice System



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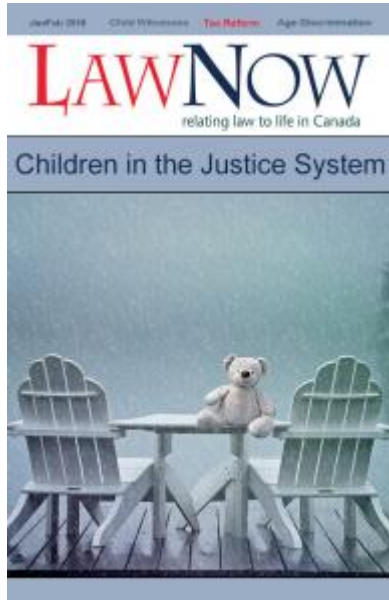


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Finding the Best Ways Forward: Report on the Symposium on Children's Participation in Justice Processes

By [John-Paul Boyd](#)



In mid-September 2017, the [Canadian Research Institute for Law and the Family](#) and the Alberta [Office of the Child and Youth Advocate](#) (“OCYA”) hosted an innovative two-day national symposium on children’s participation in justice processes in Calgary, Alberta. The symposium brought together leading stakeholders from across Canada, including judges and lawyers, mental health professionals, and government justice employees to talk about how children and youth are heard, how their interests are protected and how their evidence is received in justice processes. The symposium was intended to generate innovative proposals for policy reform, best practices, and recommendations for future research about children’s participation in justice processes.

As would be expected, the older the child was, the more likely respondents were to report that their preferences should be weighed heavily. The symposium included important plenary presentations by keynote speakers Sheldon Kennedy, the lead director of the [Sheldon Kennedy Child Advocacy Centre](#), and Dr. Nicole Sherren, the scientific director and senior program officers of the [Palix Foundation](#), as well as Del Graff, the Alberta Child and Youth Advocate, the OCYA’s youth panel and the Honourable Kathleen Ganley, Alberta Minister of Justice and Solicitor General. Those leading the workshops that made up the core of the symposium included Professor Nick Bala, Dr. Rachel Birnbaum, the Honourable Donna Martin QC, Dr. Francine Cyr, Patricia Hébert QC, Dr. Stephen Carter, the Honorable Justice Gillian Marriott, Dale Hensley QC and many others, all highly-regarded professionals.

The workshops held at the symposium covered a broad range of topics on the theme of children’s participation in justice processes, including:

- Best practices for representing youth in conflict with the law;
- Judicial interviews with children;
- Child participation in mediation and parenting coordination;
- Hearing the voices of infants and toddlers;
- The limits, if any, of children's participation in justice processes;
- The privacy rights of children and youth;
- Assessing the competence and credibility of children; and
- Hearing the voice of the alienated child.

A total of 179 individuals attended the symposium, hailing from all parts of Canada save New Brunswick. The presence of so many people involved in one way or another with the family justice system gave the Institute a unique opportunity to sample the views of attendees on children's participation in justice processes, and an electronic survey on these issues was completed by 102 participants.

To give a sense of those completing the survey, about four-fifths our respondents were women (81.2%), and most said they mostly work in Alberta (64.7%), which was not surprising given that the symposium was held in Alberta. Most other respondents came from British Columbia (12.7%), Ontario (12.7%), Saskatchewan (3.9%) and the Northwest Territories (2.9%). Almost two-thirds of the participants were lawyers (64%), 7% were mental health workers, and about one-quarter (24%) worked in other occupations, including as academics, government workers, and mediators. On average, participants reported working in their primary occupation for 19.1 years, although their responses ranged from 1.5 years to 45 years.

Most respondents agreed that children should have the right to voice their views in family law proceedings that affect them (93.1%). When asked if children's participation should be mandatory, however, 58.4% said that they disagreed, 30.7% said that they agreed, and 10.9% said that they didn't know.

Most respondents agreed that children should have the right to voice their views in family law proceedings that affect them (93.1%). Participants were asked their opinion as to which are the best mechanisms for enabling children to voice their views. The majority of respondents (82.4%) rated *legal representation for the child* as the best mechanism, followed by *assessment reports* (70.6%). *Judicial interviews with children* and *non-legal representation for the child* were considered the best mechanisms by about two-fifths of the respondents (40.2% and 38.2%, respectfully). One-fifth of respondents (18.6%) rated *children's testimony* as a best mechanism, and only 11.8% of participants agreed that a *legislative provision that parents should consult their children respectfully when making parenting arrangements upon separation* was the

best way to enable children to voice their views. Almost all respondents (98%) said that mechanisms exist in their jurisdiction to hear the views of children.

We also asked participants about the factors that should affect the legal weight to be given to children's views, the extent to which a judge should rely on a child's views in making a decision. More than 90% of respondents viewed the *age of the child* (93.1%), the *ability of the child to understand the situation* (93.1%), and the *ability of the child to communicate* (92.2%) as important factors. More than 80% of respondents viewed an *indication of parental coaching or manipulation* (87.3%), the *child's reasons for the views* (86.3%), and the *child's emotional state* (83.3%) as important factors to be considered.

The symposium was intended to generate innovative proposals for policy reform, best practices, and recommendations for future research about children's participation in justice processes.

We then asked how much weight should be given to the preferences of children about their living arrangements at specified age categories. As would be expected, the older the child was, the more likely respondents were to report that their preferences should be weighed heavily. Almost all respondents (97%) said that the preferences of children age 16 and older should receive *heavy weight*. Decreasing numbers of respondents thought *heavy weight* should be giving to the views of children aged 14 to 15 (91.9%), children aged 10 to 13 (61.9%) and children aged 6 to 9 (17.3%). For younger children, respondents were more likely to say that the preferences of children aged 6 to 9 and children under the age of 6 be given *light weight* (73.5% and 62.9%, respectively). One-third of respondents (32%) thought the preferences of children under the age of 6 should be given *no weight*.

A number of other interesting results came from our survey of symposium participants. The complete report is available from the publications section of the Institute's website at crilf.ca/publications.htm. Workshop materials are publicly available and remain online at the symposium website at findingthebestwaysforward.com.

The symposium was generously funded by contributions from the Alberta Law Foundation and the Office of the Child and Youth Advocate, with additional support provided by Our Family Wizard, DivorceMate Software, ChildView and the Federation of Law Societies of Canada.

Children Witnesses in the Criminal Courts: Recognizing Competence and Assessing Credibility

By [Nicholas Bala](#)



Until the late 1980s, the justice system in Canada regarded children as inherently unreliable and their rare appearances in court were often extremely stressful. Since then, there have been dramatic changes in the awareness of child abuse and growing recognition that children can be highly reliable witnesses, if questioned appropriately. There have been legal reforms and changes in professional practices that have allowed many more children, especially victims of abuse, to testify in criminal court. There remain, however, many challenging issues in balancing the need to protect children with respecting the rights of accused persons.

The Context: Ending The Myth Of The Unreliability

The old laws about child witnesses (and female victims of sexual assault) were based on the belief they were inherently untrustworthy and prone to fantasy about abuse. The [Supreme Court of Canada](#) required that jurors were to be warned of the 'inherent frailties' of a child's evidence, even if the child was a sworn witness. No efforts were made to modify the court process to facilitate children's testimony. In this social and legal environment, the police and healthcare professionals continued to receive few reports of child abuse.

The women's movement of the 1970s helped create an environment where adult survivors of childhood abuse began to come forward with accounts of their experiences. By the 1980s, encouraged by media reports and growing professional sensitivity, larger numbers of adult survivors began to overcome their feelings of fear, guilt and shame to disclose what they had suffered in childhood. The Canadian public was shocked by detailed disclosures from survivors of child abuse in schools, juvenile institutions and sporting organizations across the country. Many of the cases involved some of society's

most vulnerable children, those without parents to protect them, placed by the state in child welfare institutions and in the now-closed residential schools for Aboriginal children. There was also a growing awareness that much child abuse is perpetrated by family members or trusted community figures.

As such disclosures became more common place, there was more psychological research into the reliability of child witnesses. Studies revealed that, when questioned in an appropriate way, children can be reliable witnesses and that even young children can distinguish fantasy from reality. With the growing awareness of the realities of abuse a more receptive environment for disclosures of abuse by children developed. Children were encouraged to report abuse, resulting in a dramatic increase of such reports. It became clear that fundamental legal reforms were required to allow children to testify effectively. Canada's Parliament responded by enacting significant reforms.

Competence To Testify

Before a child can testify, the judge must be satisfied that the child is 'competent' to be a witness. Historically, witnesses could only testify under oath and children were expected to be able explain that they would 'burn in the eternal fires of hell' if they lied under oath. Canada enacted its first legislation on child witnesses in 1893, permitting children to testify even if they could not explain 'the nature and consequences' of an oath, but only if they demonstrated their understanding of the "duty to speak the truth."

Their 'unsworn testimony' required independent evidence or corroboration if there was to be a conviction. This was often impossible to obtain in sexual abuse cases. In 1988, the law was amended to eliminate the requirement for verification of 'unsworn evidence'. Children who did not understand the nature of an oath could testify upon 'promising to tell the truth', provided they had the 'ability to communicate'. A judicial inquiry, an investigation ordered by a judge looked into children's understanding of such concepts as 'truth', 'lie' and 'promise'. Often young children, who think in concrete terms, had great difficulty answering questions about these abstract concepts, and inquiries tended to be longer and more confusing for younger children.

There is now a growing body of psychological research into lying and lie detection. Children begin to lie starting around age 3. Almost as soon as they start to lie, children learn that it is morally wrong to do so. There is no evidence that younger children are generally more likely to lie than older children or adults. In fact, a series of studies found no evidence to support the belief that children's ability to correctly answer questions about the meaning of 'truth' and 'promise' is related to whether or not they will actually lie. However, research has established that having a child promise to tell the truth before answering questions significantly increases the likelihood that a child will tell the

truth, even if the child cannot explain the significance of this. The results of this research are consistent with child development theory and research, which establishes that young children have a great deal of difficulty in correctly answering abstract questions about the meaning of a complex concept like the 'promise to tell the truth'. It is, however, clear that young children understand the social importance of truth telling and of promising well before they can answer questions about these concepts. Children (and often adults) may be able to understand and correctly use words without being able to define them. For both adults and children, the process of promising or swearing an oath is intended to impress on the witness and others in the court the social significance of the occasion demonstrates their commitment to tell the truth. Accordingly, while a child's promise to tell the truth provides no guarantee of the honesty of the witness, it may however do some good.

In 2006, a [new law](#) came into force. It requires children to 'promise to tell the truth' before being permitted to testify, but it also specifies that no child shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether they are competent to testify. The sole test for competence is whether the child is able to understand and respond to questions. Under this test, the focus of the inquiry is on the child's basic memory and communication abilities. In a significant portion of cases, a child is now qualified to testify without inquiry, often based on video interview material disclosed to the defence before the hearing. If there is a concern, the child's ability to communicate can be assessed by asking the child questions about an event unrelated to the allegations, such as what they do to celebrate their birthday.

The inquiry required by the old law upset children, wasted court time and did nothing to promote the search for the truth. Some children who could have given honest, reliable evidence were prevented from testifying, resulting in miscarriages of justice. The present provision, focusing on a child witness's ability to understand and answer questions. It creates a much more meaningful test to use to determine whether a child is competent to testify. Asking the child to promise to tell the truth, but not expecting the child to explain the significance of this undertaking, is the same as how adults who testify under oath are treated.

Recognizing The Reliability Of Child Witnesses

Psychological research about the memory, suggestibility, and communication capacity of children has now established that they can be reliable witnesses, though children's memories are less well developed than adult memories. Children as young as 4 years of age can provide accurate information about events that happened to them a year or even two years earlier. While adults can give more information about an incident than

children, adults are also more likely to provide inaccurate information about past events than children. All witnesses are more likely to consistently and accurately recall information about the core elements of their experiences, rather than about peripheral or secondary elements, such as the physical setting.

A significant concern with child witnesses is their potential suggestibility. As a result of repeated or misleading questions, the memory of a witness may become distorted. A person who has been subjected to repeated, suggestive questioning may develop 'memories' of events that did not in fact occur. While children, especially very young children, are more suggestible than adults, there is great variation between individuals of the same age in their suggestibility. Adults as well as children can have memories distorted or even created by suggestive questioning or interviews. In practice there is a greater likelihood that a child will be repeatedly questioned about an event, both by professional investigators and sometimes by a parent.

The way that children are questioned can also affect how accurately they are able to communicate what they know about events. Children, especially young children, have not developed clear concepts of time, distance or space. For example, they will not be able to accurately answer questions about the number of times that an often-repeated event occurred, because they lack counting and computation skills. However, young children often feel socially compelled to attempt to respond to a question and are likely to guess when they are unsure of the correct answer. Further, children, especially young children, who are asked questions that they do not fully understand, will usually attempt to provide an answer based on the parts of the question that they did understand, so that their answer to a question may seem unresponsive and may even be misleading. There are questioning techniques that can increase the accuracy and completeness of the testimony of children, such as:

- mimicking the vocabulary of the child;
- avoiding legal jargon;
- confirming meanings of words with children;
- limiting use of yes/no questions; and
- avoiding abstract conceptual questions.

Canadian law has come to recognize that children can be reliable witnesses, and that it is unfair and inappropriate to have general rules discounting their evidence. In 1992, Justice McLachlin in the Supreme Court of Canada observed that there is in now an

'appreciation that it may be wrong to apply adult tests for credibility to the evidence of children... Since children may experience the world differently from

adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection ... Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate.'

In 1997, the Supreme Court upheld the validity of [legislation](#) that allows a court to consider a video-recorded police investigative interview with a child. In that [decision](#), Justice Cory acknowledged '*that the peculiar perspectives of children can affect their recollection of events and that the presence of inconsistencies, especially those related to peripheral matters, should be assessed in context.*'

Facilitating Children's Testimony

Until relatively recently, there were no services available to support children who came to court to testify and no legal provisions for their accommodation in court. As a result, the experience of testifying was often deeply traumatic for children, and their ability to participate in the proceedings was often compromised. Laws have now been enacted and services established that are intended to recognize the vulnerabilities of children, and allow them to participate more effectively in the criminal process.

The [law](#) now presumes that children who are witnesses will testify from behind a one-way screen or from another room via closed circuit TV, limiting the stress of speaking about potentially traumatic events in public or being intimidated by the presence of the accused. Court-related support services for victims and witnesses have been established in many communities with special focus on children, and a support person or even a support dog may accompany the child. Children who are adequately prepared and supported during the court process are more likely to be effective witnesses, and less likely to be traumatized by the experience of testifying.

Accommodating Children In Criminal Court

The criminal justice system is not only concerned with ascertaining or determining the truth, but also with fairness and protection of the constitutional rights of the accused. There is an onus on the state to prove the guilt of an accused beyond a reasonable doubt and inevitably there will be some true allegations of child abuse that cannot be proven in court. Further, while most disclosures of child abuse are true, there are also a relatively small number of unfounded allegations: a child may be mistaken about what occurred, have identified the wrong perpetrator, or have been induced by inappropriate questioning into making a false allegation. More rarely, children may fabricate allegations on their own.

The role of the justice system, starting with the police investigation and ending in court, is to balance the rights of the accused with the desire to ascertain the truth. Over the past thirty years, there have been significant increases in understanding of the capacities and needs of child witnesses and victims of child abuse, which have led to dramatic improvements in how the Canadian criminal justice system treats children. In many locales, programmes have been established to provide support for children and other vulnerable witnesses involved in the justice system. There remains, however, significant concerns with how children are treated in the courts.

Police, prosecutors and judges generally have a much better understanding of how to treat child victims and witnesses than in the past, but there is a need for more training and education for professionals in the justice system. There is also a need for more resources to provide adequate services for child witnesses. Such services include ensuring that only one Crown prosecutor deals with a child, rather than having different prosecutors at each court appearance, and resolving cases within a reasonable time frame. Delay in the resolution of cases in the justice system may increase a child's emotional trauma, and result in a child's memory fading and being a less effective witness. While the technology and access to equipment for video-recording of investigative interviews and closed circuit television for child witnesses have significantly improved, there are many locales where this type of equipment is not accessible, or there is a lack of adequate training in its use. Too many places have long waiting lists for therapeutic services for victims of child abuse.

There are also areas where legislative reform is still needed. For example, while the common law rules governing the admission of a child's disclosures of abuse have been significantly improved, there are still many cases in which the judge or jury may not hear evidence of the child's initial, often graphic, disclosures of abuse, and the court is left to hear only the statements that are video-recorded.

Legal changes have both reflected and contributed to a better understanding of the nature and effects of child abuse. Canadian society now deals more effectively with this devastating problem. We must, continue to reform the justice system to find a better balance between the rights of the accused and the interests of children and society. Further improvements will require consideration of experiences in other countries, as well as more empirical research in Canada about the experiences of children in court and the long-term effects of involvement in the justice system.

The Youth Criminal Justice Act: An Overview

By [Charles Davison](#)



Young persons who commit crimes must be held accountable, but in Canada (as in most other western democracies), because of their age, we approach “youth crime” differently than how we approach crimes committed by adults. In keeping with international standards and scientific understanding, young persons – under the law, those between 12 and 18 years of age – cannot be held to the same standards and expectations as adults. Therefore, we have a separate law, now the Youth Criminal Justice Act (the “YCJA”), to govern how we respond to young persons who commit criminal offences.

Historically, children who committed offences were treated as “delinquents” in need of corrective direction. Under the Juvenile Delinquents Act (the “JDA”), children who came into conflict with the law had few procedural protections. For example, the age when young accused were sent to the adult courts varied across the country, and often, between genders. In some provinces, boys aged 16 or 17 would be prosecuted and sentenced as adults while girls more often continued to be treated as children until they turned 18. Actual “trials” were rare under the JDA. More often, a private informal hearing was held where the child had few rights. Following the hearing, a child might be sent to an “industrial school” (despite the name, essentially a jail or prison for young persons), placed into a foster home, or put on probation.

In 1982, Parliament replaced the JDA with the Young Offenders Act. Since then, although there have been changes in aspects of the youth court system, the same principles and goals have generally continued and are now found in the YCJA. Young persons charged with criminal offences have enforceable rights similar to those of adult accused persons, including the right to have lawyers assist and represent them. They have input into the proceedings separate and apart from what their parents or other caregivers might offer. Children who are alleged to have committed offences are not treated differently based upon gender or where they live in Canada.

Rehabilitation of young persons who have gotten into trouble is the main goal of the law. The range of punishments and penalties is somewhat broader than what might be considered for adults who have committed crimes, in recognition of the special needs and challenges of youth. At the same time, the legislation also confirms that victims and society at large require protection from criminal conduct, and the damage and loss it so often brings.

One of the features of our youth criminal justice law (which has since been adapted to adult situations too) is what the YCJA calls “Extrajudicial Measures” – more commonly referred to as “Alternative Measures” or “Diversion”. These measures reflect that prosecuting and stigmatizing first-time offenders who have committed a fairly minor crime may cause more harm than good, and certainly is not an efficient or economic use of court and corrections resources. Therefore, such matters can often be dealt with outside of the court system (sometimes without even laying charges). In very minor situations, a police officer or prosecutor can officially “caution” a young person about the dangers and unlawfulness of their conduct and, if satisfied that this is sufficient to reduce the risk of re-offending, the matter can be considered closed. In other cases, the youth is required to meet with a community justice committee to discuss why their actions were wrong and to explore ways the child can change their behavior to avoid future conflict with the laws. If a charge has been brought before the court, it will be dismissed or withdrawn if the young person has successfully completed a community-based “diversion” program.

For matters which proceed in court, most of the procedural rules and practices are the same for youth as for an adult accused. The same pleas are permitted (“guilty” or “not guilty”), and the trial procedures and rules of evidence are almost identical. One exception is that in youth court jury trials are almost never allowed (see below for exceptions). As well, if the Crown wants to introduce evidence of what a young person has said to the police or any other person in authority, there are some extra steps to be taken. They must ensure that the youth’s legal rights were respected and that he or she understood their options and the results, if they decided to speak or answer questions.

When sentencing young persons who have been found guilty, Youth Court Judges have a broad range of penalties and sanctions which can be imposed. However, the emphasis is usually upon trying to achieve rehabilitation without the disruption of imprisonment. Adults who are punished for committing crimes usually face fines, probation or jail sentences of various lengths. Youth are fined far less often than adults. A first-time youth offender whose crime is not serious may be ordered to perform community service work, and, or alternatively, be placed on probation to ensure he or

she is steered away from future wrongdoing and misbehavior. In the most minor of situations, a formal “reprimand” by the judge can be the sentence. For most “first time offenders” imprisonment of any sort is not possible, unless the offence is one of violence or there is something uniquely serious about the crime. Where imprisonment is ordered for a young person, in some provinces and territories the judge also decides whether it should be served in “open custody” or “closed custody”. The difference relates to the level of restriction and control imposed over the youth’s conduct and behavior and privileges while serving. Young persons must be held in correctional facilities separate and apart from offenders who are 18 years of age or older.

Furthermore, the lengths of youth sentences are usually significantly shorter than would be the case for adults. This is partly because we recognize that during the formative “teen” years, there are developmental changes which occur more quickly than for adults. In general terms, a youth may never be sentenced to a more severe punishment than an adult would receive for the same offence. A probation order may not last longer than two years and a youth sentence of imprisonment may not last longer than three years. A combined sentence of imprisonment and probation may also not last longer than three years.

Still, for young persons over the age of 14 who commit particularly serious and especially, violent criminal offences, the Crown has the option of asking the court to treat the accused in ways which more closely resemble adults charged with the same offences. In these cases the youth may elect to have a jury trial. If he or she is found guilty, a lengthy sentencing hearing will usually be held at which the judge receives detailed background social and mental health evidence about the history, experiences and challenges of the young person. Ultimately, the judge must decide whether the young person should be sentenced as if they were an adult when they committed the crime, or whether the usual youth sentencing options would be sufficient to address the misbehavior of the individual and reduce the chances that he or she will re-offend again in the future.

Additionally, special rules apply for young persons charged with murder. These are cases where the Crown most often asks the court to sentence the youth as if they had been an adult at the time of the offence. However, even in this situation, the sentence imposed if the accused is found guilty is somewhat more lenient on youth. Both adults and youth sentenced as adults can be imprisoned for the rest of their life. However, for first degree murder, a youth will be ordered to serve 10 years before being able to ask for parole whereas an adult would have to wait 25 years. For second degree murder, a youth must wait 7 years before being able to ask for parole whereas an adult must wait anywhere from 10 to 25 years.

If the youth is sentenced as a youth for first degree murder, the longest sentence is 10 years (usually, 6 years in custody and 4 under supervision in the community). For second degree murder, the longest sentence for youth is 7 years (4 in custody and 3 under supervision).

In some rare cases where a serious violent offence has been committed and the accused is being sentenced as a youth, the court may impose an “Intensive Rehabilitative Custody and Supervision Order”. Such orders are possible where:

1. the young person was suffering from a mental illness, or psychological or emotional disorder at the time of the offence; and
2. a suitable treatment plan will be implemented by the provincial authorities.

Instead of being held in a correctional facility, the youth will be subjected to intensive, long term treatment, usually in a secure hospital setting, for up to ten years, or until they are considered no longer to present an undue threat to others in society. Release then takes place in gradual steps, and the young person remains under supervision of the authorities similar to an adult offender who is on parole.

A final protection for youth, which is not available to an accused adult, is in the area of publicity and privacy. The law recognizes that subjecting a young person to the stigma of publicity because of their criminal conduct is likely to reduce the chances of successful rehabilitation. The YCJA therefore prohibits the publication of the names of young persons charged or found guilty of committing offences. Court proceedings are held in public and may be reported by the media, but the name and identifying information relating to the accused may not be published. An exception applies to those young persons who the court decides should receive an “adult sentence”. In such cases, once the sentence is ordered the youth also loses the protection of the publication ban and the media may name him or her in their reports on the case.

Infants and Family Law: Advice for Parents

By [Evelyn Wotherspoon](#) and [Sonja Lusignan](#)



Until you face a family law issue, you may never know that your pre-verbal children, who have not yet learned to speak, can have a lawyer appointed to represent them with or without your consent. Lawyers are routinely appointed through Office of the Child and Youth Advocate, for children and youth, including infants, who are involved in child protection matters in Alberta. The consent of parents is not necessarily required in these instances. A lawyer may be appointed for children and youth who are involved in divorce proceedings or family law proceedings, if their parents agree to it, or if a judge orders it.

The process is slightly different in different situations. The table below explains when a lawyer may be appointed and the cost associated:

Type of Proceeding	Level of court	Is this Common?	Who pays for the lawyer? How much does it cost?
Child protection (also known as "child welfare")	Mostly Provincial Court	Yes.-	Office of the Child and Youth Advocate. No cost to parents.
Divorce	Usually the Court of Queen's Bench, sometimes Provincial Court	Rare to have lawyers appointed for babies/toddlers.-	<ol style="list-style-type: none">1. Legal Aid, \$94/hour, generally split between parents.2. CLERC (Children's Legal Education and Resource Centre), no charge for parents.3. Privately hired lawyer, \$200-300 per hour (will vary).
Unmarried parents – Family Law Act	Sometimes Provincial Court, Sometimes Court of Queen's Bench	Lawyers appointed often, especially if both parents are self-represented (i.e. neither has a lawyer).-	

Why Should My Baby Have A Lawyer?

Canada is a signatory to the United Nations Convention on the Rights of the Child. Among other things, Canada has agreed all children have a right to:

- be treated with fairness and respect;
- life, health, education and development;
- have adults care for them and act in their best interests; and
- respect and consideration of their views.

How Are These Rights Ensured For A Pre-Verbal Child In A Family Law Matter?

The rights and interests of parents are not always the same as the rights and interests of their infants. Because of the rapid pace of development in the early years, and because early development sets the stage for life-long health and well-being, the infant has urgent needs. Specifically, infants need a chance to form a relationship with a consistent nurturing and sensitive caregiver, predictable routines, and protection from too much stress. A lawyer can represent the rights of infants and ensure their needs are carefully considered in the resolution of disputes.

The role of a lawyer for infants and toddlers varies, depending on several factors. Generally, for a pre-verbal client like a baby or toddler, the courts will appoint a lawyer to be a “friend of the court”, or the lawyer may choose to take that role. The lawyer’s job will be to present relevant information to allow the judge to base decisions on what is in the baby’s best interests.

In most situations, you should expect your baby’s lawyer:

- will meet your baby, generally at your baby’s home;
- will stay independent of the parents’ wishes; and
- will objectively present evidence that could assist the judge in determining what is in the best interest of the baby.

In child protection proceedings, the lawyer will advocate on behalf of the infant to ensure there are no unreasonable delays.

Infant Development And The Court

Child development can be thought of as the baby’s job, and can be thought of in three parts: 1) babies must quickly learn how to engage in close emotional relationships; 2) as they grow, children learn how to explore and discover their environment; and 3) young children must gradually learn how to focus their attention, constrain their impulses and to manage strong feelings. Infants and toddlers rely on consistent, predictable and nurturing care, predictable routines, and stable environments to do this job properly.

It is the daily, minute and seemingly inconsequential interactions between an infant and her trusted caregivers that allow her development to unfold properly – think of the ‘serve and return’ of a tennis game. The baby initiates an interaction (serve) and the caregiver responds (return). Children who are distressed cease this type of interaction and instead become preoccupied with seeking comfort and soothing. Separations from the preferred attachment figure can deprive the infant of her most reliable and effective source of comfort. If an infant is regularly disrupted from her routines, and is repeatedly having to cope with separations from, and reunions with, her primary attachment figure, it will make her ‘job’ of healthy development much harder to do.

Stress in early childhood is far more damaging than stress exposure at any other period of development; so much so that researchers use the term ‘toxic stress’ to describe chronic, unmanageable stress exposure occurring early in life. This is because the toddler’s brain is still immature, including the part of the brain responsible for emotional regulation and for triggering the stress response (the limbic system). Some stress is unavoidable, even helpful to development; the stress of vaccinations is an example. The impact of stress on the young child depends on how controllable the stress is, how often and for how long the body’s stress response system is activated, and whether the child has familiar, safe caregivers to turn to for support.

If a baby’s stress response endures prolonged or chronic activation while it is still maturing, it can delay or prevent healthy brain development and interfere with the development of the stress response system itself. This leaves the baby less equipped to handle life’s adversities later. In other words, toxic stress *affects* the adult brain; toxic stress *organizes* the infant brain. Entry into foster care or the disruptions associated with being raised in two homes present special challenges for infants, and for the courts who must weigh these concerns against the interests, needs and preferences of parents.

Tips For Promoting Mental Health In Infants

If you are in a custody conflict or are involved in a child protection matter, the following tips can help protect your baby’s mental health:

- take steps to reduce the stress in your household wherever possible – your stress is your baby’s stress;
- reduce the conflict with your parenting partner(s) whenever you can– whether it is a foster parent, ex-spouse, step-parent or other person, conflict is stressful for you and your baby, and it can be toxic to your child’s developing brain. Very

often, the stress associated with adult conflicts is more damaging than the issues in dispute;

- forget about purchasing expensive (and overstimulating) toys that flash and beep. Spend some quiet time every day with your infant – on the floor, one-to-one, and engaged in a playful activity. You are the best toy in the room! Frequent contact between parents and infants in foster care is essential to preserve important attachment ties; and
- try to duplicate routines for infants transferring between two households, and make the transitions smooth by keeping a very predictable schedule/location. Avoid conflict at transitions by using a communication book or on-line communication tools such as Our Family Wizard.

You may request a qualified infant mental health professional to assess your baby or toddler. These professionals can provide childhood mental health assessments and consultations to help parents create developmentally-sensitive parenting plans. They can work with mediators and family lawyers to help the parents consider the developmental and emotional needs of infants and toddlers in shared parenting arrangements. Furthermore, they can offer valuable insight to judges on what factors should be considered in making decisions regarding your baby or toddler.

Conclusion

If you are involved in a child protection matter, it is always advisable to consult a lawyer. Find somebody who has experience dealing with child protection matters. Legal Aid coverage may be available to you. Alternatively, there are many sources of legal advice depending on the community in which you live. Contact your provincial Law Society for information and assistance.

The same can be said for parents that are separating. Get some legal advice, especially from somebody who has experience dealing with custody matters. There are excellent resources out there to help educate parents so that they can protect children from a stressful separation.

Lawyers and mental health professionals working with matters involving infants or young children should have specialized training and experience.

Resources

Alberta Family Wellness Initiative <http://www.albertafamilywellness.org>

Circle of Security <https://www.circleofsecurityinternational.com>

The State of Mental Health Treatment for Youth in the Justice System

By [Lisa Kasper](#)



Alberta's youth criminal justice system is struggling to meet the demand for mental health treatment due to a lack of space in secure mental health treatment facilities. The youth criminal justice system would benefit from a more integrated approach to the administration of youth criminal justice services, the introduction of youth mental health courts, and the promised increase in funding for mental health services for youth in the system.

Most countries, including Canada, recognize that young persons are inherently vulnerable and have needs unique from those of adults. In the Canadian justice system, young persons are required to follow the same criminal and provincial laws as adults. However, a foundational principle of the Canadian youth justice system is that young persons should not be treated the same as adults. Moreover, the justice system applies unique principles when addressing youth crime:

- a reduced level of moral blameworthiness and accountability on the part of the youth due to recognized restrictions in maturity;
- greater focus on rehabilitation; and
- application of unique procedural measures to ensure equitable treatment.

The relevant federal and provincial legislation, respectively, are the *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA] and The *Youth Justice Act*, RSA, 2000, c Y-1 [YJA]. Under both the YCJA and the YJA, a young person is defined as someone who is 12 to 17 years of age. The YCJA is largely focused on criminal law matters, which is within the exclusive jurisdiction of the federal government according to the Canadian *Constitution Act*. In contrast, the YJA covers violations of provincial and municipal by-laws, which are under provincial jurisdiction according to the *Constitution*. In Alberta,

proceedings of violations by youth under both the YCJA and YJA are heard in the Youth Justice Court. A minor who is less than 12 years of age who is found in violation of the law will neither be arrested nor required to go to court. Rather, the goal is for the minor's parents or caregivers to appropriately address the matter. In cases where this is not possible, the matter is referred to Child and Youth Services or a community mental health agency.

In addition, the YCJA provides for customized sentencing for youth suffering from mental illness. For instance, it emphasizes that neither pretrial detention nor custody are to be used in place of deemed necessary measures, such as mental health treatment. Recent [research](#) shows that these requirements have not been fully adopted.

In a recent [case](#), a mentally ill youth was sent to jail instead of receiving the necessary court-ordered treatment. Judge Steven E. Lipton was the judge presiding over the case. In an unprecedented move, he invited the media into his courtroom to bring public awareness to this important issue. As a result of Judge Lipton's actions, Premier Notley promised to secure more support services for youth in the justice system who are suffering from severe mental illness. A placement was eventually found in a secure treatment facility following the media's coverage of the case. Sadly, it appears that Justice Lipton is not alone in his frustration with the limited resources available for treatment of mentally ill youth in the Canadian justice system. Concerns have recently arisen in [Nova Scotia](#), [Nunavut](#), [Manitoba](#) and [New Brunswick](#).

One possible avenue for reform to Alberta's youth justice system to address gaps in mental health delivery is to include a structural reorganization at a system-wide level. Alberta's approach is fragmented, with responsibility in the province divided between the Ministry of Justice and Solicitor General and the Ministry of Children's Services according to a recent [comparative evaluation](#) of youth justice approaches. Integration of youth justice service delivery has produced favourable results in other provinces. In [British Columbia](#), adolescent mental health, youth justice and child welfare services are all under the umbrella of the Ministry of Children and Family Development. Studies show that an integrated structure can reduce the incidence of both communication and service gaps, as supervisory personnel are centralized. Provincial representatives from British Columbia have also reported that the integrated approach has allowed them to be more effective in their delivery of mental health treatment for youth in the justice system.

The introduction of a youth mental health court, in addition to the traditional Youth Justice Court, may also improve mental health care delivery to Albertan youth. The principle of therapeutic jurisprudence is at the [forefront](#) in youth mental health courts. It

allows the law to be applied in a manner that is less adversarial and encourages both the physical and mental well-being of the accused. The [purpose](#) of these courts is to direct accused individuals with mental illness away from the traditional justice system and towards mental health treatment in the community. Ontario [introduced](#) youth mental health courts in June of 2011. These courts operate within the framework of the youth criminal justice legislation. However, when youth have mental health needs, they can be referred to the youth mental health court at the discretion of a lawyer, family member or judge. Following a referral, youth receive an assessment from a mental health professional. Based on the recommendations of the professional, the Crown has the discretion to transfer the youth from the regular youth court to the mental health court. [Research](#) on the impact of Toronto's first youth mental health court concludes that the court is making advances in addressing service gaps within the system, by providing more timely access to mental health services.

[Research](#) has shown that improved access to mental health resources benefits both the youth and the general public. Youth who receive mental health supports in the criminal justice system experience more beneficial outcomes. The public benefits from a heightened level of public safety. The potential benefits that could result from these reforms is particularly important given that over [90 percent](#) of the youth in the criminal justice system suffer from some form of mental illness.

Voices of Children in Parenting Coordination

By [Catherine Quigley](#) and [Francine Cyr](#)



Parenting coordination is a form of alternative dispute resolution (“ADR”) targeting the needs of separated parents who are experiencing entrenched conflict and are having difficulty implementing court orders and parenting plans. Through different techniques such as negotiation, problem-solving, education, mediation, and – in some jurisdictions – decision enforcement, the goal of the parenting coordinator (“PC”) is to help lower conflict between the parents and keep their dispute outside of the courtroom. This ADR is gaining more and more popularity in North America and although research on its efficacy is still scarce, the literature is so far showing promising results.

The body of literature on the voice of the child in post-separation interventions has led to the conclusion that children want to have the opportunity to be heard in matters that concern them. Children do not want to make choices regarding custody arrangements but they do want their input to weigh in on the decisional scale. Moreover, research shows that children are more likely to consider custody arrangements to be fair if they are given a say in the decision-making process. Not only do most children want to be heard in post-separation proceedings, it is one of their fundamental rights as part of the *United Nations Convention for the Rights of the Child*, ratified by Canada (Article 12):

Paragraph 1: *“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”*

Paragraph 2: *“For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*

Parenting coordination is an intervention for parents in which children may occasionally be asked to participate. There is, however, no consensus as to *if* and *how* children should be given a voice in parenting coordination. In the Parenting Coordination Guidelines published by the Association of Family and Conciliation Courts (“AFCC”) in 2005, the directions about child inclusion are vague and the decision to include them is left to the PC in charge. To our knowledge, no study so far has focused on the inclusion of children in parenting coordination. Joan Kelly, a pioneering PC in California, has emphasized the importance of meeting children as part of the parenting coordination process, noting many benefits of this practice – including empowerment of the child and increased efficacy of the intervention. However, she and others also warn that PCs should have sufficient training and experience with interviewing children. Furthermore, she adds that children should only meet the PC when the content of the parental dispute concerns them and is suitable in light of their age and developmental capabilities.

Inclusion of children – What we learned from the Montreal parenting coordination pilot project

As part of a pilot project that took place between 2012 and 2014, 10 high conflict families living in the Montreal area received free parenting coordination services. The intervention was provided by two PCs hired by the Ministry of Justice. Children from eight of the 10 families met at least once with the PC during the intervention process. Following the conclusion of parenting coordination services, ten of these children (aged between 8 and 17 years-old) were asked to participate in a research project in order to better understand their experience. These children met with the PC three times on average during the pilot project, sometimes alone, or sometimes in the presence of their sibling(s). Parents and PCs were also surveyed as to their opinion on the inclusion of children in parenting coordination as part of this research.

Qualitative analysis of the data collected through the semi-structured interviews conducted with the children, parents, and PCs shows that all categories of participants agree on the importance on giving children a voice in parenting coordination. More specifically, 8 out of the ten children interviewed (80%), 12 out the 14 parents (86%) and both PCs explicitly expressed being in favour of child inclusion in parenting coordination. The main reasons mentioned by participants are shown in Figure 1:

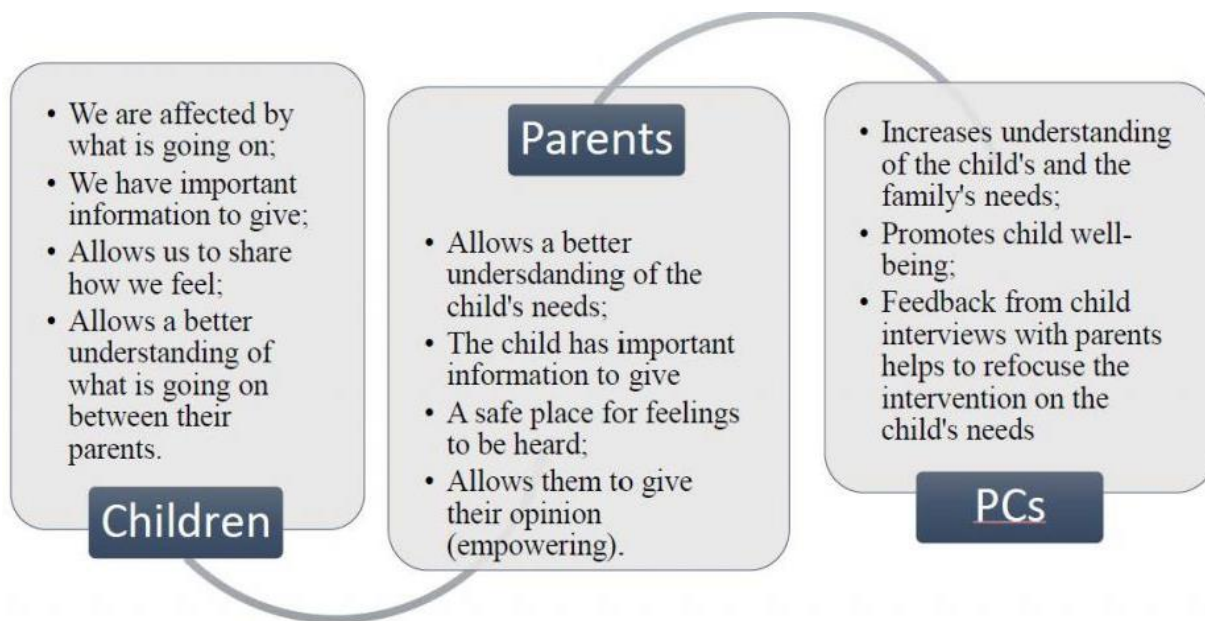


Figure 1: Main themes in favour of child inclusion in parenting coordination that were prominent in the discourse of children, parents, and PC's in the semi-structured interviews.

The excerpts in Table 1 summarize the perceptions of most of the children, parents, PCs interviewed:

Table 1: Excerpts summarizing perceptions of participants on child inclusion in parenting coordination

Children	Parents	PCs
<p>"But it's also important to have the kids involved, because it's their lives that are being...[...] there may be choices that are made that need their opinions. You would be talking about something and you would need to know the kid's point of view."</p> <p>"Because parents don't necessarily see everything...maybe they don't know all what we feel. So [the PC] asks all that."</p> <p>"The children should know what is happening. So you should involve them a bit."</p>	<p>"When there was a meeting with [the PC] and the children, it was good to see what their responses were. Sometimes, because it is such a conflictual situation, at home they don't want to talk about it. [...] And then, the honesty of what came out and what was really bothering them. I saw a different side and I got to understand a few things that I did not know."</p> <p>"If you are not ready to take what someone has told you as proof, then take it from their child. See if the child has seen it. Let the child tell you. That's my opinion."</p> <p>"There is so much emotion and anger. It was good for them to be able to feel comfortable enough to talk about it with someone who is not me or not my ex."</p>	<p>"The children's well-being improved and evolved. First, they got to be heard. Not by a [child-custody expert], by someone else. [...] I think that the fact that they had that chance gave them a bit of hope."</p> <p>"Sometimes if they are given the chance, parents will listen to their children, more than to anyone else."</p> <p>"I find that children – and this is not only in parenting coordination but in all interventions – are very creative. They can give us interesting leads."</p>

Furthermore, four out of the 10 children interviewed expressed they would have liked to meet with the PC more often and felt they were not given enough of a say. The children's discourse also highlights the importance of respecting the children's wishes to be met alone and/or with their siblings.

"I would have liked to see him alone as well, because with [my siblings] well... they didn't necessarily have the same opinion as me."

"[The PC should meet] [a]ll of them together. They will feel more comfortable all together. [If you meet the PC alone] you think it is more serious. When you are with people you know, you are more comfortable and you feel like expressing yourself more."

The two children who were against child inclusion also shared an overall negative view of their experience in parenting coordination. These children were estranged from a parent prior to the pilot project, which may have made their participation in parenting coordination more painful. A more detailed reflection on these cases is available in the full article published in the [Journal of Divorce and Remarriage](#).

Parents' discourse was very much in favor of child inclusion. Most expressed they would have liked their child(ren) to meet more often with the PC during the process. Although two parents expressed some reluctance about child inclusion, mainly because they felt the conflict didn't concern them or that they had seen enough professionals about the divorce, both those parents agreed for their children to meet with the PC and were able to see some benefit to it.

Interviews with both PCs involved in the pilot project proved very insightful as to this relatively unknown practice. In all instances where the children met with a PC (eight families), the PC saw the meeting as positive and useful. Both shared that these meetings enhanced their understanding of the family dynamics and helped clarify the children's needs. Furthermore, hearing from the child directly allowed the PCs to assess the level of conflict of loyalty to parents. It also allowed the PCs to detect, in some cases, if a child's discourse was aligned with one of the parents. While sharing enthusiasm for child participation, both PCs also acknowledge that it is a practice that warrants caution and proper training. For instance, confidentiality and its limits need to be discussed with the child from the outset. Furthermore, PCs have to choose carefully which information they will share with parents and how they will share it in a way that will protect the child's relationships. PCs also need to be careful not to conduct meetings in a way that would make the child feel that they have to take a side between their parents. The PCs should clarify their role and the goal of these meeting with the

child, and explain how they will use what is being discussed during these meetings. This is why specific training and relevant experience in interviewing children in post-separation interventions is needed.

But is child-inclusion in parental coordination a must? It seems that in cases where there is a severe degree of parental alienation, meeting with the child might negatively feed the conflict and the child's alignment to the parents. In these instances, the PC might want to refrain from encouraging the child to complain about one parent and to believe that venting these feelings is serving their best interest. More intensive and individualized services for these children and their family might also be necessary in those situations. However, in most cases, child inclusion brought many benefits, not only for the child but also for the intervention itself. Moreover, most children want the opportunity to be heard. Therefore, the results from this pilot show that in most cases, children should be given a voice in parenting coordination. The PC can contribute to children's well-being and adaptability by making decisions with proper training, judgment, and sensitivity to the child's hopes and needs that, after all, will affect their daily lives.

Reforming our Tax System: What Prime Minister Trudeau Can Learn from the Carter Commission (and his Father)

By [Chris Sprysak](#)



On July 18, 2017, the Federal Government, under the leadership of Prime Minister Justin Trudeau, released a consultation paper entitled “Tax Planning Using Private Corporations” (Consultation Paper), which identified three tax strategies that shareholders of private corporations may be able to use to reduce their personal income taxes, increase their wealth, or do both, namely:

- *Sprinkling income using private corporations*, which can reduce income taxes by transferring income that would otherwise be taxed at a high rate to a high-income individual to a lower-income family member subject to lower personal tax rates (or who may not be taxable at all);
- *Holding a passive investment portfolio inside a private corporation*, which may be financially advantageous for owners of private corporations compared to other investors since they can make larger investments (and investment returns) using corporate income that has only been subject to low-rate corporate tax rather than using personal income that has been subjected to higher rates of tax; and
- *Converting a private corporation’s regular income into capital gains*, which can reduce a shareholder’s income taxes by taking advantage of the 50% inclusion of capital gains in taxable income (or even better, the lifetime capital gains exemption) compared to the full inclusion of employment income and the special tax treatment for dividend income (which “integrates” taxes paid by the corporation in determining the net taxation to the individual shareholder).

While in accordance with current taxation law, the Consultation Paper criticized these strategies as giving a select number of Canadians “a better deal than others” as well as

using the tax system in unintended and inappropriate ways. More generally, it described the use of these tax strategies as being “unfair”.

To improve the fairness of our tax system, the Consultation Paper (and associated draft legislation) proposed adding complex measures to the existing legislation to eliminate (or at least restrict) the use of each of these three strategies. It also asked Canadians for their feedback – and gave them 75 days to provide it.

Interestingly, in the 1960s, the Royal Commission on Taxation, chaired by Mr. Kenneth Carter (Carter Commission), raised similar concerns about the lack of fairness of Canada’s tax system and what it perceived to be problems with the tax treatment of private corporations and their shareholders. Like the Consultation Paper, the Carter Commission made recommendations for reform in its six-volume Report in 1967.

The government of the day, led by Prime Minister Pierre Trudeau, carefully considered the Report and in 1969, issued a White Paper entitled “Proposals for Tax Reform”. Like the Consultation Paper, the White Paper set out the government’s suggestions for tax reform (based in part on the Report) and invited Canadians for their advice and comment. Approximately a year later, the Federal government enacted some very significant reforms which, generally speaking, have been viewed as substantial improvements to our tax system. These include bringing capital transactions into our income tax regime and integrating corporate with personal taxation.

As the current government continues the ongoing challenge of maintaining and improving our tax system, what lessons can it learn or apply from the Carter Commission’s work and experience?

1. Many Canadians are interested in major tax reform

Given the timing of the release of the Consultation Paper and that approximately half of 75-day consultation period occurred over the summer months when many Canadians take their vacations, some commentators expressed a concern that the response rate to the government’s invitation for feedback would be significantly lower than normal. While it is impossible to determine whether this concern was realized, at least in my opinion, the response rate (and quality) was exceptional.

Virtually every day after the Consultation Paper was released, there were new media articles that defended the current system, criticized or supported the Consultation Paper’s proposals, and/or suggested other possibilities for tax reform. Further, tax accountants, lawyers, economists, small business owners, government officials, and other members of the public across the country met, discussed, gave presentations,

and wrote articles. It was fantastic! I cannot think of another time in the last 20 years when there has been such sustained and thorough thought and discussion about our tax system and the policies shaping it, particularly by those outside of the professional and academic tax communities.

By the end of the consultation period, the government had received over 21,000 written submissions, which compares very favourably to the 300 briefs that the Carter Commission received and the 700 witnesses that the Carter Commission heard from in 99 days of public hearings across 12 cities in Canada.

2. Effective consultation and tax reform ideally involves an ongoing (and often lengthy) dialogue

Despite the Consultation Paper's invitation for feedback, one of the complaints that was repeatedly made during the consultation period was that by including the proposals for reform in the Consultation Paper (and by creating draft legislation), the government had already made up its mind as to what the current problems with our tax system were and what the solutions would be. This put many Canadians either on defence of the current law or on attack against the proposals, rather than being open-minded to the actual problems and best solutions.

In contrast, before making its recommendations for reform, the Carter Commission intentionally surveyed Canadians and then explored the strengths, weaknesses, and inherent conflicts (and biases) of their submissions in its Report. Why? One reason was that the Carter Commission noted that with help, Canadians appeared willing to critically examine and assess their longstanding, firmly-entrenched, and typically self-interested beliefs about appropriate tax policy. Another reason was that it facilitated a better understanding of the actual problems of the tax system and the likely solutions.

Given that the Consultation Paper did not take this approach, has this opportunity been missed? Unless the government quickly moves ahead with new legislation, the answer is "no". It can still summarize the submissions that it has received, assess their good and bad points, and then release all of that information and analysis for further comment and revision – all with the goal of coming up with the best proposals for reform which are both generally understood and supported by the majority of Canadians.

3. Ultimately, tax systems are based on multiple values and objectives, which ideally need to be ranked to help resolve the inevitable conflicts that arise

As the Carter Commission noted at the beginning of its Report, one of the key (and ongoing) challenges with our income tax system is that while we want (and design) our tax system to accomplish a variety of objectives simultaneously, these objectives can often conflict with or work against each other. If taxation was simply about raising revenues in an efficient manner, then tax law and tax reform would be relatively easy; but it is not that easy.

At the beginning of the Consultation Paper, the government listed its current objectives as:

- creating jobs and reducing unemployment;
- supporting the elderly and families with children;
- making capital improvements in our communities;
- ensuring that everyone pays their fair share of taxes;
- investing in and growing businesses, and of course; and
- helping the middle class and those working hard to join it.

Great! What it did not do was set out its ranking of those objectives, which would be helpful in resolving (or perhaps tolerating) a conflict between two objectives, such as investing in and growing businesses (through tax benefits to private corporations and their shareholders) and ensuring that everyone pays their fair share of taxes.

While the Carter Commission admitted that it was virtually impossible to rank all of the objectives it identified for our tax system in the 1960s, it selected “scrupulous fairness” as being the most important objective – and explained why it did so. In my opinion, this approach has several benefits in trying to make major (and effective) tax reforms. First, it helps Canadians understand why the government is concerned (or not) about a particular issue/strategy (i.e. even though it might enhance one of the system’s objectives, it significantly harms our most important objective) as well as why the government prefers a particular solution over others. More fundamentally, it gives Canadians the ability to challenge (or support) the government’s choice of the most important objective(s) of our tax system. Finally, it gives Canadians the opportunity to suggest other methods of tax reform which may have the same anticipated effect (or better) on the most important objective than the ones presented by government, as opposed to simply commenting on whether one supports the proposal for reform over the existing law.

Time for Tax Reform?

By [Mike Dolson](#)



Following the release of the Department of Finance's private corporation tax proposals on July 18, 2017, which was far more controversial than the government anticipated, over 21,000 letters containing comments, criticisms and suggestions were sent to Finance. A common theme contained in many of the letters was that the tax proposals should be abandoned in favour of a comprehensive review of Canada's tax system and broader tax reform.

Calls for tax reform raise their own questions. What is tax reform? Who would be responsible for this effort, and how would they do it? Why are so many people calling for tax reform now? We'll try and answer those questions in this article.

What Is Tax Reform?

Tax reform is a process that, based on historical experience, has three identifiable stages. First, a body of experts will complete a back-to-basics review of foundational aspects of the Canadian tax system and make "big picture" recommendations. These experts include including legal and economic scholars, tax practitioners and government representatives. Second, the Department of Finance will release its own report identifying which recommendations it accepts and how Finance believes those recommendations should be implemented. Third, Parliament will pass legislation enacting the recommendations that Finance has adopted.

The most significant tax reform in Canadian history happened in the 1960s, when the Royal Commission on Taxation suggested that large-scale changes to Canada's tax system were needed. The Department of Finance subsequently released a White Paper endorsing most (but not all) of the proposed changes, and Parliament responded by repealing the existing, 1940s-era *Income Tax Act* and replacing it with the current *Income Tax Act* in 1972. A smaller tax reform project was undertaken in 1987, and

advisory panels in the late 1990s and 2000s made recommendations that led to minor changes to the tax system.

Who Would Undertake Tax Reform, And How?

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Why Is Tax Reform A Good Idea?

Put simply, so much has changed in the last 50 years: more women are in the workforce and pursuing meaningful careers; Canada’s economy is shifting towards services and resource extraction; increased global competition and labour and capital mobility means that we are much more concerned with other countries’ tax systems. Because of these changes, many of the assumptions underlying the 1960s tax reform and our current tax system appear to be outdated.

Some tax professionals and academics don’t believe that the system can continue to be updated with technical tweaks while leaving the underlying assumptions unchallenged. Instead, there are some big questions that need to be revisited:

- *What is the right tax mix?* Governments raise revenues not only from personal and income taxes, but also from sales taxes, excise taxes, customs duties, EI premiums, property taxes, resource taxes and regulatory charges. Nevertheless, personal and corporate income taxes continue to generate 63% of federal government revenues and around half of provincial government revenues. Many experts believe that it would be economically efficient for governments to raise

more revenues from GST/HST, carbon taxes and regulatory charges while reducing reliance on income taxes, but meaningful coordination with provincial governments would be required to realize these benefits.

- *What is the income tax system supposed to do?* The income tax system is used to raise revenue and deliver benefits and assistance through the CRA's relatively efficient procedures. We also use the tax system to subsidize activities that we think create economic benefits (i.e. innovation by corporations) and to reward behaviour that we believe is virtuous (i.e. the school supplies tax credit, the small business deduction). Some of this signals the values supported by the government. Some of this is intended to hide the true cost of government expenditures since tax preferences are not accounted for as government spending. However, if benefits and assistance can be delivered by other means, the tax system could be streamlined and allow for a more honest discussion about the size of government.
- *What is the right tax unit?* A "tax unit" refers to the legal identity of the ultimate taxpayer. For individuals, there are two types: the individual or the family. Canada currently uses the individual as its tax unit, meaning that spouses or common law partners file separate returns and (generally) calculate their income and tax owed without regard for anyone else's income or tax payable, in the same way as single individuals. In contrast, the United States, Germany and France use the family as a tax unit, where a married couple or an entire household reports their combined income in a single return.

A family unit is superficially attractive, since it seems "fair" for families with a single earner as compared to a family with two earners and the same overall income, given our progressive rate structure. However, there are hidden complications: family taxation does not account for the value created for a family by a stay-at-home spouse, creates a disincentive for secondary earners (mostly women) to enter or re-enter the workforce, and alters the bargaining power between spouses. These were some of the reasons that the Department of Finance chose to retain the individual tax unit in 1972.

Regardless of what tax unit you think is the correct choice, the current tax system is very inconsistent. While we have rules that are intended to prevent income from being shifted to a lower-income spouse, those rules are relatively easy to circumvent using corporations. Equally troubling is that some useful tax incentives, like the working income tax benefit, are tied to household income, and therefore deviate from the individual tax unit in a way that eliminates some of the benefits of the individual tax unit.

- *How do we tax corporations and their shareholders?* In a global economy, taxing corporations at the same rate we tax individuals is unjustifiable. But many of the problems with Canada's tax system stem from our corporate tax rates being too low relative to personal income tax rates, and from dividends on shares being taxed differently than capital gain realized on a disposition of a share. If raising corporate tax rates is problematic, then we need to think about how we set our personal income tax rates, how we integrate corporate-shareholder taxation, and how tax benefits for some corporations can be reduced in order to avoid some of these problems.

Seemingly simple fixes within the current system like harmonizing dividend and capital gain tax rates would require cooperation by the provinces; the adoption of a single corporate tax rate (by eliminating the small business deduction) would require a government willing to expend significant political capital and face significant opposition. Narrowing the gap between personal tax rates and corporate tax rates by either cutting personal tax rates or increasing corporate tax rates would have large impacts on government revenues or international competitiveness.

The July 18, 2017 legislative proposals were intended to address some of the symptoms of the corporate-shareholder tax problems, rather than tackling the underlying issues. The public outcry and hasty retreat by the government under political pressure shows that these problems may not be solvable without returning to the drawing board.

- *How do we tax foreign-source income?* Canada, like almost all of its peer countries, does not tax foreign-source business income, but does tax foreign-source property income and employment income. This overall policy is unlikely to change, but how the policy is implemented may need to be reviewed. In the past, both advocacy groups and other countries have complained that Canada's international tax rules are too lax, as they permit Canadian taxpayers to avoid foreign taxes on business income while not having to pay Canadian tax. Recent media attention to aggressive international tax planning has highlighted that our staggeringly complex tax rules for offshore activities may still contain some loopholes.

The common theme uniting all of these questions is that Canada's tax regime is complicated, and is a part of an inter-related and global ecosystem. Piecemeal changes over the years to address specific issues have increased the complexity. It is very difficult to simplify the system or to change specific rules without addressing policy questions that impact the tax system as a whole.

When Might Tax Reform Happen?

Unfortunately for anyone who likes to think about or write about tax policy, the Department of Finance and the current government have indicated that they have no desire to initiate a tax reform process at this time. Tax reform is time consuming and does not offer much upside for politicians, so it is unlikely that tax reform would be pursued until the current tax system is under obvious strain. This is unfortunate, as a comprehensive study of Canada's tax system might offer a chance to be proactive in addressing concerns about fairness, efficiency, and competitiveness.

The Politicized Complexity of the Canadian *Income Tax Act*

By [Matthew Peddie](#)



An effective tax system in theory operates with objectivity in a fair, transparent and simple manner, and is used to maintain government expenditures to support and stimulate the economy. Unfortunately, this has never been the case in Canada. Since the introduction of the tax system in 1917, there has been an elaborate evolution that has led us to extreme national debt levels and a complex tax system. The introduction of tax changes and tax credits has historically been a politically charged strategy used by government to sway voters. In particular, “boutique” tax credits are used to target very specific groups of citizens. These are tax credits that apply to small segments of the population and therefore have minimal overall tax implications individually. As more of these measures are introduced, the tax system becomes more complex and, in turn, more difficult for government administration to maintain.

Tax exemptions, deductions, and credits have become extremely prevalent in the Canadian tax system. As of 2015, there were 182 exemptions, deductions, and credits combined across personal taxes, corporate taxes and GST. The accumulation of benefits to taxpayers has been extremely high with a reduction in potential taxes to the government of over 50%. This includes the major tax benefits and more minor targeted credits that complicate the system. Major tax benefits are widely used and benefit Canadians as a whole. Boutique tax credits are much more specific and benefit only certain Canadians. They are often used to gain popularity. The question to ask really comes down to:

Are boutique tax credits that are targeted to specific groups effective?

In order to determine the effectiveness of a tax credit, the following criteria could be used:

1. Does it add value to the targeted group?
2. Is it fair?
3. How much does it cost the government?
4. Is this cost made up in other areas?

However, even with an in-depth review of these criteria, it is difficult to assess the impact of the tax credits because there are factors to consider other than direct government revenues and costs associated with each different credit. The effectiveness is derived from the political perspective or influence and, in large, it is one of the major reasons that boutique tax credits are used and publicized in such a positive light.

Politicians continue to use boutique tax credits because of the inherent political value in providing tax breaks to groups that provide support in return. On the face of it, these tax breaks help the taxpayers of Canada gain an extra deduction. When we look further in depth, however, continuing to add, alter, and subtract tax credits may actually be detrimental to the tax system. The additional complexity due to constant changes creates greater difficulty in filing taxes and administration issues with the Canada Revenue Agency (the "CRA"). This complexity also creates more inefficiency and difficulty for Canadians who deal with the CRA when filings are put into review. Added confusion increases costs that lead to a further reduction in net tax revenues to the government. Therefore, even though constant changes to boutique tax credits are appealing to politicians to gain popularity, they may be detrimental the tax system in the long run.

There are certain major tax credits that are extremely popular and any changes to them would essentially be political suicide. These include RRSP benefits, the partial capital gains inclusion and the principal residence exemption. The most recent example being used by Prime Minister Justin Trudeau and the Liberal party is a credit that provides teachers a tax break for purchasing school supplies. This initiative provides an opportunity for the Liberal government to focus on the positive work that teachers do and show support to educational growth within Canada. There is nothing wrong with this intention, but when we delve further there are other questions to consider:

1. What other jobs incur expenses that should be deductible?
2. What is the cost to administer this program?
3. What is the reduction in tax revenues?
4. And most importantly does this increase the effectiveness of education in Canada?

Similar issues arise with most boutique tax credits such as those targeting the use of public transportation, volunteer firefighters, tradespeople, parents with children involved in fitness or arts activities, individuals involved in home renovation, middle income families with the ability to claim a family tax cut in prior years. The list goes on and on and there is a constant inflow and outflow of these boutique tax credits that continue to play an integral role in the tax system. Arguably, these credits do not allow for an efficient system that is able to maintain objectivity in a fair, transparent, and simple manner.

The politicization of tax law and the use of boutique tax credits are not going to change overnight or potentially ever. As a citizen of Canada and a taxpayer, it is important to have the ability to look beyond the face value of these designer credits. It is important to understand the overall implications that government policies have on the nation to encourage greater emphasis on certain changes, rather than segregating the country into groups for political reasons.

BenchPress – Vol 42-3

By [Aaida Peerani](#)

1. Privacy of Text Messages

In a split decision, the Supreme Court of Canada has ruled that text messages are protected against unreasonable search or seizure under the *Charter*. If a person has a subjective reasonable belief that a text message they send to another person will remain private, then the state cannot obtain that information without a warrant. In this case, Nour Marakah sent text messages regarding illegal firearm transactions to his accomplice, Andrew Winchester. The police obtained a warrant to search their homes, but not for the incriminating text messages on their phones which they seized. Marakah had asked Winchester to delete the messages numerous times, which indicated that he had expected privacy. Interestingly, the Court also held that a reasonable expectation of privacy will not apply to every kind of electronic communication in every circumstance. Because of the unreasonable search and seizure of the phones and text messages, Marakah was acquitted.

On the same day this decision was released, another decision with similar facts and results, [R. v. Jones 2017 SCC 60](#), was released as well.

[R v. Marakah, 2017 SCC 59](#)

2. Administrative Segregation Beyond 5 Days is Unconstitutional

Justice Marrocco, an Ontario Superior Court Judge, has ruled that administrative segregation for more than five days is unconstitutional because the prison system lacks proper safeguards. In his decision, Justice Marrocco struck down several provisions in the *Corrections and Conditional Release Act*. Administrative segregation involves keeping a prisoner in isolation, where inmates spend 22 hours a day in a cell without meaningful human contact. The decision to continue with solitary confinement after five days is left up to the discretion of the warden. However, Justice Marrocco took issue with this approach. He stated that the lack of an independent review to extend segregation beyond five days means that there is no accountability for the decision to segregate. The lack of procedural safeguards goes against the principles of fundamental justice.

The government argued that poor implementation of the law caused the rights violations, not the law itself. In rejecting this argument, Justice Marrocco stated that it was up to Parliament to address the situation.

The effect of the decision was delayed by one year to allow Parliament to address the unconstitutional practices. However, Justice Marrocco found administrative segregation to be a constitutional practice, even if it was applied to mentally ill inmates or those aged 18 to 21.

<http://www.cbc.ca/news/canada/toronto/ontario-judge-rules-long-term-administrative-segregation-in-prisons-unconstitutional-1.4455006>

3. Rest in Peace, Meika

The Supreme Court of Canada recently dismissed the appeals by Spencer Lee Jordan and Marie-Eve Magoon. Magoon and Jordan were convicted of first degree murder of Jordan's six-year old daughter, Meika. In 2011, Meika died in the hospital after being severely beaten by Jordan and Magoon. The Crown conducted a "Mr. Big" undercover operation where Jordan and Magoon admitted to the horrific treatment of the little girl to police officers who were posing as criminals. The police officers convinced the couple that they were part of a criminal organization that conducted credit card skimming, fraud, and drug trafficking. The operation lasted eight months and involved wiretapping to obtain the admissions.

The trial judge at the Alberta Court of Queen's Bench had originally convicted the two of second degree murder or manslaughter. The Alberta Court of Appeal elevated the conviction to first degree murder after finding that they had unlawfully confined Meika prior to her death. Both Courts relied on the evidence from the Mr. Big operation. In dismissing the appeal, the Supreme Court of Canada allowed the decision of the Alberta Court of Appeal to stand.

If Jordan and Magoon had been convicted of second-degree murder, they would have been sentenced to life in prison without parole for a minimum of 17 years. A first-degree murder conviction carries an automatic life sentence with no chance of parole for 25 years.

[*R v. Jordan*](#) and [*R. v. Magoon*](#)

<http://calgarysun.com/news/local-news/supreme-court-upholds-first-degree-murder-convictions-for-killers-of-six-year-old-meika-jordan>

Viewpoint 42-3: Tradition Triumphs: A New Guard for Canada's Supreme Court

By [Tasneem Karbani](#)



On June 12, 2017, the Supreme Court of Canada hinted that it would be making an “announcement of interest” later that afternoon. What could it possibly be, many of us legal beagles wondered. Was it an unexpected judicial retirement? Could it be that the Chief Justice of Canada herself was retiring?

Amid the predictions among legal academics, lawyers, and journalists alike, the Supreme Court of Canada released the official news — the Honourable Chief Justice of Canada Beverley McLachlin would be retiring from the Supreme Court, effective December 15, 2017 (nine months before her mandatory retirement date in September 2018).

In the six months since this announcement, opinions and predictions were focused on two questions: 1) who will be the next Chief Justice of Canada, and 2) who will fill the seat on the Court left vacant after McLachlin retires. With these selections now made, attitudes are also widespread on what went right and what went wrong in the process.

Who will be the next Chief Justice of Canada?

The strong views that emerged on these two questions showed the investment that everyone from legal academics to members of the public had in the future of our nation's highest court.

The last appointment to the Supreme Court from Saskatchewan was 55 years ago.

The importance of the role of the Chief Justice of Canada cannot be overstated. The Chief Justice is the highest ranking judge in Canada, representing the Canadian judiciary both at home and abroad, and maintaining a vital voice in ensuring the rule of law is advanced without succumbing to any political pressure. Interestingly, the Chief Justice can become the Administrator of Canada and exercises all the powers of the

Governor General in the event the Governor General dies, becomes incapacitated, is removed, or is absent from the country for more than a month.

When it came to guessing who would fill this judicial office, however, it seemed people were divided on who would be the best fit. A number of the current judges on the Court are relatively new appointments with limited experience. Many believed Justice Rosalie Abella was the logical choice for Chief Justice given her 13-years of experience on the Court and her position as the most senior justice after McLachlin.

Others, however, seemed to believe the Prime Minister would follow the convention of rotating Chief Justices between those from the civil law jurisdiction and those from the common law – that is, alternating between Quebec and the rest of Canada. In that spirit, Justice Richard Wagner from Quebec who had been on the Court since 2012 was the favoured choice if tradition were to trump seniority.

Altogether, only 1% of all Canadian judges are Indigenous. Ultimately, it was this traditional choice that Prime Minister Trudeau made when he named Justice Wagner the new Chief Justice on December 12, 2017. The appointment reflects a respect for the tradition of alternating chief justices between the common law and civil law traditions. Notably, the appointment also creates stability in the Court for at least the next 15 years. In comparison, Justice Abella would have had a shorter tenure as Chief Justice because she will retire in 2021. Chief Justice Wagner meanwhile faces mandatory retirement from the Court in 2032.

As our longest-serving Chief Justice, McLachlin leaves the Court after her 17-year tenure as Chief Justice (and 28 years on the Court altogether) having been known for speaking out about access to justice and Indigenous rights. The legacy that McLachlin leaves is in many ways difficult to follow for new Chief Justice Wagner. Lawyers and academics will want to see whether Wagner is able to achieve the same level of consensus-building that McLachlin came to be known for and whether he moves the Court away from what others consider “judicial activism”.

Who will fill the vacant seat on the Court?

Perhaps more than the selection of the Chief Justice, it was the question of who would fill the vacancy on the Court that engaged the minds of legal academics, lawyers, journalists, and other critics across Canada. The common points of discussion related to maintaining regional representation on the Court, ensuring a gender balance, focusing on an Indigenous judicial appointment, and upholding the bilingual language requirement for new judicial appointees.

For many, Justice Martin is an excellent choice with remarkable qualifications and credentials as an educator and constitutional law advocate. The most-discussed issue, however, was whether the Prime Minister would translate his words into action to truly embrace the spirit of reconciliation and use this opportunity to finally appoint an Indigenous judge to the Supreme Court of Canada. In the entire history of the Supreme Court (since 1875), there has never been one non-white judge who served on the Court. Not only did it seem like time for an Indigenous judge, but the view was that Canadians *need* an Indigenous person on the Supreme Court.

The two individuals whose names came up consistently as topmost Indigenous candidates for the spot on the Supreme Court were University of Victoria law professor John Borrows (who is Anishinabe/Ojibway and member of the Chippewa of the Nawash First Nation in Ontario) and Saskatchewan provincial court judge Mary Ellen Turpel-Lafond (a member of the Muskeg Lake Cree Nation). Turpel-Lafond was also the BC Representative for Children and Youth for almost 10 years.

Both Borrows and Turpel-Lafond have enviable qualifications and credentials. Borrows is a Canada Research Chair in Indigenous Law and considered a leading scholar in the area of Indigenous legal traditions. Turpel-Lafond holds law degrees from Harvard University and Cambridge University, and she was only 35 when she was appointed to the Saskatchewan Provincial Court. Turpel-Lafond also pointed out that she thinks Borrows is extraordinary and would be “one of the strongest people we could get” on the Court.

Given both Borrows and Turpel-Lafond were from the western Canada region as well, they seemed like logical and sensible choices for appointment. The possible “glitch” with Turpel-Lafond’s eligibility is that she was only at the Saskatchewan Bar for seven to eight years before being appointed a provincial court judge. The *Supreme Court Act* indicates that a candidate must be a current or former barrister of at least 10 years standing *or* a current or former judge of a superior court of a province. To be considered, Turpel-Lafond would first have to be elevated to a superior court.

Missed opportunities

Despite all the expectation for an Indigenous judicial appointment, many were slightly surprised that the Prime Minister appointed a non-Indigenous judge from Alberta – Justice Sheilah Martin. The appointment was met with mixed reactions. The issue was not with the selection of Justice Martin herself, but with the process of selection. For many, Justice Martin is an excellent choice with remarkable qualifications and credentials as an educator and constitutional law advocate. She is trained in both the common law and civil law traditions, has a doctorate in law from the University of

Toronto, is bilingual, and has been known for being an advocate for equality and women's issues.

The two individuals whose names came up consistently as topmost Indigenous candidates for the spot on the Supreme Court were University of Victoria law professor John Borrows (who is Anishinabe/Ojibway and member of the Chippewa of the Nawash First Nation in Ontario) and Saskatchewan provincial court judge Mary Ellen Turpel-Lafond (a member of the Muskeg Lake Cree Nation). On the other hand, Indigenous lawyers are understandably disappointed and frustrated at the maintenance of the status quo and the missed opportunity to have an Indigenous judge on Canada's highest court. Reportedly, none of the final three applicants the Advisory Board shortlisted for the Prime Minister were Indigenous. Given the number of Indigenous cases that are brought before the courts (and ultimately to the Supreme Court in many instances), Indigenous representation on the Court seems both vital and sensible.

Former Prime Minister Kim Campbell is the chair of the Advisory Board that streamlines candidates. She says the pool of qualified Indigenous candidates is still small, and that there are a number of good people who did not apply.

Indeed, the [statistics released by the Government of Canada](#) about those applying to sit as federally appointed judges show the limited number of Indigenous judges who advance through the application stages. Of the 997 judicial applicants received between October 2016 and 2017, only 36 applicants were Indigenous. Only five Indigenous candidates of a total of 129 applicants were ranked in the "highly recommended" category. Lastly, of the 74 candidates appointed to judicial positions from 2016-2017, only three candidates were Indigenous. Altogether, only 1% of all Canadian judges are Indigenous.

The issue then is that, in general, there needs to be more Indigenous judges appointed at the provincial and superior court levels to allow for their ultimate advancement to the Supreme Court. Progress is slow, but it is happening. For example, in late November, Paul Favel – a Poundmaker Cree Nation lawyer from Saskatchewan specializing in Indigenous law – was appointed a federal court judge.

Speaking much before the vacancies on the Supreme Court, Turpel-Lafond discussed Indigenous representation in the courts with *Lawyer's Daily* and highlighted the importance of "Indigenizing" the justice system to end the incredible systemic racism prevalent in the courts. In her interview, she said the following which seems most fitting in moving forward:

Appointing the first Indigenous judge to a bench could “make you feel like you have done a lot,” she remarked. “Or you could actually change systems, and then you will have done a lot.”

Regional divisions – Saskatchewan and BC left out

Amid these discussions on Indigenous appointments, however, there is less discussion about the regional divisions created with the new appointment. Those from British Columbia and Saskatchewan have also missed out on another spot on the Court. Currently, there are three judges from Quebec, three from Ontario, two from Alberta, and one from Newfoundland. The last appointment to the Supreme Court from Saskatchewan was 55 years ago.

Ultimately, it was this traditional choice that Prime Minister Trudeau made when he named Justice Wagner the new Chief Justice on December 12, 2017. With McLachlin’s departure, British Columbia no longer has representation or a voice on the Supreme Court. This lack of representation also ties in with the concerns about Indigenous representation. The issues that involve Indigenous groups in British Columbia are often unique from those in the rest of Canada. The Supreme Court stands to lose out on both a British Columbia perspective and Indigenous perspective by having a judicial appointment that neither represents the region or Indigenous peoples.

It may be a few years before we can move forward in addressing issues with Indigenous representation on the Court. The next likely vacancy on the Supreme Court will be when Justice Abella retires in 2021. Justice Moldaver retires a year later in 2022. However, for either vacancy, the judicial appointments will be filled from Ontario. This may further limit the number of eligible Indigenous candidates.

The western Canadian region – namely, British Columbia and Saskatchewan – will have to wait much longer for their regional seats to become vacant. Justice Brown faces mandatory retirement in 2040, whereas Justice Martin is likely to face her mandatory retirement about 15 years from now.

Moving forward, the pressure on the Prime Minister (whether Trudeau or otherwise) will be even higher for the future appointments to ensure that Indigenous representation, regional representation, and bilingualism are properly considered.

If anything, however, the past several months have shown how vital it is to engage in such discussions. Proper representation on our courts ensures that the Canadian public remains confident in our justice system and they feel that the composition of our courts represents the diversity of views and backgrounds that constitute our nation.

New Resources at CPLEA – Vol. 42:3

By [Aaida Peerani](#)

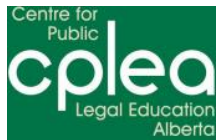


LawNow has created a Department called New Resources at CPLEA, which is now a permanent addition to each issue. Each post will highlight what's new, updated/revised or popular at CPLEA. All resources are free and available for download. We hope that this will raise awareness of the many resources that 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

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CPLEA's Families and the Law: Child Welfare Series of publications are now available.

There are too many people and organizations to name, but this was truly a community effort. Thank you to all for your valuable input.



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For a listing of all CPLEA family law publications see: www.cplea.ca/publications/family-law

To Charge or not to Charge? That is no longer the Question

By [Melody Izadi](#)



The Ontario Court of Appeal finds no harm or foul in blanket mandatory fines.

Pursuant to Section 737 of the *Criminal Code of Canada*, The Victim Fine Surcharge is a mandatory fine imposed on each and every individual that is found guilty of a criminal offence in Canada. On each summary conviction: \$100. On each indictable offence: \$200. Or, 30% of any fine imposed by the court. The monies paid fund support mechanisms for victims of crime. This fine is imposed despite an individual's economic background or ability to pay. In *R. v. Tinker et al. 2017 ONCA 552* a constitutional challenge was brought under sections 7 and 12 of the *Charter of Rights and Freedoms* alleging the mandatory blanket fine, without giving consideration to the socio-economic status relative to each individual, is a violation of fundamental rights. The Court of Appeal disagreed.

Ontario's Court of Appeal takes no issue with the blanket mandatory fines, because, according to the Court:

- A court may offer an extension of time to pay
- An impoverished offender who cannot pay cannot be imprisoned
- There is no civil enforcement mechanism to enforce collection of the surcharge

The issue is, despite the available mechanisms for asking for an extension of time to pay, that extension is discretionary, and can be denied by a Judge. Though an impoverished offender who cannot pay may not be incarcerated, or be compelled to pay: why do we mandate that individual to pay a fine? In addition, there *is* a mechanism under the regime to lay an information against an individual for failure to pay their fines which can result in imprisonment (the circumstances surrounding an impoverished individual *may* make it statutorily impossible to impose a prison sentence).

The individuals affected most by this blanket fine, in addition to those who are homeless or impoverished, are those who commit crimes to support their drug addictions. Many individuals who are moderate to severe drug addicts often have criminal records that carry on for pages and pages. Essentially, the addict will commit crimes like stealing money from store tills (\$20 here, \$100 there) in order to pay for their addiction. What then happens is this: that individual is charged with multiple offences. Then these individuals are taken into custody. They suffer severe withdrawal symptoms, want to be released as soon as possible, and so they end up pleading guilty to multiple offences all in one blow. So, then we as community mandate that these drug addicts be saddled with potentially thousands of dollars of victim fine surcharges that need to be paid. These individuals often have little to no support system, no fixed address, and courtesy of their criminal record, are not likely to be hired at any standard business location. How is this helpful to anyone?

1. The Court of Appeal reiterated that the purpose of the Victim Fine Surcharge is the following:
2. To rectify some of the harm done by criminal activity by raising funds for public services devoted to assisting victims of crime; and
3. To hold offenders accountable to victims of crimes and to the community by requiring a contribution by them to these funds at the time of sentencing

But if certain individuals cannot be civilly compelled to pay, and can avoid imprisonment due to their impoverishment, then how are the two above goals met if the take-home message to an impoverished offender is that they can ignore their obligations so long as they continue their current lifestyle?

Rather, why don't we have a mechanism whereby the contribution to victim services was not necessarily financial, but could involve other contributions that were specifically suited to each offender and each set of facts? Volunteering one's time in the community may perhaps be a suitable alternative for those who cannot pay a surcharge. Even the simple ability for a sitting Justice to adjust the amount of the fine to suit each individual's financial circumstances would be a welcome rectification of the regime. Similar to the principal of totality in sentencing where the judge must consider the net or bulk worth of the sentences imposed on all the offences an individual has been found guilty of before passing sentence, a Judge could consider the net or bulk worth of what surcharge should be imposed on each individual offender. For instance, if an impoverished drug addict with no family support or fixed address robs 10 stores in one plaza, having stolen \$700 total in cash, having been sentenced to several months in jail, under the current regime that offender would be liable to pay a minimum of a \$1000 fine upon release. Alternatively, a Judge presiding over his case could substitute some community service

hours to fulfill his obligation to victim services, and perhaps reduce the surcharge to \$200 which would still be a high fine amount for that specific individual and would still connote the purpose and principles of the Victim Fine Surcharge regime.

Instead, what we have is a regime that demands money from many who cannot pay. The middle-class family man convicted of a drinking and driving offence after leaving a dinner party one fateful night will not be adversely affected by this regime. But what about those in our community who are cast aside, shunned and forgotten?

Harassment as a New Workplace Safety Issue

By [Peter Bowal](#) and [Thomas D. Brierton](#)

Introduction

Since harassment is the biggest trending topic related to the workplace, it seems opportune to highlight the harassment provisions in the new Alberta occupational health and safety (“OHS”) legislation, which is known as *Bill 30: An Act To Protect The Health And Well-Being Of Working Albertans*.

Harassment and violence bear some unusual characteristics as workplace hazards. These are human-centric problems, unlike most hazards which are physical and external to the workforce. Harassment, by definition, is largely subjective and generally a longer term harm like other damaging exposures. Both harassment and violence may be difficult to predict.

Existing Legal Protection

Part 27 of the current *Occupational Health and Safety Code 2009* addresses the hazard of workplace violence. Employers must develop effective policy and procedures to minimize workplace violence and ensure that workers are aware of the same and instructed in how to recognize workplace violence.

Workers must be instructed in the appropriate response to workplace violence, including how to obtain assistance, and procedures for reporting, investigating and documenting incidents of workplace violence. Workers must be advised to consult a health professional for treatment or referral if the worker reports an injury or adverse symptom resulting from workplace violence.

To summarize, currently the legal obligations on Alberta employers is to maintain a policy and procedures on workplace violence and to instruct workers on how to deal with it. There are no definitions of harassment or violence and no clear duty on employers to minimize either of them. There are no specific OHS regulations pertaining to harassment, although human rights legislation and the common law of employment operate to discourage it.

The New OHS Provisions Define Harassment

The amendments broaden the concept of workplace “health and safety”. Employers and other stakeholders must ensure the psychological and social well-being of workers, which includes protecting against harassment, bullying and psychological violence.

The new definitions of harassment and violence address psychosocial risks. All forms of abuse, including sexual and domestic, are now captured and regulated.

Harassment is defined as:

any single incident or repeated incidents of objectionable or unwelcome conduct, comment, bullying or action that causes offence or humiliation to a worker, or adversely affects the worker's health and safety, and includes

- i. conduct, comment, bullying or action because of race, religious beliefs, colour, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, gender, gender identity, gender expression, and sexual orientation, and
- ii. sexual solicitations or advance, but excludes any reasonable conduct or an employer or supervisor in respect of their management of the workers or a work site. "violence" threatened, attempted or actual conduct of a person that causes or is likely to cause physical or psychological injury or harm, and includes domestic or sexual violence.

Other General Duties on Employers

Employers must also ensure the health, safety and welfare of workers, that workers are aware of their OHS rights, that workers are not subjected to or participate in harassment or violence, and that any health and safety concern raised is resolved quickly. These will all be unique challenges in the harassment domain.

Workers may refuse to work whenever they reasonably believe there is a dangerous condition, presumably including harassment, at the worksite or the work constitutes a danger to the health and safety of any person. Refusing workers will still be entitled be paid their normal wages and benefits while their refusal is being investigated.

Why Harassment Should Not be Enshrined in OHS Legislation

Many people hold strong convictions that more legislation regulating harassment and bullying would not produce positive behavioural outcomes. This occurs in the workplace as well as in other settings of social interaction and it is despicable behaviour that

should be condemned and punished. But does more layered regulation – in this case in the OHS context – risk further overall harm?

Defining harassment in a legal all-or-nothing framework is problematic. What is the threshold quality and quantity of the prohibited behaviour? Is it a subjective or objective analysis? What standard of evidence is required for proof? Experience shows how factually-relative, indeterminate and practically intractable these kinds of workplace disputes may become. There is no evidence of any meaningful deterrent effect of this legislation.

This OHS layer of legislation will duplicate and possibly conflict with other regulation and legal recourses including in the *Criminal Code*, the *Human Rights Act*, and *Labour Relations Code*, the *Charter of Rights*, the *Workers' Compensation Act*, and the existing Part 27 of the *OHS Code*, not to mention most collective agreements and labour, employment and torts common law. Already there is excessive complexity in reconciling rights and obligations between workers, co-workers, employers and regulators. This additional regulatory layer may interfere with otherwise effective private remedies.

Employers are usually apprised of the problem of workplace harassment and are already motivated by existing regulatory and civil recourse to minimize it in their own workplaces. If they lose trained employees, endure reductions in productivity and suffer internal strife, and face lawsuits based on harassment and bullying, they are clearly incentivized to reduce this behaviour in their workplaces.

OHS legislation should focus on solving issues clearly and specifically related to safety and resist the urge to regulate what are essentially interpersonal and labour relations disputes, especially since harassment can represent almost anything to anyone who seeks to assert it as a legal claim. Will OHS regulators be adequately resourced and trained to effectively intervene or respond to inter-personal complaints?

Workers will have no reason to develop skills to effectively manage workplace problems outside of regulation. The regulatory regime may compromise confidentiality of vulnerable workers who report and are forced to participate in investigations that ultimately hurt their own long term employment interests. The new OHS regulation of harassment increase worker expectations that ultimately will not be satisfied. This may lead to less respect for, and confidence in, the regulatory process to protect them over time at work.

Conclusion

There are other legislation-specific concerns with these reforms. Violence and harassment appear to be treated as variations of the same problem. Harassment may be as little as a single incident or comments that a worker says causes offence.

These reforms will significantly expand Alberta's OHS regulatory processes and impose high costs and disruption on employers.

Get ready. The new law comes into effect on June 1, 2018.

Dispensing with a Parent's Consent for Counselling for Children

By [Sarah Dargatz](#)



When parents go through a separation, the effects on children can be harsh. Often, children benefit from counselling. Usually, both parents agree and provide their consent for this to occur. But occasionally, one parent will not consent. This leaves the other parent, and the child, in a difficult spot.

Unless a court order says otherwise, both parents are most often the joint guardians of their child. This means that they both need to provide their consent for their child to participate in activities such as counselling. If a counsellor cannot get the consent of both parties, they likely are not able to proceed.

There may be some situations where counselling is not appropriate given the needs of the child. There may be legitimate concerns about the cost of counselling, whether the proposed counsellor is qualified, or if the type of counselling is appropriate. Most parents can work together to determine what is in their child's best interest. However, there are situations where counselling is in a child's best interests but one parent will not consent to it for reasons that are less legitimate. This is particularly troubling in cases of family violence. The perpetrator of family violence may not consent to counselling because they do not want the counsellor to discover more about what they have done or they do not want to admit that violence is a real issue in their family. What can the other parent do?

The parent who believes the counselling should occur can apply to the court to dispense with the other parent's consent for counselling. There are two main routes to obtaining such an order: (1) as part of a custody and access or parenting order; or (2) as part of a Queen's Bench Protection Order.

Parenting orders, or custody and access orders, can deal with all parenting issues in dispute between separated parents, including decision-making for children. A parent can apply for an order as part of a custody and access order under s. 16 of the *Divorce Act*, or a parenting order under s. 32 of the *Family Law Act*. A parent can apply for whatever terms are required such as:

- with whom the child will live;
- what access or parenting time schedule the parents will follow; and
- who makes decisions for the child, including decisions about “health-related treatment”. Generally, counselling is considered “health-related treatment”.

The perpetrator of family violence may not consent to counselling because they do not want the counsellor to discover more about what they have done or they do not want to admit that violence is a real issue in their family. If there is already a custody and access or parenting order in place, a parent can apply to change, or vary, that order to include a term who can consent to health-related treatment, or more specifically, counselling for the child.

In any application for a custody and access or parenting order, the only consideration the Judge makes is what is in the child’s best interests.

A Queen’s Bench Protection Order (“QBPO”) is granted under the *Protection Against Family Violence Act* (“Act”). An Emergency Protection Order can turn into a QBPO or it can be applied for on its own. QBPOs can provide protection to claimants and their children where there has been family violence. In this *Act*, family violence is defined specifically as:

- any intentional or reckless act or omission that causes injury or property damage and that intimidates or harms a family member;
- any act or threatened act that intimidates a family member by creating a reasonable fear of property damage or injury to a family member;
- forced confinement;
- sexual abuse; and
- stalking

If there has been this kind of family violence, a Judge may grant a QBPO which may include no contact conditions, area restrictions, and other terms including “a provision authorizing counselling for a child ... without the consent of the respondent”. The parent (or “claimant” in this case) must prove the underlying family violence to be granted this kind of order.

In either situation, the Judge will need evidence to support why it is necessary to dispense with one of the parents' consent. For example, there should be evidence showing that someone has made reasonable efforts to get the parent's consent and that it has been refused. There should be evidence indicating the child would benefit from counselling, for example, that they are struggling at school or have made concerning disclosures about what they have seen or feel. There should also be some information about what kind of counselling is being proposed including who will provide the counselling and their qualifications. The issue of who will pay for the counselling should also be addressed.

It is ideal if parents can speak to a lawyer to get individualized advice about their situation and what kind of application, if any is right for them. It is also ideal to have a lawyer assist in bringing any court application. If a parent cannot afford to speak to a private lawyer, they may be able to access brief advice from an organization such as the Edmonton Community Legal Centre or Calgary Legal Guidance. Parents can get procedural information from Resolution and Administrative Services throughout the province.

Stinchcombe: 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

The last *Famous Cases* column narrated the story around the 1991 decision of the Supreme Court of Canada in [R. v. Stinchcombe](#). In this article, we set out some of the main content of the *Stinchcombe* Crown duty of disclosure principles. Readers who interact with the criminal or regulatory process will be interested to learn about their constitutional right to Crown disclosure.

Purpose of Crown Disclosure

Crown disclosure facilitates the accused's right to know the case to meet and to be able to make full answer and defence to any offence charged. It is the principle of fair play. The right to disclosure is one of the most important rights guaranteed to an accused in the criminal process. Disclosure facilitates agreement on facts in issue and, where appropriate, early guilty pleas. It arises from the common law, the *Charter* (section 7) and is codified in the *Criminal Code*.

Accused persons have no equivalent disclosure obligation. They can maintain a purely secretive and adversarial role with regard to their defence.

Not an Absolute Right

Most constitutional rights are not absolute. Likewise, the right to Crown disclosure is neither absolute nor unlimited. For disclosure rights, "Crown" only means the "prosecuting Crown" and not all other Crown entities including police.

Stinchcombe disclosure only applies to material relating to the accused's case that is in the possession or control of the Crown. Police records from an unrelated file that is not in possession of the prosecuting Crown is not subject to disclosure. Information in the possession of third parties such as boards, social agencies, government departments, rape crisis centres, women's shelters, doctors' offices, mental health and counselling services or foreign law enforcement agencies is not in the possession of the Crown.

An accused person does not have to pay for one copy of basic disclosure materials.

If the accused believes all required disclosure has not been made, one may apply for review by the trial judge.

Timing of Disclosure

The Crown should advise a self-represented accused of the right to disclosure. The right to disclosure arises once it is requested. In practice today the Crown discloses automatically as soon as reasonably practicable even without a formal request. Initial disclosure should be provided to allow the accused to make an informed decision about election and plea.

The Crown is often unable to make complete disclosure at the initial stage of the disclosure process. Premature disclosure may result in harm to an individual or public interest and can be delayed to protect the integrity of an ongoing investigation or where necessary to protect the safety of certain witnesses.

The Crown's disclosure obligation is a continuing one and attaches to information that comes to the attention of or into the possession of Crown counsel throughout the process. It even continues after conviction, including after appeals have been decided or the time of appeal has elapsed. On the other hand, great deference is shown to the Crown's manner and timing of disclosure.

General Principles of *Stinchcombe* Disclosure

The Crown must preserve and disclose to the defence all information under its control – whether inculpatory or exculpatory – which may assist the accused in some way. Admissibility of the information as evidence is not a consideration. Crown information is subject only to relevance and privilege.

The prosecutor has broad discretion to determine relevance. Information which is not useful is irrelevant.

Withholding for privilege includes the protection of informants, cabinet confidences, national security, international relations and national defence information. Information that is protected by solicitor-client privilege or may reveal confidential police investigative techniques is not shared. The Crown's own internal notes, memoranda, correspondence, opinions or other materials generated to prepare the case for trial are not subject to disclosure.

Type of Information Disclosed

Generally disclosure includes some of the following as available: the charging document, particulars of the offence, audio/video and transcribed witnesses statements, statements of the accused, any expert witness reports, documents, exhibits, search warrants, private communication intercept authorizations, similar fact evidence, identification evidence, and witness and accused criminal records. Defence lawyers can obtain records of sexual assault victims.

The disclosure documents may be in either paper format such photocopies, electronic format such as CD-ROM, or a web-based format. Where disclosure is in one of the two official languages, it does not need to be translated. The Crown must organize the disclosure so it can be meaningfully searched and used. This is essential where a great volume of material is disclosed.

Conclusion

The purpose of criminal prosecutions is not to score the most convictions, but to present all relevant evidence and obtain justice. The prosecutor's objective is not to win, but to perform a public duty with dignity and fairness.

Prior to 1991, Crown disclosure was made on an *ad hoc* voluntary basis. *Stinchcombe* is a landmark Supreme Court of Canada ruling that mandated it in every criminal prosecution, forcing police and prosecutors to share all information with the accused person, not just the evidence the Crown will use in court. *Stinchcombe* has changed criminal prosecutions more dramatically than any other decision. Now we have *Stinchcombe* principles (of disclosure) and the *Stinchcombe* application (to stay the charges).

These disclosure rights have added many millions of dollars to the cost of prosecuting cases. Much more work must be done by the Crown at the beginning. Delays in getting cases tried and the length of trials has increased. Deciding what is relevant is not always easy. A simple omission, as in the actual *Stinchcombe* case, can lead to the withdrawal or staying of charges or overturned convictions.

On the other hand, *Stinchcombe* enables the accused to better prepare one's defence. Early and full disclosure facilitate plea negotiations, and reduces the number of full criminal trials and wrongful convictions. Fairness does not depend upon the goodwill of the particular prosecutor, evidence is no longer withheld, and surprise is eliminated. Disclosure made the prosecutors better prepared. It also bolstered the photocopy industry.

Ironically, – and this is often the reality in judicial decision-making – the facts in Bill Stinchcombe's case were exceptionally weak to support such a sweeping constitutional principle. The potentially favourable evidence the secretary originally gave was likely Stinchcombe himself 'refreshing her memory' at the courtroom doors. Stinchcombe may have contributed to the evidentiary confusion. He easily could have called her to testify at his trial. There was no prejudice. For him and the Supreme Court of Canada to suggest he was facing a miscarriage of justice was an overstatement which led to this exceedingly onerous judicially-fashioned disclosure obligation. The evidence that led to this historic legal development would have most likely made no difference at all in the real *Stinchcombe* case.

Age Discrimination in Alberta Human Rights Legislation: New Developments

By [Linda McKay-Panos](#)



Alberta will be amending its *Alberta Human Rights Act* RSA 2000, c A-25.5 (“Act”), to expand protections for age discrimination and include improved program protections. Bill 23, which introduced amendments to the Act, was passed on November 14, 2017. These amendments were scheduled to come into force on January 1, 2018. The changes were prompted by a *Charter* challenge by elder advocate Ruth Adria, who argued that the exclusion of protections against age discrimination in the areas of services available to the public and tenancies (in sections 4 and 5 of the Act) violated her *Charter* equality rights. In early 2017, the Alberta government agreed to a court order that required age discrimination to be added to the Act by January 2018.

The Alberta government then undertook consultations on the issue of how the amendments might affect adults-only condominiums, cooperatives and rental apartments (I attended one of the consultation meetings on behalf of Alberta Civil Liberties Research Centre). Bill 23 attempts to provide a compromise to these concerns by providing some exceptions to the new protections against age discrimination in these areas. In addition, to address some other expressed concerns, the Act will add a new section 10.1, which will protect policies and programs aimed at improving or ameliorating some situations.

Seniors-only (55+) housing will continue in all units reserved for one or more people, at least one of whom is 55. Communities can choose to set an age that is 55 or older.

“Age” is still defined in the Act as being 18 years of age or older, which means that people under 18 will still not to be protected from age discrimination (although they can be protected from discrimination on other grounds).

Bill 23 adds “age” as a protected ground to section 4 of the Act, which prohibits discrimination in the area of goods, services, accommodations or facilities that are customarily available to the public. By virtue of a legal decision (*Condominium*

Corporation No 052 0580 v Alberta (Human Rights Commission), 2016 ABQB 183), section 4 also applies to condominiums. Age is also added as a protected ground to section 5, which prohibits discrimination in the area of tenancies (commercial and self-contained dwelling units) and mobile home sites. As of January 1, 2018, the Alberta Human Rights Commission can accept complaints of age discrimination in these areas, unless one of the exceptions found in Bill 23 applies.

There are three exceptions in the new provisions that will allow some types of age distinctions to continue without finding there is a violation of the Act. First, new section 4.1 would permit benefits for seniors (defined as age 55 or older) and minors (those under 18) to continue. “Benefits” means preferential access, terms, conditions or treatment in respect of goods, services, accommodation or facilities but “does not include a minimum age for occupancy or accommodation”. These sections are intended to protect service providers who give special rates to minors or seniors for items such as transit fares, movie tickets or other discounts at stores.

Professor Koshan notes that independent minors between 16 and 18 years of age may not be protected from age discrimination when they are denied rental or other accommodations because of their youth. Second, new subsections 4.2(2) and 5(3) will permit seniors-only housing. Seniors-only (55+) housing will continue in all units reserved for one or more people, at least one of whom is 55. Communities can choose to set an age that is 55 or older. Regulations can also set out additional details (e.g., a concern about live-in caregivers who do not meet the minimum age requirements was expressed at the consultations and the regulations could exempt these individuals).

Third, new subsection 4.2(1) addresses existing age-restricted condominiums and issues in rental accommodation. Subsection 4.2(1) allows minimum age restrictions for condominiums, cooperatives and mobile home sites that currently exist to be given a 15-year transition period, and claims based on age or family status discrimination will not be accepted during this period. The transition period applies to condominiums that are either owner-occupied or rented. During the transition period, these could be changed to seniors-only housing, even though there are people who do not meet the new age restrictions.

Some concerns about the new legislation are discussed by Jennifer Koshan in her [blog post](#) “Age discrimination and Ameliorative Program Protections to be Broadened under *Alberta Human Rights Act*”.

Professor Koshan notes that independent minors between 16 and 18 years of age may not be protected from age discrimination when they are denied rental or other

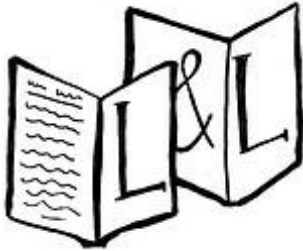
accommodations because of their youth. She points out that Ontario's human rights legislation clearly protects such independent minors. If it is not clearly set out, youth living independently of their parents may not be protected from age discrimination given the current definition of "age". She recommends that this issue be clarified by the government.

The Act also includes new section 10.1, which protects ameliorative programs and activities, which are designed to improve the conditions of disadvantaged people. It is interesting to note that Alberta was the only jurisdiction in Canada whose human rights legislation did not provide an exception for ameliorative programs and activities. Section 10.1 requires that the program or policy "achieves or is reasonably likely to achieve" the ameliorative objectives. Professor Koshan hopes that this section will not allow those with reverse discrimination claims or claims of discrimination to defeat those trying to defend genuine ameliorative programs.

The inclusion of "age" as a protected ground in sections 4 and 5 of the Act has created a challenge for the Alberta government in trying to address the concerns of all the stakeholders, including condominium owners and renters who like adult-only buildings. Also, the government had to seek ways to continue with programs aimed at ameliorating some situations. However, in the end, it must be remembered that the original inclusion of "age" was mandated by a *Charter* case. Alberta's Government must abide by the supreme law of Canada.

Orwell on Law, Order and Corruption in Burma

By [Rob Normey](#)



George Orwell was an outstanding man of letters who is also quite likely the most influential political novelist of the 20th century. Best known for his satiric animal fable *Animal Farm*, and the dystopian novel *1984*, he began his career as an unlikely candidate for literary stardom. His first novel, *Burmese Days* (1934), reveals his complicated feelings about both being part of the machinery of British imperialism and secretly hating it in ever-escalating feelings of disgust during his six years in the Indian Imperial Police (Burma was a region within the Indian division of the British Empire). As a police officer, Orwell had an unparalleled opportunity to see the workings of imperial rule close up, as part of the machinery devised to impose law and order.

Nonetheless, Orwell's cynical outlook on the abuse of power by both British and Burmese characters provoke me to make a connection to the brutal military rulers who now govern Myanmar (formerly Burma) with an iron fist and utter contempt for human rights and the lives of their citizens. At the time Orwell, whose real name was Eric Blair, arrived in Burma in 1922, nationalist agitation was just beginning to become a serious problem for the imperial masters. Whereas the important [Montagu –Chelmsford](#) reforms took effect in India, perhaps out of either carelessness or indifference, they were not extended to the province of Burma, leading to riots and cries for greater autonomy. The British attempted to respond, but the local governor's reforms were too little, too late. Historians inform us that economic pressures created by British manufacturing and the opening of the Suez Canal were transforming traditional Burmese life in sometimes startling ways. A further point of serious tension was the decision by the British to establish secular schools, thereby depriving Buddhist monks of a fair amount of their secular power. As a consequence, a number of monks advanced nationalist positions and became serious trouble makers to British officialdom. They would obviously have a considerable amount of scorn for police officers like Blair/Orwell. This friction is described in one of Orwell's well known essays, "Shooting An Elephant", when he admits: "With one part of my mind I thought of the British Raj as an unbreakable tyranny, something clamped down . . . upon the will of prostrate peoples; with another part I thought that the greatest joy in the world would be to drive a bayonet into a Buddhist priest's guts." Fortunately, he did not give in to the impulse but resigned from

the service, instead, and sailed home with little money and a completely uncertain future but with his dignity and self-respect intact.

In *Burmese Days*, the protagonist, John Floy, was a fairly typical Orwellian “hero” mostly lacking heroic qualities. He is not a policeman but rather a hugely unhappy timber agent. He strongly detests the ugly racist attitudes of his fellow Brits in the colony in a nondescript town in Burma but, being fully aware of his uniquely dissenting views, is able to voice his true feelings only in the comfort of his own room. However, at various points in the plot he is compelled to come to the rescue of certain of his fellow colonists, such that by the end of *Burmese Days* we might think of Flory as an honorary policeman, or at least guardian of the civilian population. So, for example, early in the novel he leaps into action after hearing a fearful cry and a commotion created by a water buffalo. He competently frightens the animal away, winning over the lovely Elizabeth girl who recently came from the cultured city of Paris. Before long Flory is madly in love but various obstacles to a match are placed in his way.

The narrator lets us look behind the successful outward poses of officers and merchants to see their narrow-mindedness and frequent recourse to alcohol to get them through difficult and unrewarding careers. The scenes describing the British colony and the ill-mannered members of the Club that Flory has little choice but to attend are advanced with a bracing cynicism. The narrator lets us look behind the successful outward poses of officers and merchants to see their narrow-mindedness and frequent recourse to alcohol to get them through difficult and unrewarding careers. There is of course a strong colour bar and arrogant club members think little of assaulting and demeaning servants who fail to please their masters.

Both laws that discriminate against the local population and oppressive treatment at the hands of the colonial masters who at times act with impunity lead at one point in the novel to a full-scale riot. Ellis, a bigoted racist, has lost his cool and lashed out with his walking stick at a schoolboy who has acted mischievously and greatly annoyed him. Due to incompetent medical treatment the boy is blinded. As the law will clearly not operate to hold Ellis accountable for his actions, a mob of incensed Burmese begin an all-out assault on the Club. Flory performs a truly heroic deed in breaking out to courageously cross the river to the point where the police force is stationed and alerting them to the danger.

One might think that after such a remarkable deed, Flory would be treated like a genuine hero by members of the colony and finally win over the beautiful but conventional and shallow Elizabeth. However, by this point in the novel, we have been educated by Orwell to recognize that mere virtue will not overcome conventional

prejudices and assertions of white superiority. As if Flory's struggles weren't great enough already, we learn that he has a truly serious enemy in the corrupt magistrate, U Po Kyin. In the course of the novel, we come to learn that there is nothing in the dark arts of political advancement and unethical legal maneuvering that the fat and greedy magistrate needs to learn. U Po Kyin wishes to achieve the coveted goal of becoming the first non-white member of the British Club. His only competition is the Indian doctor, Veraswamy, who is a good friend of Flory's. The shrewd magistrate sets in place a series of false reports and anonymous letters making false accusations against the two men and creates a truly embarrassing scene involving Flory's old mistress. Kyin has accumulated great wealth and power as a magistrate by taking bribes from both sides of a case. Then, rather than favouring the side that might have offered the larger bribe, he simply decided the matter on correct legal grounds, pocketing tidy sums in the process. He also levied a ceaseless toll, a kind of private taxation system, from all the villages under his jurisdiction.

At the time Orwell, whose real name was Eric Blair, arrived in Burma in 1922, nationalist agitation was just beginning to become a serious problem for the imperial masters. U Po Kyin is a corrupt, dangerous and indeed evil man who will ruthlessly destroy any individual who he perceives will be an obstacle to his path to success. Orwell of course did not anticipate the various changes that would occur in Burmese society after it acquired independence in 1948. Nonetheless, Orwell's cynical outlook on the abuse of power by both British and Burmese characters provoke me to make a connection to the brutal military rulers who now govern Myanmar (formerly Burma) with an iron fist and utter contempt for human rights and the lives of their citizens. The long-time military ruler of Myanmar, Ne Win, seized power after a military coup in 1962, thus ending all hope for a successful democratic form of governance. Ne Win's bloodthirsty and ruthless reign came to an end in 1988. A serious uprising aiming to establish democratic rule was crushed and military rulers continue to suppress all forms of dissent. The "ethnic cleansing" of the Rohingya, one of the many minority religious groups in the country, is the latest in an ongoing series of atrocities perpetrated by the military.

While the novel is certainly limited in scope and must ultimately be viewed as a minor work, it does contain some of Orwell's best writing in the novel form.

Registered charity rights and privileges

By [Peter Broder](#)



Canadians recently marked the 35th anniversary of the *Charter of Rights and Freedoms*. Since it was enacted that document has profoundly altered the legal discourse – and the public's perceptions – on many issues in Canadian law. Given this change, coupled with the centrality of free speech to the concept of fundamental rights, particularly the freedom of political speech, it is not surprising that the debate over regulatory treatment of charities, and more specifically the permissibility of charities engaging in political activities, has occasionally been framed as a *Charter* or rights question.

As appealing as this argument is, it is legally questionable. With respect to registered charities and their donors who enjoy preferential treatment under the *Income Tax Act*, the case law suggests that eligibility for status, and the advantages that registration confers, is a privilege, not a right. (Note here that the applicability of this jurisprudence to common law charities that do not seek federal registration is uncertain, and that the legal context for these groups may be subject to different considerations.)

That said, in Canada much of the case law on charities and rights concerns the *Income Tax Act* registered charity regime and its provisions addressing political activities. In that context, rights arguments with respect to eligibility for charitable status have not been well received. For example, in *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*, a Section 15 equality *Charter* argument was roundly rejected by Justice Iacobucci. Essentially it was held that it was always open to the stakeholders of a group rejected for charitable status to constitute a body that met all the common law and *Income Tax Act* requirements.

Once it is understood that federal charitable status is not a right, the issue of the procedural fairness to which applicants for status or charity's at risk of losing their registration are entitled comes into sharper focus. Unhappily, the law on that question, and the related one of the appeal rights of entity's denied registration, is more ambiguous.

In October of last year, a Quebec applicant for charitable status initiated a proceeding in the Federal Court of Canada (“FCC”). This case may provide some additional guidance on the obligations of the Canada Revenue Agency (“CRA”) as the federal regulatory body with authority over granting and revoking status as a registered charity to act fairly and promptly in its decision making in this area.

The Institut de Recherche sur L’Autodétermination des Peuples et les Indépendances Nationales (“IRAI”) asserted in its filing that the CRA engaged in an abuse of process, demonstrated bias and improperly exercised its discretion by not rendering a timely decision on that entity’s application to be a registered charity.

The IRAI was constituted as a think tank mandated to do research into independence issues. It asserts in its submissions that similar organizations – notably including some with a federalist research orientation – have been granted status. While it is settled law in Canada that previous registration of similar bodies is not binding precedent on CRA when considering new applications, an allegation that the IRAI was not treated equitably with these other groups when its eligibility was assessed, if proven, could be more troublesome. It would potentially support an abuse of process or bias argument.

The IRAI proceeding is in the FCC. The normal venue and the appeal body specified in the *Income Tax Act* (“ITA”) for charitable registration and revocation disputes to be settled is the Federal Court of Appeal (“FCA”). IRAI is apparently taking the position that the FCC has jurisdiction in this matter because it alleges the organization suffered damages associated with the CRA’s failure to render a decision. Under the *Crown Liability and Proceedings Act*, the FCC has jurisdiction over claims for damages against federal government bodies.

It is perhaps not surprising that IRAI is opting for the FCC instead of the FCA. The ITA statutory provision giving the FCA jurisdiction provides little guidance on that Court’s role other than stating its authority over federal charity matters. The Court itself has rarely shown much inclination to address procedural matters at length, beyond looking broadly at whether CRA has acted reasonably in determining an entity’s eligibility for registration or moving to revoke a registered charity’s status.

The majority of FCA procedural holdings that do exist deal with revocations, and while the Court held in the 1980s case of *Renaissance International v. M.N.R.* that groups facing loss of registration are entitled to natural justice, it has not set out in detail the elements of equitable treatment in the context of an application.

As long as federal charitable registration is associated with generous tax advantages, it is highly improbable that groups enjoying or aspiring to that status will ever be able to rely on the full scope of Charter rights and freedoms. Most notably, they will likely never have the same degree of protected speech available to others. It is reasonable to expect, however, that they be given fair and equitable treatment in their dealings with the CRA. Regardless of outcome, if the IRAI proceeding in the FCC can advance that goal, it will have been worthwhile.