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Our Legal System

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October 26th to 30th, 2020 is National Access to Justice Week. And we are celebrating with this issue! Read on for articles about different aspects of our legal system and perspectives on public legal education.

Feature

Our Legal System

Retaining a Lawyer

Kevin Unrau

You have asked your friends, looked at websites and finally settled on a lawyer who seems to be a good fit for your case. But before you become a client of that lawyer, you must first retain them.

Unfortunately, retaining a lawyer is not always straightforward. The process involves checking whether the lawyer can take your case and defining the circumstances of your working relationship. The steps below identify the process of retaining a lawyer and some things you should consider.

1. The Prospective Client

Once you connect with a lawyer but before you retain them, you are a prospective client. A "prospective client" is defined as anyone who discloses confidential information to a lawyer for the purposes of retaining the lawyer. A lawyer has a duty to keep confidential the information they receive from a prospective client.

Nevertheless, it is in both your and the lawyer's best interest to minimize the exchange of confidential information before the lawyer is actually retained. From the would-be client's perspective, the application and scope of a lawyer's duty of confidentiality to prospective clients is not clear-cut. For example, if you do not disclose any confidential information, you may not be considered a prospective client. Even if you are a prospective client, any duty of confidentiality that the lawyer owes you may be overridden in certain circumstances.

The lawyer too faces risks by receiving confidential information from prospective clients. In some situations, a lawyer cannot act *against* a prospective client even if that prospective client does not end up retaining the lawyer.

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2. Conflict Check

Before a lawyer is retained, they must perform a conflict check. A conflict check ensures the interests of the prospective client do not conflict with duties the lawyer owes their other clients. The information needed to complete the conflict generally includes:

- Who is the prospective client
- Who, if anyone, is adverse or potentially adverse to the prospective client, and
- What is the general nature of the advice the lawyer will be providing.

If you are not sure whether you need to disclose certain information before you retain the lawyer, it is better to withhold the information.

A careful balance needs to be struck here. The lawyer needs enough information to do the conflict check, but not too much information, in case the lawyer is in conflict. Usually, individuals contacting lawyers provide more information than is necessary. If you are not sure whether you need to disclose certain information before you retain the lawyer, it is better to withhold the information. Instead, ask the lawyer whether information of that general type is necessary for the lawyer to complete the conflict check or determine whether they

are able to assist you. The lawyer will be in the best position to judge whether that information is needed or if it is better dealt with after they are retained.

3. Engagement Agreement and Retainer

Assume the conflict check comes back clear, and the lawyer is able to assist you. Next, the lawyer and the prospective client will most often enter into a written engagement agreement that outlines both of their responsibilities. A well-drafted engagement agreement will be written in easily understandable language and usually addresses:

- the identity of the client
- the scope of services the lawyer will provide
- the fee structure and billing model
- how the lawyer may communicate with the client, and
- circumstances in which the lawyer may withdraw from representation.

The content and structure of engagement agreements varies widely. For example, certain lawyers have fixed fees while others prefer to charge an hourly rate. The lawyer may also require an up-front monetary retainer to ensure they will receive at least some compensation for the services they perform. There is no required method for paying your lawyer. However, lawyers have ethical responsibilities that may limit their ability to accept creative payment schemes.

More recently, engagement agreements have come to address certain technological aspects of the practice of law, such as:

- how your confidential information will be stored (e.g. on which cloud computing storage service and where their servers are located)
- the platforms the lawyer may use to communicate with you (e.g. by email or Zoom).

The content and structure of engagement agreements varies widely.

As a client, you should be comfortable with how the lawyer will manage your confidential information and communicate with you. If you are not, ask the lawyer for other arrangements.

When completing the engagement agreement you may also be required to provide proof of your identity, such as a copy of personal identification or certificate of incorporation. Lawyers are required to collect this information to reduce the risk that their services will be used in fraudulent or illegal activity. Lawyers will ensure that any personal information you provide is treated and stored confidentially.

4. Client

Having accepted the engagement agreement, you have retained a lawyer. Your lawyer now owes you certain duties, including:

- a duty of competence, which involves the lawyer knowing the substantive law and the general legal principles and procedures for areas in which the lawyer practices, and
- a duty to avoid conflicts of interest, which reflects the lawyer's loyalty to you as a client.

The most practical benefit of retaining a lawyer is that solicitor-client privilege now protects most communications between you and your lawyer. This means a lawyer cannot disclose these communications without your instructions, except in very limited circumstances. This privilege is absolute in scope and permanent in duration.

These are all important benefits of the lawyer-client relationship and good reasons to consider retaining a lawyer. However, you too

have a role to play in helping your lawyer to meet their duties. Fundamental to an effective lawyer-client relationship is the client providing all honest and relevant information to the lawyer. Without a full understanding of the client's situation, even the most skillful lawyer cannot serve the client effectively.

Fundamental to an effective lawyer-client relationship is the client providing all honest and relevant information to the lawyer.

Conclusion

Finding and retaining a lawyer is the first step in an effective lawyer-client relationship. Your legal issue may be urgent. But taking time to assess whether the lawyer is able to assist you and to define how you would like the lawyer to represent you will avoid issues and improve the quality of service the lawyer can provide.

Kevin Unrau

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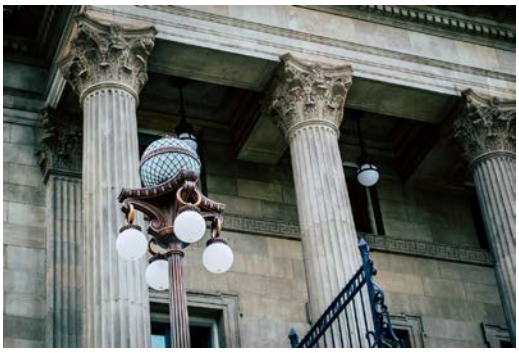
The Role of Crown Prosecutors in our Criminal Justice System

Thomas Kannanayakal

Television shows such as Law and Order portray lawyers who prosecute crime as the heroes – fighting for justice and being the victim's voice in the court. In real life, these lawyers do play a critical role in the criminal justice system. However, shows that portray prosecutors as the defenders of justice thrive on the audience's emotions and their desire to see "the bad guy" bought to justice. In these shows, the prosecutors plead to the jury with an unquenchable thirst for justice, bringing viewers to tears. Such courtroom scenes might be real in other jurisdictions. However, in the Canadian criminal justice system, the primary role of Crown prosecutors is neither representing the victims nor securing a conviction.

Who are Crown Prosecutors?

Governments employ lawyers to prosecute crime. In Alberta, these lawyers are Crown prosecutors. The Government of Alberta employs most of the Crown prosecutors in the province, and the federal government employs the rest. Crown prosecutors deal with charges under Canada's *Criminal Code*, Canada's *Youth Criminal Justice Act*, offences under provincial laws (such as Alberta's *Traffic Safety Act*) and more.



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The Role of Crown Prosecutors

The role of the Crown prosecutors is to represent the interests of the community. Crown prosecutors are not lawyers for the police, the victims, or the accused.

Crown prosecutors have a quasi-judicial role (a judicial role performed by a non-judicial official) in that they decide whether to prosecute a case. If there is enough evidence and the case is in the public interest, the Crown prosecutor prosecutes the charges laid by the police against the accused. In the absence of enough evidence or if not in the public interest, the Crown prosecutor withdraws the charges or enters a stay of proceedings. In complex matters, the office of the Crown prosecutor may assist the police during an investigation. However, usually the police independently conduct the investigation before passing the case to the Crown prosecutors.

The role of the Crown prosecutors is not to secure a conviction. The Supreme Court of Canada in *Boucher v The Queen* stated:

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

Crown prosecutors must observe the accused's right to a fair trial, and be independent and dispassionate. They must review the evidence objectively and not form their own opinion of what happened. Forming a premature prosecutorial theory is called "tunnel vision" and can contribute to wrongful convictions.

Why Must We Learn About the Role of Crown Prosecutors?

Canada is rooted in the principles of the rule of law (no one is above the law) and democracy. Our criminal justice system plays a vital role in upholding these principles. Awareness of the law and those who administer it helps those interacting with the justice system better understand their rights. Education can also help reduce our frustration with, and the potential for abuse in, the justice system.

The role of the Crown prosecutors is to represent the interests of the community.

For example, victims of crime often think that the Crown prosecutor assigned to the case is their lawyer and will represent their interests in court. This is not true. Crown prosecutors will usually meet with victims to get their evidence and will decide if the victim should be a witness in the case against the accused. However, the Crown prosecutor makes all of the decisions about how the case will proceed.

Think also about a person charged with a criminal offence. The complexity of the justice system could easily intimidate them. However, the court has a duty to ensure the process is fair and that the accused's rights are respected. And Crown prosecutors play a part in this system.

Rights of the Victims and Accused

Victims have certain rights that Crown prosecutors must respect. Victims have a right to obtain information. This includes information about the justice system, services available to them and the status of the case. Victims also have a right to participate in the criminal justice process. In some cases, victims have a right to have their own lawyer in court to represent their interests. For example, victims of sexual violence have a right to counsel (and the right to be informed of the right to counsel) when they have to provide evidence on their sexual activities (sections 276 and 278.94 of the *Criminal Code*) or when required to provide certain records to the court (section 278 of the *Criminal Code*).

... the primary role of Crown prosecutors is neither representing the victims nor securing a conviction.

The accused also has rights the Crown prosecutor must respect. The accused has the right to trial within a reasonable time, the right to be presumed innocent until proven guilty, and the right to not be denied reasonable bail without just cause. Crown prosecutors

must—in a timely fashion—provide disclosure (the reasons for the charge and the evidence against the accused) to the accused so that the accused can fully respond to the charges against them. The accused's lawyers (defence counsel) and Crown prosecutors are "equal contributors and advocates of justice." Crown prosecutors cannot purposefully make the procedure difficult for the accused or defence counsel.

Both the victims and the accused have a right to an interpreter if they do not speak or understand the language of the proceedings or have impaired hearing.

If someone has a concern with how a Crown prosecutor is handling a case, they may voice their concern to the chief Crown prosecutor at the Crown prosecutors' office that handled the case, the Director of Public Prosecutions for cases within federal jurisdiction, or the Law Society of Alberta. The person may also want to get legal advice from a lawyer about the situation.

Conclusion

The role of Crown prosecutors is to represent society when prosecuting those charged with crimes. Contrary to what some people may think, a Crown prosecutor's role is not to represent victims or secure convictions. Education about the justice system and the roles of the people involved with it is the first line of defence to protect one's rights. Victims empowered with the knowledge of their rights and the Crown prosecutors' role can avoid frustrations with criminal justice proceedings. And those charged with a criminal offence can understand how Crown prosecutors play into their right to a fair and just process.

Thomas Kannanayakal

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Access to Justice in Family Law: A guide to offering limited scope retainers

Tonya Lambert

In Canada, access to the justice system is largely reserved for wealthier individuals and corporations. The poor have limited access through legal aid and poverty law clinics. However, the majority of Canadian citizens fall between those two extremes, unable to pay a lawyer to represent them but also not qualifying for free legal help.

Nowhere is this access to justice crisis felt more acutely than in the country's family law courts, where over half of all litigants have no legal representation. The Action Committee on Access to Justice in Civil and Family Matters prioritized family law as most in need of changes to make it more accessible, fair and efficient. One of the committee's recommendations was to regulate and promote limited scope retainers.

A limited scope retainer (LSR), as defined in many provincial Codes of Professional Conduct, "means the provision of legal services for part, but not all, of a client's legal matter by agreement with the client." The idea is that people in the middle-income bracket can afford to pay for some legal help so they should be able to do so to create fairer outcomes more quickly.

Lawyers have been offering LSRs on a small scale for years, but only since 2011 have law societies attempted to regulate and encourage

Photo by Jenna Hamra from Pexels

these services as an access to justice measure. Even so, most people have never heard of LSRs. Lawyers themselves are divided on whether they help self-represented litigants or simply open up lawyers to greater risk of malpractice claims. It is too soon to know how much such services will relieve the pressure on family courts and self-represented litigants. Preliminary research suggests that 'something is better than nothing'.

A Step-by-Step Guide for Lawyers Considering LSRs

Before a lawyer begins offering LSRs, they must give due consideration to the matter. To guard against malpractice claims, a lawyer should carefully review what types of service options and fee structures there are and then thoroughly prepare to provide the chosen services in an efficient yet competent manner.

Lawyers Who Should Not Offer LSRs

A lawyer should only offer LSRs on matters that they possess a considerable amount of

expertise. In the Canadian Bar Association's "The Limited Scope Retainer" resource, Anne L. Kirker, QC and Jennifer Blanchard advise:

> *Consider limited retainers only in cases within your competence. A lawyer must fully understand what issues may arise and what steps may be required in order to assess whether the LSR is advisable and to explain to the client the potential consequences of limited representation. You cannot reasonably discharge your professional obligations if you lack familiarity with the subject matter.*

Clients Unsuitable for Limited Scope Retainers

It is important that lawyers offer LSRs only to those clients who can understand what is being done for them and what they must do for themselves (as well as the capability of fulfilling the latter). As a result, people with a low level of literacy, an intellectual disability or a poor grasp of either English or French are not suitable clients for LSRs.

Lawyers offering LSRs must also consider a potential client's emotional state when deciding whether to provide the service. Family law matters, in particular, can be very emotional. A client in a great deal of distress may not be able to fully understand instructions and thus have difficulty managing matters. Their expectations may also be difficult to contain. "If you are concerned that the client won't be receptive to your advice and willing to rein in their expectations, the LSR should be declined," says Jeanette Fedorak, QC.

Having a detailed written retainer helps both the lawyer and the client know what services the lawyer will and will not provide.

Matters Unsuited to Limited Scope Retainers

The *Code of Conduct of the Law Society of Alberta* reads:

> *When a lawyer considers whether to provide legal services under a limited scope retainer, the lawyer must consider whether the limitation is reasonable in the circumstances. For example, some matters may be too complex to offer legal services pursuant to a limited scope retainer.*

If a matter is or has a real potential of becoming too complex (a real possibility in some family law disputes) or is too technical, then a limited scope retainer will not be appropriate. A lawyer should only offer a full-service retainer.

In short, "unbundling can really only work for educated, articulate litigants in routine matters" as a 2000 Australian Law Reform Commission report judged.

Deciding What Services to Provide

Family law lawyers perform a myriad of tasks for their clients. Under the correct circumstances, it is possible to perform many of these tasks discretely. For example, a family law lawyer may choose to:

- draft or edit court documents
- draft or edit prenuptial, cohabitation and separation agreements
- calculate child and spousal support or the proper division of family property
- provide advice
- draft or edit speaking notes for court
- appear in court on a single matter
- provide behind-the-scenes mediation or negotiation support, or
- research and prepare a legal opinion.

Lawyers in Canada are divided on whether offering legal services under a LSR is a legitimate way of addressing the access to justice crisis in family law.

When deciding what services to provide, a lawyer should make a list of all possible services they can offer on a limited scope basis. This list should be limited to those services the lawyer is experienced enough to provide competently and efficiently in this manner. To do otherwise would be not only unethical but also financially foolish. The lawyer should also consider what matters they feel are too complex to deal with on a limited scope basis. Not all lawyers will draw the line in the sand at the same place, so know where your own line is. Finally, consider how technology might be used to increase your efficiency and your potential client base.

Once a lawyer has determined what limited scope services they can reasonably offer, they next need to determine the price. Will a flat fee be charged or an hourly rate? If the former, how will the fee be determined? If the latter, will it be the lawyer's regular rate or a discounted rate to align more with the means of a target market?

In the end, whether a lawyer decides to provide a limited scope service to a client must be determined on a case-by-case basis considering the complexity of the matter and the abilities of the potential client. Conducting a thorough initial interview is necessary to avoid future problems. If you decide not to provide unbundled services to a potential client, give them a detailed explanation of why not in writing. Keep a copy for your records.

Drafting a Limited Scope Retainer Agreement

When a lawyer agrees to take a client on a limited scope basis, it is imperative that the scope of the retainer is laid out clearly and precisely in writing. Lawyers offering LSRs may wish to draft a general LSR in advance and modify it as needed to fit the exact services being offered in any given case. One way to do this is with a checklist format.

Having a detailed written retainer helps both the lawyer and the client know what services the lawyer will and will not provide. The importance of having such a carefully delineated retainer cannot be overstated. In *ABN Amro Bank of Canada v Gowling, Strathy & Henderson*, the court made it clear that it will decide any ambiguity as to the scope of a retainer in favour of the client. Thus, a carefully drafted retainer that outlines precisely what the lawyer has agreed to do can prevent malpractice claims by delineating the lawyer's duty of care.

Stay Within the Scope of the Retainer Agreement

A retainer agreement only works as long as the lawyer stays within the scope of the agreement. If the lawyer and the client decide to expand the scope of the services, put it in writing and amend the retainer agreement.

A lawyer should only offer LSRs on matters that they possess a considerable amount of expertise.

A lawyer should not act in a way that would lead the client, another lawyer or the court to mistakenly believe that the lawyer is providing full-service representation when that is not the situation. The *Alberta Rules of Court* demand that a lawyer working on a limited scope retainer and appearing before the court must disclose the limited nature of their representation either verbally or in writing.

When the lawyer has fully rendered the agreed-upon service, they should give the client a Notice of Withdrawal form or termination letter so that the client understands that the lawyer's work is done.

Conclusion

Lawyers in Canada are divided on whether offering legal services under a LSR is a legitimate way of addressing the access to justice crisis in family law. Some lawyers refuse to offer limited scope services, citing liability concerns as well as fears about low-quality service. Others wholeheartedly embrace the notion of LSRs, believing that some legal assistance is better than none at all.

Most of the lawyers who participated in the Alberta Limited Legal Services Project felt LSRs improved clients' understanding of forms, pleadings and court procedures, and increased their confidence in the justice system, its processes and outcomes. The majority also felt it made legal services more affordable and prices more predictable. However, less than half the lawyers thought such services improved a client's outcome or made the outcome more just, nor did they think hearings were shorter or more focused or fewer in number then when no assistance was provided. If this is truly the case, then LSRs are, at best, only a partial solution to the access to justice crisis of Canada's 'missing middle'.

Tonya Lambert

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Getting a Fair Say: Adjudicative bodies and the duty of fairness

Evan Oikawa

"Administrative bodies" play a critical role in many areas of the law – from human rights to municipal planning to labour and employment. Maybe you have heard of the Human Rights Commission, the Subdivision and Development Appeal Board, the Labour Relations Board, the Immigration and Refugee Board or the Alberta Securities Commission? These are all administrative bodies.

Indeed, these bodies, not the courts, make most decisions that impact everyday Canadians. What's more, these bodies have the power to significantly affect an individual's legal rights. For example, the Human Rights Tribunal in Alberta recently awarded $18,000 each to two claimants (plus interest) for breaches of the *Alberta Human Rights Act*. Clearly, these bodies play an important role within Canada's legal system. So, it's valuable for everyone – not just lawyers – to know about them.

What is an administrative body?

Administrative bodies form part of the executive branch of government. This branch is led by the Prime Minister (Premier at the provincial level) and cabinet ministers who are each responsible for a government ministry – for example, the Ministry of Health, the Ministry of Transport, and so on. Each ministry oversees a specific area of public policy. Overall, the executive sets government policy and administers the laws passed by the legislative branch of government.

Photo by Harun Benli from Pexels

Administrative bodies are agencies, boards, tribunals and other government bodies created by statute. This allows for the informal expansion of government. Some administrative bodies adjudicate disputes – that is, decide conflicts between individuals or between individuals and the government. The decision-makers typically have specialized knowledge and experience relevant to the role. This is in contrast to judges who tend to be generalists by necessity.

Importantly, an adjudicative body's authority to hear a particular case is dictated by the relevant governing legislation. For example, the Alberta Human Rights Tribunal can only address issues set out in the *Alberta Human Rights Act* – the statute under which the tribunal was established. This is different from superior courts, such as the Alberta Court of Queen's Bench or Ontario Superior Court, which have "inherent jurisdiction" – the authority to decide any issues that come before them (with some exceptions).

A common feature of adjudicative bodies is that often the government will be a party to the proceeding. Typically, legal counsel

or a government officer represents the government. Their role varies depending on the forum. In cases before the Alberta Human Rights Tribunal, for example, counsel advocates on behalf of the complainant. In other forums, the government limits its role to setting out the relevant legal test and summarizing the evidence.

"Administrative fairness" refers to a collection of principles that ensure a fair decision-making process.

Adjudicative bodies tend to be more accessible and less formal than the courts. For example, they often do not have to follow the formal "rules of evidence" (laws and judge-made rules the courts follow to enhance the fact-finding process). Since these rules can be restrictive, adjudicative bodies typically have more flexibility in how they conduct a trial or hearing. But despite this greater flexibility, they must still ensure that participants are treated fairly.

Administrative Fairness

"Administrative fairness" refers to a collection of principles that ensure a fair decision-making process. One of the most fundamental of these principles is that each party to a dispute must have a fair opportunity to present their case. Let us look at *Borgel v Paintearth (Subdivision and Development Appeal Board)*, a recent Alberta Court of Appeal decision, as an example.

The issue in this case was a windfarm development in the County of Paintearth. In Alberta, windfarm developments require approval from both the Alberta Utilities Commission (AUC) and the relevant municipal authority. In this case, the county's Municipal Planning Commission (MPC) approved 74 development permits for the windfarm. A group of landowners who opposed the project appealed some of these permits to the Subdivision Development Appeal Board (SDAB), a tribunal created by Alberta's *Municipal Government Act*. Following the filing of the appeal, the AUC approved the project.

The parties attended a preliminary hearing before the SDAB to address how the AUC's decision affected the issue before the board. By this time, the SDAB had already scheduled a hearing for the appeal for the following month.

Following the preliminary hearing, the SDAB determined that the *Act* required the AUC's decision to take priority over the municipality's planning decision. That is, the MPC – and by extension the SDAB – could not "veto" the permit applications. Since the AUC had already approved the project, the board granted the permits and cancelled the hearing for the appeal.

Adjudicative bodies tend to be more accessible and less formal than the courts.

This turned out to be a breach of the landowners' rights. The Court of Appeal agreed with the SDAB that they had to follow the AUC's decision – but only insofar as the development applications were consistent with the AUC's approval. Because the SDAB cancelled the second hearing, the landowners did not have a fair opportunity to make their case about the consistency of the development permits with the AUC decision, or about other issues not covered by the decision. Cancelling the appeal hearing deprived the landowners of their right to procedural fairness. So, the court sent the matter back to the SDAB to be reheard.

Reasonableness

In addition to providing the parties with an opportunity to participate, an adjudicative body must also typically address the central issues or concerns of the parties. Failing to do so may result in an "unreasonable" decision – a

decision which is not justified in light of the facts, and which may be overturned on appeal or review. *The Owners, Strata Plan NW 2575 v. Booth* shows how this can happen.

This case involved two condo owners and their condo corporation. The dispute was over who was responsible for maintaining and repairing a deck, which the owners had altered to include an enclosed sunroom. The owners launched their lawsuit through the Civil Resolution Tribunal (CRT), an online administrative tribunal in B.C. created by the *Civil Resolution Tribunal Act*. Among other things, they claimed about $25,000 for "loss of enjoyment of life, threats, abuse and stress."

In proceedings before the CRT, a party cannot be represented by legal counsel unless the tribunal grants permission. In this case, the condo corporation asked for approval to have lawyers represent them. However, the tribunal denied the request, stating that the issue was a "common dispute type."

... an adjudicative body must also typically address the central issues or concerns of the parties.

The condo corporation disagreed with the CRT's decision and filed an application for review, and later an appeal to the B.C. Court of Appeal. The appeal court found that the CRT had failed to consider a key submission by the condo corporation – namely, that the claim was complex. Indeed, the court noted that the claim raised complex legal issues, and questions of personal and corporate reputation. In the court's view, the CRT's failure to consider this point rendered the decision "unreasonable." So, the court sent the request back to the tribunal for reconsideration.

Conclusion

Adjudicative bodies are created by statute and are a speedy, accessible and informal form of dispute resolution. Yet, like with the courts, these decision-makers must act fairly towards participants. This duty of fairness includes, first and foremost, providing participants with a meaningful opportunity to present their case. As well, adjudicative bodies usually must address the central issues or concerns of the parties. This principle is rooted in the duty of fairness, as this is how decision-makers demonstrate that they have actually listened to the parties.

Having an understanding of adjudicative bodies and the rights given to participants under the process can be helpful. Indeed, should you ever need to appear before such a body, you'll be in a strong position to ensure that your rights are protected and that you get a fair chance to present your case.

Evan Oikawa

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Good Behaviour and Tenure of Supreme Court Justices in Canada and the United States

Myrna El Fakhry Tuttle

The death of Justice Ruth Bader Ginsburg, in September 2020 at the age of 87, and the appointment of Justice Amy Coney Barrett to the Supreme Court of the United States, where she can serve for decades, prompted me to write this article.

The Supreme Courts of Canada and the U.S. are the courts of last resort. They should decide cases without fear of punishment or influence by the executive or legislative branches. In order to sustain the rule of law and hold powerful individuals and government agencies accountable, Supreme Court justices should have:

1. security of tenure to guarantee that they will not be removed from office except in specific situations, and
2. financial security where judges are paid enough so they are immune from external influences.

These two elements are crucial for an independent judiciary in which the public has confidence.

In Canada and the U.S., Supreme Court justices have financial security and security of tenure but they cease to hold office in two different ways.

Photo by MiamiAccidentLawyer from Pixabay

In Canada

Section 101 of the *British North America Act* of 1867 (now *Constitution Act*, 1867) gave Parliament the power to establish a "General Court of Appeal for Canada." In 1875, the *Supreme Court Act* created the Supreme Court of Canada.

The Supreme Court consists of nine judges, including a chief justice called the Chief Justice of Canada (section 4(1) of the *Supreme Court Act*). All judges are appointed by the Governor in Council (section 4(2)) and must have been either a judge of a superior court or a member of at least ten years' standing of the bar of a province or territory (section 5).

The Supreme Court acts as a check against the power of Congress and the President.

A judge on the Supreme Court holds office during good behaviour until they retire or reach the age of 75 years. They can be removed before that time by the Governor General on address of the Senate and House of Commons (sections 9(1) and (2) of the *Supreme Court Act*). They "can be removed for incapacity or misconduct in office before that time".

However, mandatory removal at age 75 was not always the case. Judges in Canada used to have life tenures. The old section 99 of the *British North America Act* read: "the Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons." Superior Court justices were protected from mandatory retirement until the *British North America Act* was amended in 1960.

When it comes to Supreme Court justices, the *Supreme Court Act* was amended earlier, in 1927, to impose a compulsory retirement age of 75. The change applied to current and future justices.

The reason behind the change was that Prime Minister Mackenzie King's government believed age had become a negative factor for some justices of the Supreme Court in the 1920s. Supreme Court Justice John Idington was 86 at the time and then-prime minister King considered him senile. Justice Idington's poor health, absenteeism and refusal to resign created a sense of urgency and helped move along the amendment.

According to the Bingham Centre for the Rule of Law:

> *Security of tenure serves as a bulwark against external pressure and ensures that judges do not face conflicts of interest arising from a possibility of renewal.*
>
> ...
>
> *There is also the spectre of the judge of advanced years and deteriorating mind who refuses to resign or accept voluntary retirement. In many jurisdictions the removal of a judge on grounds of capacity requires the same onerous procedure to be followed as removal for misconduct. A mandatory retirement age helps avoid such costly and acrimonious proceedings.*

In *Felipa v Canada (Citizenship and Immigration)*, 2011 FCA 272, the Federal Court of Appeal held that justices over the age of 75 are too old to decide cases.

It is worth mentioning that in addition to a compulsory retirement age, the drafters of the *Charter of Rights and Freedoms* (the *Charter*) in 1982 included a "notwithstanding clause" (section 33 of the *Charter*) so that the Supreme Court does not have an absolute power. This clause allows a provincial legislature or Parliament to override a court decision by reinstating a disputed law or regulation the Court considered contrary to some sections of the *Charter*. The U.S. does not have such a clause in its Constitution.

On September 29, 2020, three members of the House of Representatives introduced a bill to impose term limits for Supreme Court justices.

In the U.S.

Article III, section 1 of the 1787 Constitution states:

> *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times,*

> *receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*

Article II, section 2 of the same Constitution states that "the President … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the supreme Court…" The Constitution does not specify the number of Supreme Court Justices; the number is set by Congress. Since 1869, there have been one Chief Justice and eight Associate Justices.

The Framers of the U.S. Constitution relied on English common law to interpret "during good behaviour" by stating justices can serve as long as they wish, only to be removed through impeachment. Before 1701, the tenure of judges in England was determined by the Crown, which had the right to remove them. In 1701, Parliament enacted legislation forbidding the Crown from removing judges by allowing them to serve *Quamdiu se bene gesserint* (Latin term for "as long as they conduct themselves well") and kept the right to remove judges for itself.

The good behaviour clause ensures judges are independent from external pressure. In *The Federalist No. 78*, Alexander Hamilton stated that judicial independence "is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."

Article III, section 1 does not specifically state that judges have "lifetime appointments". Congress can remove judges if they no longer meet the "good behavior" requirement. Otherwise, they can remain in office for life. The Supreme Court acts as a check against the power of Congress and the President. Therefore, article III protects the judiciary from the other two branches by making the tenure of federal judges permanent and not temporary.

However, there have been many critics of lifetime tenure where justices stay in office for a long time after they have become too old to do their job properly and have lost touch with present times. Politicians, scholars and organizations have been suggesting that Supreme Court justices should have an 18-year limit term (this is the most popular proposal). This proposal allows for appointments every two years to balance the influence presidents can have on the Court's structure. Also, according to this proposal, senior justices could sit on lower federal courts as many retired justices have done.

Calabresi & Lindgren stated:

> *The eighteen-year non-renewable term … is more than long enough to guarantee judicial independence without producing the pathologies associated with the current system of life tenure.*

Even current Supreme Court Justices Breyer and Roberts have expressed concern about lifetime appointments and support setting a term for judges.

The reason behind those proposals is that lifetime appointment was made to insulate judges from any external pressure. But in modern times, judges have been serving well into their 70s, 80s, and even 90s. Professor Mark Tushnet stated: "The existence of tenure until death or choice is extremely rare around the world." He added: "People didn't live as long back then, and, as Hamilton wrote, few 'outlived the season of intellectual rigor.'"

A judge on the Supreme Court holds office during good behaviour until they retire or reach the age of 75 years.

On September 29, 2020, three members of the House of Representatives introduced a bill to impose term limits for Supreme Court justices.

The bill is similar to the proposal mentioned above where justices will be appointed for non-renewable 18-year terms. After that term, "appointees would become senior justices able to temporarily rejoin the court in the event of an unexpected vacancy." The bill is the first effort to establish term limits by statute without amending the Constitution.

These proposals and bill talk about term limits and not a mandatory retirement age. With only a retirement age, presidents can pick nominees in their 30s to make sure they serve on the bench for a long time. An 18-year term at the Supreme Court would "restore limits to the most powerful, least accountable branch of American government."

Conclusion

While Canada has imposed a compulsory retirement age since 1927 for Supreme Court justices, the U.S. still has lifetime appointments. Most democracies in the world have either a compulsory retirement age or a term limit for their judges. Life tenure would have made sense in the seventeenth and eighteenth centuries but may not so much anymore.

Lifetime appointment leads to less frequent vacancies on the bench. And when there is a vacancy, the fight to appoint a judge becomes much more intense and politicised. Life tenure motivates justices in the U.S. to remain in office until there is a president of their own political party to ensure a same-party replacement. In Canada, judges retire at 75 regardless of which party is governing.

Myrna El Fakhry Tuttle

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You Have Choices! Resolving family law problems outside of court

John-Paul Boyd

The only way legal disputes ever seem to get resolved on TV or in the movies is in court. That's understandable, because the other ways we resolve legal disputes are, well, boring. I don't think we are ever going to see a prime-time legal drama about people going to mediation.

However, the emphasis the media places on the courtroom gives the impression that litigation is sort of a default. Litigation is often the first thing people think of when they are in a jam. "I'll see you in court!" is a really satisfying response to a problem. However, the available research suggests that resolving a problem in court is actually the most expensive, most time-consuming and least efficient way of going about it.

Negotiation, mediation, arbitration and parenting coordination are all important parts of our legal system.

Finding other ways of resolving legal disputes is especially important for disputes about family law problems. In other areas of the law, the people involved in a dispute – the *parties* to a dispute – are usually strangers to each other. They did not have a personal relationship before the problem arose and will have no significant continuing relationship afterwards. The problem they are arguing about – whether it is about a car accident, an unfair firing or breach of a contract – often finished a long time ago. Once the legal dispute wraps up, the parties will not have anything more to do with one another. Ever.

Things are different with family law problems. The parties were, and continue to be, in an intimate relationship with each other. Whatever the problem was that first provoked the legal dispute, there is never really an end point. The parties will be dealing with each other for many years to come. The final order they get at the end of their trial isn't really final. It just lets everybody take a breath before the order needs updating.

The other big difference between family law problems and other legal disputes is that the conflict takes a toll on more people than just the parties. Conflict between parents can have profoundly significant short- and long-term impacts on children in particular. I don't really care how mad you are with your neighbour, the person who hit you with their car, or the employer who fired you. Get as mad as you'd like. But I do care if the person you are mad at is the other parent of your children.

Other Good Options

However, we have options for resolving family law problems other than going to court. A lot

of really good options, in fact. These options largely focus on cooperation and consensus rather than opposition and obstruction. They are about building bridges rather than walls. They encourage parents to work together to find solutions that work for them and their children. And along the way, they usually wind up taking some of the sharp edges off the emotions that promote conflict.

Photo by Ann H from Pexels

Negotiation, mediation, arbitration and parenting coordination are all important parts of our legal system. They are effective alternatives to litigation, and are almost always cheaper and faster than going to court. However, everyone involved in a legal dispute has to agree to use negotiation, mediation, arbitration or parenting coordination to resolve their problems. No one has to agree to litigate. If someone is dead set on taking you to court, you may have no choice but to participate in the litigation process until you can convince them to try something else.

Negotiation

Negotiation is something you can try with or without lawyers. We negotiate disagreements every day, from little things like what we will make for dinner with our spouse to big things like a raise or a promotion we want from a boss. Negotiation is a bargaining process in which each person gives things up to get things in return. You might really want to get $150 for your used printer on Kijiji. But if the only person who expresses interest offers you $100, you have the choice of negotiating a different price (something less than $150 but more than $100) or not selling your printer at all.

It works the same way for family law problems. Each parent has a different view about:

- what parenting arrangements are best for the children,
- whether spousal support should be paid and, if so, how much should be paid, or
- how property should be divided and shared.

What is really important to remember, however, is that negotiation is a process of give and take. No one should expect they are going to get all they want while compromising on nothing that the other person wants.

Collaborative Negotiation

Collaborative negotiation is ordinary negotiation on steroids. Sometimes it is called "collaborative law," even though it's not a kind of law. In collaborative negotiation, each party hires a lawyer specially trained in the collaborative approach. The lawyers and their clients work toward settlement by taking a team approach – voluntarily exchanging the information that is necessary to help everyone find a mutually-acceptable compromise.

Collaborative negotiation is ordinary negotiation on steroids.

Because family law problems are complicated and often involve powerful emotions, the lawyers may sometimes recommend the involvement of other professionals:

- *Coaches* are counsellors who work one-on-one with each party to help them cope with the breakdown of the relationship and the emotional hurdles to settlement.
- *Children specialists* are mental health professionals who might be called in to give advice about the best parenting

arrangements for the children or to discuss how the kids are dealing with their parents' conflict.

- *Financial specialists* include valuators, appraisers and accountants. They are often asked to help figure out complicated tax problems or determine the value of property.

Apart from the team approach, the other thing I really like about collaborative negotiation is how it tries to look after the emotional needs of family members as well as their legal needs. Collaborative negotiation aims to resolve peoples' legal disputes while leaving them as psychologically and emotionally whole as possible.

Mediation

Mediation is negotiating with the help of someone else, a neutral person called a mediator. The mediator's job is to help the people involved in a dispute talk to each other. They help to identify areas of potential compromise and different alternatives that might lead to settlement. Like negotiation, there is no requirement that a lawyer represents you when you are using mediation to resolve a problem.

Many but not all mediators are lawyers. Lawyers who mediate tend to play a more hands-on role and will at times offer their opinion about the strengths and weaknesses of a particular position or option for settlement. Mediators who are not lawyers do this a lot less. While they are also interested in moving the parties toward settlement, they are less pushy about it and are prepared to take a lot more time exploring alternatives and the parties' opinions and feelings about those alternatives.

Arbitration

Arbitration sticks out from these processes like a sore thumb. Unlike negotiation and mediation, arbitration is a lot like court. In fact, it is court. Except that it is fast, you get to pick your judge (the arbitrator) and you get to work with the arbitrator to design your dispute resolution process. Arbitration is good when you know you are going to need someone to step in to make a decision for you, but you don't want to spend the time and money going to court. Arbitration also has the benefit of being completely private. You will never need to worry about a grade ten civics class doing a court tour and interrupting your cross-examination, nor about a reporter from the National Post pulling your court file.

Arbitration is good when you know you are going to need someone to step in to make a decision for you, but you don't want to spend the time and money going to court.

What I like best about arbitration is how the parties can pick the process that works best for them and their dispute. You do not need to have oral evidence from witnesses if you don't want to. Maybe you can resolve your dispute with written evidence, or maybe you don't need any evidence at all. Maybe you need to have oral argument, or maybe written submissions will do. If you need a hearing (and not all cases do), maybe you don't need to attend in-person but can do it all through videoconferencing. There are also many options for dealing with exchanging documents and information before the hearing, and about how the parties must cooperate to produce records and information for the hearing process itself.

You do not need a lawyer to represent you if you decide to resolve your problem through arbitration. However, a lawyer can be a good idea if the law or the processes you choose are complicated. Some arbitrators also prefer to handle disputes between people who have lawyers. It is easier for the arbitrator because, among other things, they can usually rely on

lawyers to do the heavy lifting – explaining legal concepts and describing the benefits and disadvantages of different approaches to the arbitration process.

Remember that when you take a problem to arbitration, with or without a lawyer, you are giving the power to make a decision to someone else – your arbitrator rather than a judge – and you are taking it away from yourself. In negotiation and mediation, the people with the power to resolve a dispute are the people involved in the dispute; it's up to them and no one else to create their own resolution.

Parenting Coordination

Finally, I'll say a few things about parenting coordination, a hybrid of the processes used in mediation and arbitration. Parenting coordination is for parents who just simply cannot get along with each other or agree on basic parenting decisions. The parents best suited for parenting coordination are the people who were in court a handful of times before trial, about critical life-and-death parenting problems and those verging on the trivial, and are likely to be in court a handful of times after trial as well.

A parenting coordinator might be a lawyer or a mental health professional. In the traditional model of parenting coordination, the parenting coordinator helps parents implement the parts of an order, award or agreement dealing with the parenting of the children. When a problem about parenting comes up, one or both of the parents contact the parenting coordinator. The parenting coordinator tries to work with the parents, build consensus and resolve the problem using a process a lot like mediation. If the problem is urgent or agreement cannot be reached, then the parenting coordinator will resolve the problem by making a decision, using a process a lot like arbitration. Whether by the parents' agreement or the parenting coordinator's decision, the problem gets resolved.

Photo by Shutterbug75 from Pixabay

Parenting coordinators normally do not deal with child support, spousal support or dividing property. They *cannot* appoint or remove someone as the guardian of a child, or make permanent or long-lasting changes to the children's parenting schedule. They *can* resolve a whole bunch of the issues that drive parents back to court. Parenting coordinators work with parents to resolve disagreements about childcare, health care and education. They can help with choices about children's participation in extracurricular activities, language instruction, diet, religious instruction and, if necessary, haircuts, piercings and tattoos.

Along with this sort of bread-and-butter dispute resolution, parenting coordinators also work with the parents to improve their communication and problem-solving skills. The parenting coordinator helps the parents recognize the needs of their children and put those needs ahead of their own, and to recognize the triggers that cause conflict. No parenting coordinator wants a permanent job stick-handling a family's disagreements. This extra work is intended to help parents resolve future parenting problems on their own, without calling on the parenting coordinator.

Give Them a Try

Litigation is very satisfying, at least at first. It feels good to sue the person you are mad at. The black-and-white world of the courtroom seems to reduce complicated problems into comfortable, reassuring narratives of good versus evil and truth versus fiction. However,

real life is rarely this simple, especially in family law cases. (Most mediators and arbitrators will tell you that their work is really difficult because they deal with feelings as well as facts and emotion alongside evidence. Black and white is not a thing for mediators and arbitrators.) If you can admit that there are two sides to every story, even when it comes to the stories in which you play a leading role, you should consider trying to resolve your legal problems another way.

Negotiation, mediation, arbitration and parenting coordination may not make for good television but they are all faster, cheaper and more efficient ways of resolving family law disputes than litigation. The research I mentioned earlier also supports the idea that collaborative negotiation, mediation and arbitration are all more likely to produce resolutions that are:

- longer-lasting than the results produced by litigation,
- more satisfactory to the parties than litigation, and
- in the interests of the parties' children than litigation.

Try something different.

John-Paul Boyd

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Special Report Public Legal Education

Public Legal Education: Unexamined theory constrains practice

Lois Gander

> ***Nothing is so practical as good theory.***
> *~ Kurt Lewin*

When Public Legal Education (PLE) began to take shape in Canada, it was an innovative, disruptive form of legal service. We were definitely thinking 'outside the box'. So far out, in fact, that the mere thought of educating the public about the law was threatening to the legal establishment. Over time, PLE has come to be seen as an essential legal service. In the process, though, PLE's unique potential to expose injustice, promote social justice, and enhance confidence in our legal system has been compromised. How did that happen?

Photo Credit: Alexandra Hunter

While there are many answers to that question, one of the most fundamental is that we have not paid enough attention to the theories that are implicit in our work. To capture the full potential of PLE, we need to make those understandings explicit and to challenge their utility. Why are we doing what we are doing? Are we making a real difference or are we propping up a system that is increasingly losing its ability to cope – and even its legitimacy? What role can we play in transforming our legal system into a justice system?

Let's start by reconceptualizing PLE. Consider this metaphor:

> *Public legal education exists in the terrain that overlaps the space occupied by the public on one side and the space occupied by the legal community on the other. In ecological terms, PLE is an ecotone, a fertile zone that lies between two biological communities. It has attributes of both as well as its own unique features. PLE providers are the amphibians that can live within both the public and legal communities. We have unique opportunities to learn from and communicate with both. An ecotone is also a zone in which biodiversity flourishes and different forms of life learn to live together. What if we could harness that potential!*

So much for metaphors…

An interdisciplinary field, PLE draws both theory and practice from a host of other disciplines, not just law and education. Keeping up with developments in this extensive range of knowledge is impossible for any single organization but collectively we have a lot of capacity. I suggest we harness that capacity to take a hard look at some of the theories that constrain our ability to, again, think outside the box.

Theorizing the Public: Who we serve and why

The public in Public Legal Education has, for the most part, been an untheorized aspect of our practice. In the early years we quickly realized that there was no such thing as the 'general public' but rather, numerous 'publics' with quite different needs and learning preferences. So, we worked with tenants, or inner-city agencies, or librarians, or whatever group presented us with an opportunity to help people better understand their legal circumstances. It wasn't long, though, before we were called upon by funders to focus our services on publics variously identified as vulnerable or marginalized. More recently, PLE agencies have been urged to help to relieve the crisis in the courts by providing information to support self-represented litigants.

PLE is well-positioned to work with community members to co-create knowledge that goes beyond what is captured in formal legal knowledge.

But meeting the needs of the public as consumers of legal services has been accomplished largely at a cost of programs and resources that would help them perform their roles as citizens. Few programs are funded to support law-related education in the schools. Where are the community-based programs that help people understand how the system works and why it produces the results it does? LawNow is one of the few services that provides context for, and explanations of, contemporary law-related issues. But it wasn't always so.

As we lost funding for citizen development and engagement activities, the media resumed its role as the primary source of the public's information about our legal system. As a result, public understandings often hang on media accounts of high-profile, often sensationalized, legal cases. Couple these stories with personal experiences in dealing with legal matters and a distorted picture of our legal system emerges and becomes popularized. Misinformation breeds distrust leaving our legal system, a fundamental institution of democracy, vulnerable to reactionary 'reforms' and to cutbacks to its critical infrastructure. Why should governments pump resources into a struggling legal system if the public doesn't believe it is accessible or operates fairly?

Realizing PLE's full potential surely includes reactivating its vital role in citizenship development and engagement. What could this look like? Models exist. It is timely to revisit them.

It is easy to grasp PLE's mandate to enhance the public's understanding of the law. It is more difficult, and, perhaps, counterintuitive to see that PLE can also play a role in helping the legal community understand the public's needs and interests, and more significantly, understand the impact that the law has on the people it is meant to serve. Remember the ecotone!

Which leads to problems with the concept of law that lies at the base of most public legal education.

Theorizing Law: What law? What justice?

From its beginnings, PLE has reflected the positivist understandings of the law that were prevalent at the time. While HLA Hart did not publish his *The Concept of Law* until 1972, his three features of a modern legal system consolidated positivist understandings of law that were largely taken for granted by then. I reference his work because in it he made claims about modern legal systems that explain why legal positivism has had a firm grip on our imaginations.

The presence of both primary and secondary laws

Hart argues that a modern legal system contains two types of laws. The primary laws are the laws that govern our activities. The secondary laws are the laws about the laws: how they are made, recognized, reformed, administered, and the like.

In the early years of PLE, we argued that people had a right to know the laws that governed their affairs – in effect, Hart's primary laws. Our programs and services focused on the day to day legal problems that people had, how to prevent them, how to recognize that they had a legal dimension, and how to get help. This rationale is captured in the report of The Action Committee on Access to Justice: Prevention, Triage and Referral Working Group.

We promised our sceptics that we had no intention of turning people into their own lawyers, so Hart's secondary rules were off the table. Well, mostly. Some of us did teach people how to read statutes, participate in court proceedings, and the like. But other PLE providers saw this as inappropriate for their clientele. Ironically, as I have already noted, we are now called upon to help self-represented litigants make their way through the courts.

But whichever position a PLE group takes on providing help with secondary laws, most PLE groups still work from a positivist understanding that the law is the body of knowledge that is understood and developed by people who inhabit the legal realm.

Realizing PLE's full potential surely includes reactivating its vital role in citizenship development and engagement.

Thinking outside the box means re-conceptualizing the 'legal' in Public Legal Education to include other understandings of the concept of law. Whose understanding of law counts? Not just people within the system but people outside it? How is it experienced by people? What about the vast amount of discretion that is exercised both formally and informally by people in the system? What about critiques of the law? Alternatives remedies? Once we free ourselves from understanding law as being what lawyers, judges, and police know, we will begin to experience the creative potential of our ecotone!

The existence of a special class of people who understand the secondary laws

Hart saw the secondary laws – the laws about laws – as the real indicia of a modern legal system. These laws would be sufficiently complex that a privileged group would need to be trained and trusted to apply them. In Canada, this is reflected in the monopolies that law societies have to determine who is qualified to practice law in their jurisdictions. Knowledge of the secondary rules is hard won through law school, articling and practice. Law societies have been very reluctant to allow the type of paraprofessional stratification that we see in health care.

Well, the number of people who now represent themselves in court challenges the Hartian view that only lawyers need to know and should have access to the laws about the laws. The increase in self-representing litigants

has revived consideration of the potential roles for legal paraprofessionals. Do all legal matters require the attention of lawyers? Lawyers don't even practice in all areas of the law. Who helps people whose legal problems need more holistic solutions? Or even non-legal solutions? In their report, "Community Justice Help: Advancing Community-Based Access to Justice", Julie Matthews and David Wiseman recently tackled issues involved in allowing legal paraprofessional to provide some forms of legal services under certain conditions. Is this the start of something bigger? Where would PLE fit?

The separation of law and morality

Perhaps most vexing for PLE is the positivist separation of law and morality, or more commonly, law and justice. When PLE began, we spoke of access to the law or to the legal system – which is what we were all about. However, in the mid-seventies, the expression, access to justice, became more popular. But in conflating law and justice, the expression implies that access to the legal system provides access to justice. It isn't so. Our legal system makes no apology for the fact that judges are not charged with dispensing justice. The test of the validity of their decisions is the appropriateness of their application of the law to the facts before them. They do not rule on how fair the laws are or on the justness of their decisions. The only form of justice that our system holds out is procedural justice – and even that is compromised by the real limits in the ability to get your day in court.

An interdisciplinary field, PLE draws both theory and practice from a host of other disciplines, not just law and education.

As this might suggest, much of the contemporary 'access to justice' activity focuses on improving access to legal advice and representation and on streamlining access to the courts. However, the focus on access to justice opens a window of opportunity for PLE to engage the public in discussing the kind of justice we and want – formal justice, substantive justice, social justice, restorative justice? What are the options? PLE organizations are well-positioned to bring together stakeholders to critique the legal system and expose injustices. Critical theorists have provided us with forms of analysis we did not have when we were launching early PLE programs. Times have changed, and we have new tools to work with. Let's use them.

Legal positivism is still the dominant concept of law embedded in our legal system. But contemporary challenges to a Hartian understanding of the concept destabilize it and create opportunities to give the 'legal' in PLE other meanings.

Theorizing Education: New ways of knowing

Programs focused on providing legal information tend to adopt the 'empty vessel' or 'banking' theory of education. One party – the expert – has the knowledge and the other party – the recipient – does not. Information travels only one way. But educational theory and practice offer other ways of knowing and other knowledge domains. PLE is well-positioned to work with community members to co-create knowledge that goes beyond what is captured in formal legal knowledge. How do publics perceive our legal system? What have they learned through their encounters with the system? Does the system work the way people in the system think it does? And what is the actual impact of the law on the lives of people? Co-created knowledge expands what counts as legal knowledge and whose knowledge counts. It gives us a way of engaging diverse perspectives on what our current legal system looks like and what it would take to make it more just.

In raising these challenges to the theories that guide much of contemporary PLE, I do not mean to trivialize the importance of the service PLE organizations currently provide. Nor do I mean to suggest that theorizing is easy. It's not. But it is work we have to do if we want to advance access to 'justice' not just access to the legal system. Nothing could be more practical!

Lois Gander

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BearPaw Media and Education: Indigenous public legal education in Alberta

Daena Crosby

What is BearPaw Media and Education?

As a department of Native Counselling Services of Alberta (NCSA), we produce and distribute free, multimedia Indigenous public legal education and information (PLEI). Our resources are for Indigenous people, by Indigenous people in Alberta and include culturally-relevant videos, publications and workshops. Our goal is to increase the confidence and self-determination of Indigenous individuals and their families in navigating complex legal systems.

Our documentary, (Re) claiming Indian Status, was a 2020 Calgary International Film Festival Winner ...

Our Indigenous PLEI helps guide our target populations towards better awareness and understanding of the specific ways Canadian laws affects them and their legal rights and responsibilities. Community Legal Education Ontario contends that PLEI printed text is highly effective due to its wide reach. We agree. We also combine a unique blend of multimedia resources (aimed at various learning styles, challenges and age groups) and distribution formats (print, video, workshops, online and social media platforms) to reach those in urban and rural areas.

Our target audiences include:

- Indigenous (First Nations, Métis, Inuit, status and non-status) people of Alberta who are navigating legal systems themselves or with their families.
- Service providers working with Indigenous people and families. They act as a bridge to help share BearPaw resources immediately with those most in need. Our videos, publications and workshops also help to increase service provider knowledge on legal topics specific to this population.
- Other research-based organizations or institutions.
- First Nations, Métis and Inuit people across Canada and internationally with the aim to increase legal education literacy and access to Canadian legal information.

NCSA Resiliency Model in BearPaw Media and Education

BearPaw's Indigenous PLEI mobilises Indigenous worldviews, cultural knowledges with evidence-based, healing-centred approaches. This makes our resources congruent and meaningful to Indigenous people. NCSA's resiliency model is embedded in BearPaw's work. It centers an interconnected worldview that privileges building, maintaining and strengthening of good relationships with all living things (LaBoucane-Benson 2009).

Photo Credit: BearPaw Media and Education

Our resiliency model has three principles that guide BearPaw's production and community engagement:

1. Fostering reconciliation
2. Reclaiming interconnected worldviews, and
3. Encouraging self-determination.

Below is a brief overview of how BearPaw integrates our resiliency model principles (LaBoucane-Benson and Choby 2018).

To **foster reconciliation of relationships damaged by colonization**, BearPaw:

- Reconciles relationships and highlights common ground between Indigenous legal traditions and Canadian society and law
- Highlights the strength of Indigenous legal traditions
- Addresses issues related to historic trauma
- Provides content that promotes healing and reconciliation. We examine the historic and systemic roots of the issue discussed, and raise awareness on how Indigenous individuals can use the law to protect themselves.

To **reclaim interconnected worldviews**, BearPaw:

- Encourages connectedness to community-based resources
- Creates workshops that are culturally congruent, delivered by Indigenous facilitators and offered in Indigenous communities at no cost
- Creates good and reciprocal partnerships with agencies throughout Alberta
- Produces PLEI publications that reflect Indigenous worldviews and aim to create positive Indigenous identities

Our resources are for Indigenous people, by Indigenous people in Alberta …

To **encourage self-determination**, BearPaw:

- Aims to increase Indigenous people's abilities to understand and navigate legal systems, recognize the areas of law where they can assert their rights and make good decisions for themselves
- Produces resources that help Indigenous people understand their responsibilities regarding Canadian law. This increases awareness in an effort to prevent evictions, arrests, fines or incarceration.

BearPaw's Resources

BearPaw focuses on developing new robust Indigenous PLEI. We use effective methods that target many learning styles: visual (spatial), aural (auditory-musical), verbal (linguistic) and physical (kinesthetic), social (interpersonal), solitary (intrapersonal) and logical (systems reasoning).

- We make print publications and videos that provide the most pertinent legal information related to the topic. Individuals then have the freedom to choose which type of resource best suits them depending on their preferred learning style. All videos and publications are also available in hardcopy and on our website. As we develop new workshops, we embed

the new video into the facilitator's guide to increase connection to material and dialogue with participants as a learning technique to make them visual and tactile.

- Videos are essential because they can represent Indigenous people and worldviews respectfully and in ways that are accurate to them. Videos can attend to a variety of learning styles (visual, aural, verbal, social, solitary and logical) to increase knowledge transfer. By creating videos, we can effectively reach a broader audience online or on USBs. This makes legal information accessible to Indigenous individuals and educators.
- Indigenous graphic design is necessary so that Indigenous individuals feel a sense of ownership and connection with written materials that reflect them specifically.

BearPaw's current resources include over 40 publications and over 30 videos and workshops. Every year, we distribute over 20,000 publications, deliver over 100 public legal education workshops and hit over 98,000 video views on our YouTube channel.

Our resource topics include:

- **Indigeneity:** Indigenous identity, natural law, Indigenous hunting and fishing, (re) claiming Indian Status
- **Criminal Justice:** children and youth going to court, breach charges, Fetal Alcohol Spectrum Disorder and the law, rights with police, cyberbullying, identity theft, probation, Gladue Reports, domestic violence & reporting sexual assault, impaired driving
- **Family Justice:** divorce (child and spousal support, parenting and guardianship orders), parenting legal rights and responsibilities, elder abuse, kinship and foster care, adoption and the *Child, Youth and Family Enhancement Act*
- **Other:** employment rights, education (suspensions/expulsions, learning disabilities), landlord and tenant rights, money matters (payday loans, deferred payments), lateral violence, the criminalization of HIV

Photo Credit: BearPaw

What's New at BearPaw?

(Re)claiming Indian Status

Since the passing of Bill S-3 and its amendments, thousands of Indigenous people are now eligible for Indian Status. These resources provide a thorough explanation of Indian Status by answering common questions about eligibility, the application process and how to find government records that can assist you with your application. It also provides a historical overview of the *Indian Act* and sex-based discrimination, including government Bills that changed the *Indian Act* and affected Indian Status registration.

The target audience is Indigenous adults (18+ years), service providers and educators working with Indigenous communities.

Our documentary, (Re)claiming Indian Status, was a 2020 Calgary International Film Festival Winner (Audience Favourite for Documentary Short Film and Honourable Mention for Alberta Documentary Short: Lese Skidmore). This documentary digs into the stories of Indigenous women and their families to (re) claim their Indian Status through their fight

for the elimination of sex-discrimination in the *Indian Act*. It highlights the impacts of the law on individuals, families and communities. This video also includes Status eligibility information and recommendations for finding family records.

Other resources include:

- (Re)Claiming Indian Status Booklet
- (Re)Claiming Indian Status Workshop

Visit our website to view our free resources.

Obtaining Government Identification and the Right to Vote

This group of resources provides step-by-step guidance on how to get Alberta identification (driver's licenses, Alberta ID card), how to legally reclaim a traditional Indigenous name, how to apply for Indian status and how to vote in federal elections.

The target audience is Indigenous adults (18+ years), service providers and educators working with Indigenous communities.

Legally reclaiming a traditional Indigenous name can be a part of a person's healing journey and help define who they are as an Indigenous person. Our Legally Reclaiming Your Traditional Name wallet card explains how to legally reclaiming a traditional name at no cost until January 2024, the documents needed, and supports available to help with the process.

Other resources include:

- Fill Your Wallet (wallet card)
- Changing Your Sex Marker on Alberta I.D. (wallet card)
- Obtaining Government Identification and Voting Workshop

Visit our website to view our free resources. Follow us on social media (@BearPawLegal on Facebook, Instagram and YouTube) to stay up-to-date.

References:

LaBoucane-Benson, P. (2009). *Reconciliation, repatriation and reconnection: A framework for building resilience in Canadian Indigenous families* [Unpublished doctoral dissertation). University of Alberta. Edmonton, Alberta.

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Daena Crosby

Dr. Daena Crosby is the Director of Legal Education, Media and Research at BearPaw Media and Education at Native Counselling Services of Alberta. Daena is honoured to work with NCSA and the BearPaw team to continue to advance public legal education for Indigenous communities into the future.

A2J and Public Legal Education in 2020 in Alberta

Jeff Surtees

What is justice?

It is widely stated that we have an access to justice (A2J) crisis in Canada. You will get a variety of answers, though, if you ask people what they think this means and what we can do about it. As Lois Gander points out in her article in this issue of LawNow, one reason is that 'justice' can have several meanings:

- *Procedural justice* is about whether decisions that affect participants are made fairly. Fairness requires decisions made in a reasonable time by impartial, neutral, unbiased decision-makers; consistent rules that are knowable in advance; and usually the opportunity for some kind of input when a decision is going to affect you.
- *Retributive justice* is about punishing deserving wrongdoers for their past improper behavior in a way that is proportionate to that behavior and morally acceptable. The punishment is meant to both 'set things right' between the wrongdoer and society and to deter others from similar future behavior.
- *Restorative justice* takes the emphasis off punishment and moves it to healing the victim and repairing the harm that the crime has caused to the victim and relationships in the community. Willing victims participate in the process, meeting with wrongdoers to talk about how they have been affected and what it will take to restore them. Wrongdoers are asked to take responsibility for their actions and to make amends. The process is meant to bring real change to the wrongdoer and to bring their future behavior back into line with what the community expects.

Photo by Ivan Bertolazzi from Pexels

If you want to dive deeper into what justice means on a philosophical level, watch Michael Sandel's free Harvard lecture series on YouTube titled "Justice – What's the Right Thing to Do?". Professor Sandel argues that justice is about how wealth, opportunities, rights and powers are divided between members of a society. The hard questions start when we ask, "What are people entitled to?" and the even harder question of "Why?". Professor Sandel says we can approach those questions by thinking in turn about what it means to maximize welfare, to respect freedom or to cultivate virtue. There will be disagreements in society about what 'welfare', 'freedom' and 'virtue' mean. People will not always agree about what we should do if we can only get more of one of those things at the cost of giving up something from the

others. Debating those hard questions, Sandel says, can help to understand what justice means to us. The questions he poses go right to the heart of what we want our society to look like, how we think we should be treated and how we should treat others.

What is *access* to justice?

If we have different ideas about what makes a 'just society', then it makes sense that we will not agree about what proper *access* to justice means. Each of us sees the world through the lens of our past. A white, middle-aged, stable, privileged, capable, university-educated, healthy male with a good steady job in a major city will experience the world in profoundly different ways than someone who is – insert one or more of the following – female, a person of colour, in poverty, a young person, an immigrant, LGBTQ2S, physically challenged, suffering from addictions, isolated, Indigenous, a residential school survivor (or the descendant of one), a survivor of domestic abuse or sexual violence, or a member of the one in five people in Canada who experience a mental health problem in any given year. When it comes to A2J, our backgrounds matter. Two of us can have exactly the same legal problem but totally different experiences because of who we are and everything that has happened in our lives up to the point the problem occurs. People with different experiences, backgrounds and capabilities will need different ways to solve the same legal problem.

The type of legal problem will also affect what A2J requires. Consider the following situations:

1. You are in a dispute with a store about returning something you bought.
2. You are a parent who disagrees with your former partner about money or some aspect of your children's upbringing.
3. Your landlord won't fix the stove in your basement suite.
4. You have a dispute with someone over a contract, a will, an injury you suffered or a debt.
5. You are accused of a crime.
6. You are a victim of a crime.
7. You are a victim of a violent crime.
8. You have been wrongfully convicted of a crime.
9. You are Indigenous and being asked to testify in a court that terrifies you, in part because you see it as a symbol of colonialism and oppression.
10. You are new immigrant turned down for a job you are qualified for or, having found a job, being forced to work more hours than you think you should.
11. You are a farmer, and a company wants to build a pipeline across your land.
12. You disagree with a government policy and are not being allowed to protest peacefully.

Because there is such diversity of participants, life experiences and situations, we cannot think of A2J as just one thing, having one solution.

Problems one through four are examples of civil or family matters, which are disputes between people or organizations. These are 'justiciable' problems – ones that have legal elements, whether or not the people involved know it and whether or not they have taken any steps to come up with a solution.

People with different experiences, backgrounds and capabilities will need different ways to solve the same legal problem.

In the introduction to their recent book *The Justice Crisis – The Cost and Value of Accessing Law*, editors Trevor Farrow and Lesley Jacobs describe the evolution of thinking about what A2J means in civil and family matters. The

more familiar approach, they say, is concerned with people in a dispute having access to courts and lawyers and the ability to have a decision made. They then describe a growing alternative approach they call *meaningful* A2J, based on "people's ability to access a diverse range of information, institutions, and organizations – not just formal legal institutions such as the courts – in order to understand, prevent, meet, and resolve their legal challenges and legal problems when those problems concern civil or family justice issues." Meaningful A2J can be measured by whether *paths* are available to address and resolve the legal problem or complaint. This seems like a good measuring stick. If a participant in a civil or family law dispute cannot find a way to resolve it, despite their best efforts, then they do not have access to justice.

... meaningful public legal education builds a better, more inclusive society.

Problems five through nine are criminal in nature. A2J will require some of the same things needed in civil and family cases but whether it exists more often involves considering larger societal issues. In criminal matters, the state prosecutes a person or organization suspected of breaking a criminal law. The state is powerful. It creates the laws, investigates the crimes and decides (in most cases) whether to lay charges. Whether a person thinks they have access to justice or not might depend on whether they think the laws and processes are legitimate. The state controls almost everything so the pathways metaphor used above doesn't fit quite as well.

Watching the news of the day provides plenty of opportunity to think about what access to justice can mean in criminal matters:

- In Canada, the Gerald Stanley trial for the killing of Colton Boushie raised issues of how police investigations are conducted, when rural residents should have the right to plead self-defence or defence of property when they kill someone who comes onto their property, jury selection rules that effectively exclude Indigenous people, and how racial dynamics and cultural competence of lawyers and judges can affect the process and outcomes (see the extensive analysis here).
- Also in Canada, the 2018 acquittal of Raymond Cormier, who was on trial for causing the death of young Tina Fontaine, was met with outrage, prompting calls for more to be done to protect Indigenous youth in government care.
- Protests following the killing of George Floyd have raised issues of systemic racism and funding of police forces in the United States but also in Canada.

In these cases, A2J is about more than procedure. The justice conversation becomes one of what we want our society to look like. From the Stanley case, do we really want reconciliation? Is it even possible? (and a host of other questions). From the Cormier case, how do we prevent what happened to Tina Fontaine from happening again? From the Floyd case and others like it, does a just society require an 'iron hand' and militarization of police forces to maintain order or does it require the opposite?

If we have different ideas about what makes a 'just society', then it makes sense that we will not agree about what proper access to justice means.

The final three scenarios are examples of legal problems that are neither purely civil nor criminal. A legal problem might be about human rights (example ten). It might come from dealing with any of the hundreds of administrative tribunals across Canada

(example eleven). It might be about rights that come from the *Canadian Charter of Rights and Freedoms* (example twelve).

A2J is best thought of as an aspirational goal that we want to keep moving towards. We can always be taking steps to make things better, even if we will never agree on what complete success would look like.

What is the role of public legal education?

The public legal education work we do at CPLEA helps increase A2J. *Meaningful* public legal education (borrowing the word from Professors Farrow and Jacobs) is about so much more than giving someone a brochure to explain how a law works (although we do love that part!). It helps individuals by raising their legal capabilities and understanding, hopefully helping them avoid problems in the first place. It helps individuals by shifting the perspective from that of legal system insiders to that of the participants themselves. What problems do they have? What is their perspective? What do they need? How can we help them find a path to a solution? What information can we give others to help them avoid similar problems?

In addition to helping individuals, meaningful public legal education builds a better, more inclusive society. Individuals informed by public legal education have the opportunity to be better citizens. Heathy debate by individuals informed by meaningful public legal education will generate ideas about what justice means and what we want it to mean, how we can best increase access to it and about what kind of society we want. The best ideas will rise to the top.

Jeff Surtees

Jeff Surtees, BComm, JD, LLM, is the Executive Director of the Centre for Public Legal Education Alberta.

The Critical Role of Public Legal Education in Societies Governed by the Rule of Law

John-Paul Boyd

At some point in high school, we learn that we live in a nomocracy, which is a fancy ten-cent word for a *society governed by the rule of law*. The whole "governed by the rule of law" thing is an especially important quality of democracies like ours. It includes the following rights:

- the right to vote, and the right to be governed by those whom we elect rather than by monarchs or oligarchs,
- the right to freedom of speech, regardless of what the government thinks of the things we choose to say,
- the right to freedom of assembly, even for purposes of which our government disapproves,
- the right to have a judiciary which is theoretically and actually independent of the legislature and the executive branch,
- the right to be subject only to laws that are published and accessible,
- the right of access to the court system, and
- the right to be free from arbitrary detention.

All of this sounds pretty good. I even think we are getting most of this right in Canada, although we certainly have not reached perfection. We are fairly good with our freedoms of speech and assembly, and many of the other rights affirmed by the *Charter*. We manage to transition between elected governments without rioting and anarchy. Our judges make their decisions largely without being measured by the partisan yardstick tormenting their American cousins. And the legislation to which we are subject is readily available for review by anyone with an internet connection.

While we might be doing well with the top-level governance issues listed above, we are not doing nearly as well with the lower-level things that affect Canadians' day-to-day interactions with the state and the courts. Sure, our legislation is published and freely accessible to anyone with a library card. But the majority of these laws are almost incomprehensible to anyone who struggles to read above a grade ten level, and to many of those who do not. We do not do a very good job of talking about the justice system in school. The language of the law is the language of judges and lawyers rather than that of the average person. And I am fairly certain that even the most basic legal concepts not covered by *Law & Order* are a mystery to the majority of us.

The truth, I'm afraid, is that although every one of us has access to the law and the courts in a

formal sense, we do not have access to the law and the courts in a functional, practical sense, any more than having the keys to a car means we can actually drive that car.

Photo by nrjfalcon1 from Pixabay

The truth, I'm afraid, is that although every one of us has access to the law and the courts in a formal sense, we do not have access to the law and the courts in a functional, practical sense, any more than having the keys to a car means we can actually drive that car.

Take, for example, section 56.1(2) of the federal *Income Tax Act*. This section tells you how to calculate the amounts you need to deduct from or add to your taxable income as a result of paying or receiving spousal support:

> ***Agreement***
>
> ***(2)*** *For the purposes of section 56, this section and subsection 118(5), the amount determined by the formula*
>
> ***A - B***
>
> *where*
>
> ***A***
>
> *is the total of all amounts each of which is an amount (other than an amount that is otherwise a support amount) that became payable by a person in a taxation year, under an order of a competent tribunal or under a written agreement, in respect of an expense (other than an expenditure in respect of a self-contained domestic establishment in which the person resides or an expenditure for the acquisition of tangible property, or for civil law corporeal property, that is not an expenditure on account of a medical or education expense or in respect of the acquisition, improvement or maintenance of a self-contained domestic establishment in which the taxpayer described in paragraph (a) or (b) resides) incurred in the year or the preceding taxation year for the maintenance of a taxpayer, children in the taxpayer's custody or both the taxpayer and those children, if the taxpayer is*
>
> ***(a)*** *the person's spouse or common-law partner or former spouse or common-law partner, or*
>
> ***(b)*** *where the amount became payable under an order made by a competent tribunal in accordance with the laws of a province, an individual who is the parent of a child of whom the person is a legal parent,*
>
> *and*
>
> ***B***
>
> *is the amount, if any, by which*
>
> ***(a)*** *the total of all amounts each of which is an amount included in the total determined for A in respect of the acquisition or improvement of a self-contained domestic establishment in which the taxpayer resides, including any payment of principal or interest in respect of a loan made or indebtedness incurred to finance, in any manner whatever, such acquisition or improvement*
>
> *exceeds*
>
> ***(b)*** *the total of all amounts each of which is an amount equal to 1/5 of the original*

principal amount of a loan or indebtedness described in paragraph (a),

is, where the order or written agreement, as the case may be, provides that this subsection and subsection 60.1(2) shall apply to any amount paid or payable thereunder, deemed to be an amount payable to and receivable by the taxpayer as an allowance on a periodic basis, and the taxpayer is deemed to have discretion as to the use of that amount.

Now, I admit to cherry-picking a particularly nasty part of the *Income Tax Act* for the purposes of this discussion. But I will point out that errors in calculating one's personal income tax obligations can carry potentially serious penal and financial consequences. You can be sure that the CEOs of neither H&R Block nor QuickTax are going to pay the penalty for you if you muck up your tax calculations. And this is why public legal education programs are so very, very important: they fill a critical gap between the formal access to justice we all enjoy in theory, and the practical ability of individual Canadians to meaningfully access justice in their daily lives. If you need to understand the tax impacts of spousal support and cannot afford to pay a lawyer, which is hardly uncommon, you will likely find yourself visiting a public legal education program.

The language of the law is the language of judges and lawyers rather than that of the average person.

None of these programs are perfect, of course. They cannot cover every area of law in every jurisdiction in Canada. Specialized programs focus on specific areas of the law or specific legal issues, such as the rights of Indigenous peoples, the criminal law, landlord and tenant disputes or commercial law. They cannot address those areas or issues in a way that is comprehensive, written in easy-to-understand language, broadly available, and published in many languages. (My public legal education book, *JP Boyd on Family Law*, for example, runs to some 789 pages in print yet still provides only a thumbnail sketch of all that is involved in family law in B.C.!) These programs nonetheless provide a critical part of the social infrastructure necessary to ensure that the rule of law is more than a hollow promise.

The shame of it all is that public legal education programs are, at least in Canada, poorly supported by governments and the courts, and even more poorly funded. Personally, I see the obligation to ensure that all Canadians enjoy the benefits of living in a nomocracy as falling primarily on governments rather than on not-for-profit societies which must beg for their budgets each year. If government cannot draft laws and the rules of court in a clear and comprehensible manner, then public legal education programs are what we are left with to fill the gap between theory and reality. I just wish we were prepared to provide them with the funding they deserve.

We need to, I think, increase the legal literacy of our population by radically improving how we teach civics in primary and secondary school if practical access to justice is to become a reality. We also need to make government, the law and the courts as accessible as possible by reducing complexity, ensuring that the legislation to which we are subject is written in plain language, and offering training and education to those starting or defending a lawsuit. We need to promote resolving legal disputes through alternative processes that are more efficient, faster and less destructive than litigation. We need to greatly improve our funding of legal aid programs, especially with respect to the advancement and representation of women, Black people, Indigenous people, people of colour, members of the LGBTQ2+ communities and other marginalized groups. But, in the all

too likely event that none of these fantasies materialize, we at least need to better fund our public legal education programs.

John-Paul Boyd

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Have You Heard?

Personal Debt Resources

Lesley Conley

Access to Justice Week

Did you know?! October 26th to October 30th, 2020 is National Access to Justice Week! Look for amazing initiatives underway across our country, including here in Alberta.

We want to hear from you!

What do you love about LawNow? What do you wish was different? Please take a few minutes to complete a short survey about LawNow.

Help with Debt Alberta

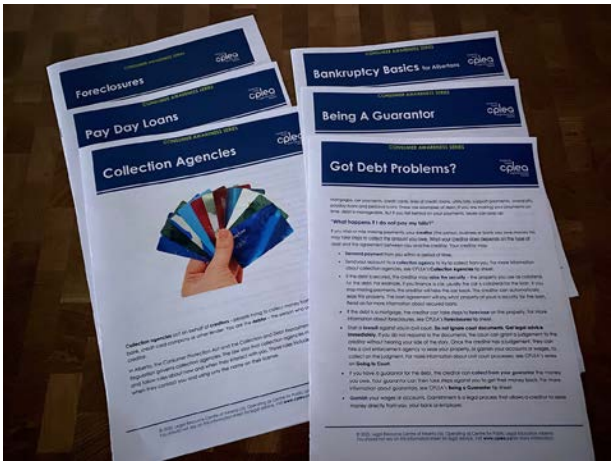
Are you or someone you know struggling with personal debt? And not sure where to turn? **Check out our new Help with Debt Alberta resource.** This webpage is for Albertans struggling with debt and looking for help. Answer questions to find the help you need.

New & Updated CPLEA Resources

We have updated our resources on personal debt. Check them out!

- **Free Consumer Law Information** – information sheets you can save, print off or order copies of all, all for free
- **Bankruptcy Frequently Asked Questions** – read these common questions and answers about bankruptcy and other personal debt solutions

Looking for more information? Visit CPLEA's website and YouTube channel to view all of our resources.



Lesley Conley

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Columns

When the Doorbell Rings: Direct sales contracts

Judy Feng

Your doorbell rings at home. You take a peek out your window. Then the realization hits you: it's someone going door to door trying to sell you something again. If you're anything like my cat (or me), you promptly hide in another room until the seller is gone –unless they are selling cookies, of course. For those of you who are brave enough to answer your door, or are at least curious about the legalities of door-to-door sales, you should keep reading.

In Alberta, the legal term for sales of goods or services door-to-door is a **direct sales contract**. A direct sales contract is a contract for goods or services (or both) totaling more than $25. You and the seller negotiate or sign the contract somewhere other than the seller's usual place of business. Unlike a contract that you negotiate or sign in a marketplace, auction, trade fair, agricultural fair or exhibition, you will typically negotiate or sign a direct sales contract in your own home.

The *Consumer Protection Act* is the main law that applies to direct sales contracts. There are also regulations that set out more rules. For example, licensing processes for direct selling businesses and types of sellers that do not need a licence.

In Alberta, the legal term for sales of goods or services door-to-door is a direct sales contract.

Direct sales contracts are legal but must meet certain legal requirements. For example, it must include specific information to be valid, and the Government of Alberta must licence the seller as a direct selling business. Not all businesses need a direct seller licence though. For example, insurance businesses, mortgage brokers and sales of perishable foods fit under this exception.

Photo by Cottonbro from Pexels

> ***TIP:*** *You can check if a seller has a direct seller licence by searching for the business on Service Alberta's website. You can also call the Consumer Contact Centre at 1-877-427-4088.*

Under the *Consumer Protection Act*, direct sales contracts must include standard contract information such as you and the seller's full name and address, the date and place where the contract was signed, etc. Most notably, the contract must include a **statement of cancellation rights** and, if the purchase is financed, a **disclosure statement**.

A statement of cancellation rights sets out when and how you can cancel the contract. It must be on the front of the contract. Alternatively, there must be a notice on the front letting you know where in the contract the statement is.

On the other hand, a disclosure statement sets out the terms of the loan agreement between you and the lender. It includes information such as:

- Amount borrowed
- Loan duration
- Amount and frequency of payments

- Interest rate
- Any other fees charged
- What security the lender is taking. This could be in the form of a mortgage or registration against personal property such as your vehicles, boats, trailers, etc.

Direct sales contracts are legal but must meet certain legal requirements.

Okay, so let's say you decide to answer your door. Before you let the person into your home, you should ask to see their identification card. The ID must show their name plus the name, address and licence number of the direct selling business they are working for. You should also call or check with Service Alberta to confirm that the seller is licenced. If you find yourself in a situation where you might want to purchase something from the seller, here's a couple of quick tips to protect yourself:

- Like with all other contracts, make sure you review the terms carefully before you sign anything.
- Do not rely on the sales representative to tell you what the contract says.
- Make sure that any terms you agreed to orally are also in writing on the contract.
- Do not let the sales representative pressure you into buying right away. You can always say no or take time to think about the potential purchase.

Lastly, what happens if you have buyer's remorse after entering into a direct sales contract? Well, there's a short window to cancel it. You can cancel it in writing within 10 days (including weekends and holidays) after you receive a copy of the written contract. There are some exceptions to this rule – for example, you have one year to cancel it if the seller did not have the required licence or the direct sales contract does not include all required information.

> ***TIP:*** *Is a door-to-door seller trying to sell you a furnace, air conditioner, water heater, windows or energy audit? As of January 1, 2017, the Government of Alberta has banned these types of door-to-door sales. But if you invite someone to your home to discuss buying these goods or services, then the transactions are still allowed.*

To learn more about door-to-door sales, including cancellation rights, go to our publication: Door to Door Sales…What You Should Know.

Judy Feng

Judy Feng, BCom, JD, is a staff lawyer at the Centre for Public Legal Education Alberta.

Employment

Changes to Alberta Employment Law. Again.

Jessica Steingard

On November 1, 2020, several changes to Alberta's *Employment Standards Code* came into effect. Changes include payment of earnings after termination, deductions, averaging arrangements for calculating overtime, rest periods and calculating general holiday pay. These changes are detailed in *Bill 32: Restoring Balance in Alberta's Workplaces Act, 2020*. Remember the government's red-tape inquiry? Bill 32 is a response to issues raised.

Bill 32 also includes changes to the *Labour Relations Code*, the *Police Officers Collective Bargaining Act*, the *Post-secondary Learning Act*, the *Public Education Collective Bargaining Act* and the *Public Service Employee Relations Act*. This article will only address changes to the *Employment Standards Code*. For more information on the other changes, see the Government of Alberta's webpage.

Some of the provisions in Bill 32 came into effect on **August 15, 2020**:

- The layoff period was increased from 60 days to 90 days, within a 120-day period. If an employee does not work for more than 90 days in that period, their employment automatically terminates. The employer must pay the employee termination pay.
- The layoff period due to COVID-19 is 180 consecutive days. This means an employer can layoff an employee for 180 consecutive days for reasons due to COVID-19 and still recall them.
- For group terminations or layoffs of 50 or more employees within a 4-week period at a single location, employers must give the Minister written notice at least 4 weeks before the first termination. Before, there were different notice periods based on the number of employees being laid off. These rules do not apply to seasonal employees or those employed for a definite term or task.

Photo by Kateryna Babaieva from Pexels

Bigger changes came into effect on **November 1, 2020**.

Payment on Termination

One of the biggest changes is when an employee gets their final pay once their employment ends. The *Code* used to say that if an employee quit, the employer had to pay within 10 days of the last day of work. If an employer terminated the employee's employment *with* cause, the employer also had 10 days to pay up. If an employer terminated *without* cause, the employer only had 3 days to pay up.

Now, an employee is entitled to 30 minutes of rest if they work* more than *5 hours but* less than *10 hours.

Now, the *Code* gives more power to the employer. Regardless of how an employee's employment ends (quits, without cause, with cause), the employer can choose from two periods to pay:

1. 10 days after the end of the pay period in

which the termination occurs, or

2. 31 days after the last day of employment.

From an employer's perspective, these periods likely address administrative and cash flows concerns that the previous rules may have caused. However, now an employee may be waiting a long time for monies owed to them! Say for example, an employee is paid monthly and is terminated right after payday, and the employer chooses the first option. That employee may be waiting around 40 days for their final pay cheque.

Deductions

Section 12 of the *Code* sets out what an employer may deduct from an employee's earnings. Previously, the only deductions allowed were:

1. statutory deductions (income taxes, CPP contributions, EI premiums)
2. money owing by law or under a judgment or court order (such as garnishing accounts)
3. amounts owed under a collective agreement (such as union dues)
4. any other amount the employee agreed to in writing (with exceptions)

These deductions are still allowed, along with two new ones:

5. overpayment of earnings due to a payroll calculation error (but only within 6 months of the overpayment)
6. vacation pay paid in advance of an employee being entitled to it

For these new deductions, an employer must give an employee written notice beforehand. As well, these new deductions only apply to overpayments or advances paid November 1st or after. No retroactive deductions!

Averaging Arrangements

The old hours of work averaging agreements are now called averaging arrangements. Averaging arrangements average out an employee's hours over a period for the purpose of calculating overtime. One of the biggest changes is shift in power from the employee to the employer. Now, an employer can "require or permit" an employee or group of employees to work an averaging arrangement. Employers can adopt an arrangement by giving two weeks' notice and do not need employees' consent first. Again, if a collective agreement applies, it governs.

One of the biggest changes is when an employee gets their final pay once their employment ends.

The length of an averaging arrangement has increased from 12 weeks to 52 weeks. The arrangement must be in writing, include a schedule of daily and weekly hours of work, and does not need an end date. It can also say how an employer can change the schedule, including the amount of notice given to the employee. Based on the language of the new subsection 23.1(4), the notice period can be shorter or longer than the 24 hours' notice usually required. Employees still need 8 hours of rest between shifts.

Rest Periods

Before November 1st, employees were entitled to 30 minutes of rest for every 5 hours worked. So if an employee worked a five hour shift, they got a 30-minute break (or two 15-minute breaks), paid or unpaid. For 10 hours, they got two 30-minute breaks.

Now, an employee is entitled to 30 minutes of rest if they work *more than* 5 hours but *less than* 10 hours. Breaks can still be split into two 15-minute periods and can be paid or unpaid. So an employee working a five-hour

shift is not entitled to a rest period. But if they work 5 hours and 1 minute, they are. For employees who work *more than* 10 hours, they are entitled to two 30-minutes breaks. Again, a collective agreement may say otherwise and takes priority.

General Holiday Pay

The change here is calculating average daily wage for general holiday pay. First, vacation pay and general holiday pay are no longer included in the calculation. Second, an employer can choose from two periods for averaging an employee's total wages over the number of days worked in the period:

1. The 4-week period immediately before the general holiday. So if a holiday falls on a Monday, the period is the 28 days ending on the Sunday before.
2. The 4-week period ending on the last day of the pay period immediately before the general holiday. So if the holiday falls on a Monday and the last pay period ended the Friday before, the period is the 28 days ending on the Friday.

No doubt this change makes it easier for an employer to calculate general holiday pay. However, the employer's choice could affect an employee's pay.

For more information about employment standards in Alberta, see CPLEA's FAQs and employment law information sheets.

A Few Others

The provision setting out when an employer has to give notice of a layoff has been repealed. Presumably, an employer can give an employee a layoff slip effective immediately.

For "greater certainty", subsection 34(2) has been added regarding vacation entitlements.

When an employee is away on certain leaves (maternity, parental, reservist, compassionate care, death or disappearance of a child, critical illness of a child, long-term illness and injury and others listed in division 7.6 of the *Code*), the time away is included when calculating the employee's years of employment to figure out how much vacation time they get.

For more information about employment standards in Alberta, see CPLEA's FAQs and employment law information sheets.

Jessica Steingard

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Famous Cases

The Inuit Status Case

Peter Bowal and Dustin Bodnar

> *It appears to me to be a consideration of great weight in determining the meaning of the word "Indians" in the British North America Act that the Eskimo were recognized as an Indian tribe by the officials of the Hudson's Bay Company which, in 1867, exercised powers of government and administration over this great tract … It is clear that the Eskimo are classified under the generic term Indian.*
>
> *– Inuit Status Reference, [1939] SCR 104 (SCC) at pp 109–10*

The Inuit in Canada

An historically nomadic people, the Inuit began migrating into what is now Canada almost a thousand years ago. First contact with Europeans was the arrival of Hudson's Bay Company (HBC) traders from Europe at the end of the 1600s at an Inuit whaling camp on Hudson Bay. Inuit and HBC employees traded goods such as animal fat oils and metal knives and co-existed for decades despite some hostilities in the mid-1750s. Languages and cultural teachings were shared. The HBC-provided firearms changed how the Inuit hunted.

The Inuit and European cultures became more integrated through trade. The appearance in 1903 of the Canadian North West Mounted Police brought employment and other support, and with that, greater dependence on western ways. Today this people of storytelling, hunter-gathering, and common survival in the harsh Arctic climate resides mostly in Nunavut, in an area known in Inuktitut as Inuit Nunangat ("*the homeland*"). Numbering fewer than five thousand in 1867, the Inuit population has grown to 65,000 according a Statistics Canada estimate in 2016. Canada is home to the largest population with smaller groups living in Alaska, Greenland and Denmark.

Just outside Inuvik, Northwest Territories.
Photo Credit: Dave Pettitt

Over the years, the federal government largely left the Inuit alone as a matter of law. This article describes the constitutional case that addressed the status of the Inuit in Canada.

The "Eskimo Case" in the Supreme Court of Canada

The *Constitution Act, 1867* established Canada as a self-governing country and divided legislative authority over all matters in the country between the federal and provincial levels of government. "Indians, and Lands reserved for the Indians" were placed under federal responsibility but no mention was made of the Inuit in the *Constitution Act, 1867*. In 1876, the federal government enacted the *Indian Act*, with respect to First Nations, but the Inuit were overlooked.

In the late 1920s and early 1930s, a decline in trade with the HBC saw the Inuit in dire economic straits. As the HBC, Quebec and federal government continued to supply food and other resources to the Inuit, the question arose as to who would pay for it. The Inuit had not entered into any treaty with the federal government. The question became: are the Inuit "Indians" under the *Constitution Act, 1967* and, accordingly, under federal jurisdiction?

The case reached the Supreme Court of Canada as a reference from the federal government in mid-1938. Inelegantly titled, *Reference as to whether "Indians" includes in s. 91 (24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, the issue took ten months to be decided. The evidence considered was primarily records of how the Inuit were historically viewed by the HBC and governments. Even before Confederation, the HBC considered all Indigenous peoples to be "Indian Tribes". Along with the Blackfoot, Sioux and Algonquins were the "Esquimaux". Other accounts of contact from early governors, missionaries and clergymen referred to the Inuit as "Esquimaux Indians".

***In 2001, Kiviaq sued the federal government, asking it to define Inuit status in Canadian law and confer upon the Inuit the same rights as First Nations under the* Indian Act.**

The North West Territory and Rupert's Land – where the Inuit were living – were admitted into the Dominion of Canada by 1870. The federal Parliament enjoyed the "full power and authority to legislate for the future welfare and good government" of these territories, the population of which was 93% Indigenous at the time.

The Supreme Court was unmoved that the Inuit had never been under protection of the Crown in the same way as treaty Indians or that, despite the Inuit sharing Aboriginal status, they were genetically and culturally unrelated to Indians. The Court unanimously concluded that the Inuit came within the taxonomy of constitutional "Indian". This placed them under the authority of the federal government.

[As an aside, the Supreme Court of Canada, employing a different, more culturally-sensitive approach and reasons, rendered the same conclusion for the Métis in 2016.]

Inuit Status in Canada Post-1939

After being assigned legislative responsibility for the Inuit, the Government of Canada seemed reluctant to create the same dependency relationship that had developed with First Nations. It has enacted no special Inuit legislation.

The 1982 *Canadian Charter of Rights and Freedoms* corrected the Supreme Court's 1939 error. It expressly identified the Inuit as an "aboriginal people" in Canada, distinctive from First Nations and Métis (articles 25 and 35). The original 1867 provision about "Indians and Lands reserved for the Indians" now cannot be amended without first consulting with, among others, Inuit representatives at a constitutional conference (article 35.1).

Over time the Inuit became more politically engaged and aware that they have not benefited from the special status and privileges of their First Nations counterparts.

The Court unanimously concluded that the Inuit came within the taxonomy of constitutional "Indian".

The federal government created Nunavut as Canada's newest territory in 1991. It granted ownership of the land and paid $580 million to the Inuit. In return, the Inuit signed an extinguishment clause – whereby any and all historical Inuit claims against the federal government were at an end. However, this did not dissuade one successful and prominent Inuit man in Edmonton. Kiviaq still sought to extend First Nations' rights and benefits to the Inuit.

Kiviaq (full Inuit names are usually one word) was born in 1936 in Chesterfield Inlet, a hamlet on the western shore of Hudson's Bay. His birth parents were both Inuit. He was removed

with his sister and mother (Kumanaq) by a white RCMP officer (Charles Raymond Ward), renamed David Charles Ward and raised in Edmonton in the English language.

David, beaten by his stepfather and bullied by children at school, took up boxing and became a Golden Gloves champion. He also excelled at football, was elected to Edmonton city council and later served as a popular radio talk show host. In Edmonton in 1983, he became the first Inuit lawyer in Canada. He then won a legal battle to revert to his single-word Inuit name given at birth – Kiviaq.

In 2001, Kiviaq sued the federal government, asking it to define Inuit status in Canadian law and confer upon the Inuit the same rights as First Nations under the *Indian Act*. The case was not resolved before the former boxer and lawyer Kiviaq died of cancer in Edmonton at age 80 in April 2016.

Peter Bowal

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Dustin Bodnar

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Human Rights

Human Rights and Civil Liberties Implications of COVID-19 Mask Laws

Linda McKay-Panos

As the COVID-19 pandemic continues to affect the entire world, many governments have passed legislation requiring that face masks be worn in many public locations. This has resulted in claims that the mask requirements violate civil liberties. At the same time, there have been some incidents of individuals being confronted for not wearing masks, yet they have a legitimate exemption from the mask requirements.

For example, the City of Calgary passed The Temporary Face Coverings Bylaw, which went into effect on August 1, 2020. It requires face masks in any indoor space the public has access to, including retail stores, shopping malls, recreation centres, churches and public common spaces in office buildings. The Bylaw provides several exceptions to the public face covering requirements:

- Children under 2 years of age
- People with underlying medical conditions or disabilities impacting their ability to wear a face covering
- People who are unable to place, use or remove a face covering safely without assistance
- People who are eating or drinking at public places that offer food or beverage services
- People engaging in an athletic or fitness activity
- People who are caregiving for or accompanying a person with a disability where wearing a face covering would hinder accommodating the person's disability
- People who have temporarily removed their face covering where doing so is necessary to provide or receive a service (for example, a visit to the dentist)

Photo by Anna Shvets from Pexels

The *Calgary Herald* reported that a city survey done in August found 89 per cent of Calgary residents are complying with the bylaw.

Health officials have released evidence and opinions that wearing a mask can reduce the spread and potency of COVID-19, should one be exposed to the virus. Despite the exceptions, and the evidence from experts, there are people who object to wearing masks. Some of these people believe that the COVID-19 evidence is false.

While an adult is generally at liberty to take risks with their own health and safety, there are limits.

There are claims that mandatory mask laws violate individual liberties. Section 7 of the

Canadian Charter of Rights and Freedoms says that laws and government actions cannot violate one's rights to life, liberty and security of the person except in accordance with the principles of fundamental justice. Thus, limits must not be arbitrary, grossly disproportionate or overbroad. While an adult is generally at liberty to take risks with their own health and safety, there are limits. Infringements of individual rights can be justified by a pressing and substantial interest. The government must show that the measures it is using are rational, reasonable in the context and proportionate to the affected individual freedom. Krajewska, Sjolin and Marjin argue that if there are exceptions to mandatory mask laws for those who have legitimate reasons, the limits should be reasonable and justifiable in the circumstances. Presumably, the exceptions to the Calgary Bylaw meet this requirement. The authors conclude:

> *In the context of a global health crisis, collective action to minimize the spread of the virus enhances everyone's freedom. Declining to adopt mandatory masking leaves the burden on those who are already at risk. It's also ineffective. At the end of the day, the virus will not care about philosophical differences. When it comes to mandatory masking, neither should we.*

Another potential civil liberties restriction in the context of COVID-19 is the freedom of movement. For a discussion of this issue, see Myrna El Fahkry Tuttle's LawNow article.

The government must show that the measures it is using are rational, reasonable in the context and proportionate to the affected individual freedom.

There have also been incidents of individuals not wearing masks being accosted or refused service. Assaulting someone is potentially a crime and not an appropriate response to someone not wearing a mask. Landlords, employers and providers of services normally available to the public must follow human rights legislation. For example, if a person has a mental or physical disability that prevents them from wearing a mask, they cannot be discriminated against. Service providers must accommodate persons with disabilities to the point of undue hardship. Many human rights commissions have published policy statements on Discrimination, COVID-19 and Human Rights, such as the Alberta Human Rights Commission and the Ontario Human Rights Commission.

Human rights and civil liberties issues arise in many contexts, including in this time of COVID-19. Laws such as the *Charter* and human rights legislation govern the way Canadians and governments must conduct themselves. It is not usually safe to make assumptions about individuals and government policies without adequate information.

Linda McKay-Panos

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Law & Literature

Two Human Rights Heroes

Rob Normey

The year 2020 has been a time of great rupture and adversity. Around the globe, we have seen the rise of a large number of authoritarian, hard-right rulers who have demonstrated contempt for democratic values. Their actions have seriously undermined the fundamental rights of their own citizens, and demonstrated a callous disregard for refugees and stateless individuals. It is nonetheless a time when some in the legal community have remained steadfast in their commitment to the rule of law and to the rights of their clients.

The two brilliant human rights lawyers whose work I would like to highlight are British solicitor Gareth Peirce and Guatemalan human rights lawyer and activist Renata Avila. Both have represented and continue to represent Julian Assange in his case recently argued in an English court. The court will render its decision in January 2021 on his extradition to the U.S.A. Experts are referring to this case as the most significant challenge in a western nation in our lifetimes to the freedom of the press.

Gareth Peirce

Gareth Peirce is described as shy and opposed to publicity focussing on her accomplishments. Nonetheless, she is acclaimed as a brilliant and unrelenting human rights defender, who has been at the centre of some of the greatest legal fights of the past half-century to prevent or overturn injustices.

I treasure Peirce's 2010 book, *Dispatches From the Dark Side: On Torture and the Death of Justice*, as a clear-eyed account of the mistreatment of suspects in the Bush/Blair War on Terror declared after the 9/11 attack. Peirce begins her book with the inspiring account of

Photo from Pixabay

John Lilburne's quest to maintain his rights in the face of oppression.

Lilburne was an uncompromising Puritan who faced imprisonment on trumped up charges. He was brought before the dreaded Court of Star Chamber in England in 1637. Despite mounting pressures, Lilburne insisted on his right not to incriminate himself and the right to the basics of due process in the proceedings. He was a member of the radical group of Levellers who sought to remake English society based on equality. Lilburne endured two and a half years in the Fleet Prison – tortured, gagged and kept in solitary. The revolutionary Long Parliament largely vindicated his struggle for justice when they met in 1642. Its first act was to set him free, then to abolish the Star Chamber and finally, to adopt a resolution that Lilburne's sentence was "illegal and against the liberty of the subject, and also bloody … barbarous and tyrannical."

***Peirce first came to prominence here in Canada with the release of Jim Sheridan's 1993 film* In the Name of the Father.**

Pierce's series of essays draw inspiration from Lilburne but also point to the shocking reality that we must fight anew to protect these fundamental rights in the 21st century.

Many of the accused she helped defend were vulnerable Irish workers in Britain, during an era of hysteria on the part of officials and the public provoked by the actions of the IRA. She connects her clients' plight to the situation of Muslims and Arabs in Britain post-9/11. These individuals have become the new 'Irish' to an often callous and indifferent government.

Pierce's series of essays … point to the shocking reality that we must fight anew to protect these fundamental rights in the 21st century.

Peirce first came to prominence here in Canada with the release of Jim Sheridan's 1993 film *In the Name of the Father*. The film is a docudrama, which uses some fictional elements to highlight complex legal proceedings. A small group of Irish men and women working as casual labourers in London are arrested for the horrific bombing of the Guildford Pub (in Surrey, just outside of London). Sheridan bases the film on the memoir of one of these wrongly convicted individuals, Gerry Conlon. Conlon, played by Daniel Day-Lewis, was to serve 15 years for a crime he had no connection to whatsoever. Without unwavering belief in his innocence and voracious efforts to establish the truth about what the court determined to be coerced confessions, Conlon and the rest of the "Guildford Four" may never have been exonerated. Peirce is convincingly played by Emma Thompson (director Sheridan employed dramatic license to transform Peirce from investigating solicitor into a barrister, the better to dramatize the mighty effort to achieve a measure of justice). The film paints a sombre picture of the reality of prison life for Gerry and for his father, Giuseppe, who dies after 5 years in prison for a bombing he could not conceivably have been a part of.

Peirce went on to represent many others and succeeded brilliantly in overturning a number of convictions or military detentions. As the hardworking counsel outlines in her book, many of these cases involved members of the new "suspect community" in Britain – Muslims and Arabs. In her experience, "once you've made a community suspect, almost anything goes."

Renata Avila

One of the other counsel representing Assange is the young Guatemalan human rights lawyer and digital activist, Renata Avila. Avila has had a number of high profile cases and has worked on a number of vital justice initiatives in the global south. She currently resides in Berlin and works for the World Wide Web Foundation, directing the Web We Want initiative. This aims to promote a positive, human rights-oriented agenda for internet users. The foundation promotes legal and policy reform particularly for countries in Central and Latin America and elsewhere in the global south. Avila is a regular legal advisor on diverse human rights issues, under the guidance of former Spanish justice Baltasar Garzon Real.

***A concise summary of Avila's position and the urgent need to defend Assange is found in her essay "Who is Julian Assange and What did WikiLeaks Do," in the book* In Defence of Julian Assange.**

One of Avila's most significant assignments was the universal jurisdiction case, on behalf of Rigoberta Menchu Tum (the Nobel Peace Prize winner) and other victims in the Guatemalan Genocide case before courts in Spain. Renata has also worked with the Citizens Lab project at the Munk School of Global Affairs, University of Toronto. There she researched the dark impact various surveillance technologies can have in developing countries, including countries particularly impacted by the "war on drugs".

One gets a sense of the accomplishments and concerns of Avila in a book she co-edited, *Women, Whistleblowing and WikiLeaks*. The book recounts the valuable work WikiLeaks has done in revealing the full extent of government malfeasance. A concise summary of Avila's position and the urgent need to defend Assange is found in her essay "Who is Julian Assange and What did WikiLeaks Do," in the book *In Defence of Julian Assange*.

Seeking Places of Hope

In these dark days, as alluded to in Peirce's book (and a CBC Ideas episode on her, "Human Rights Under Attack: Gareth Peirce on the New Dark Age"), we must seek places of hope. Two such places are in the continually unfolding human rights work of these remarkable women, Gareth Peirce and Renata Avila.

Rob Normey

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

Model Crowdfunding Statute Released

Peter Broder

The **Uniform Law Conference of Canada (ULCC)** is a body that develops model legislation that provinces can adopt to create a consistent and harmonious legal framework across jurisdictions. It has now provided a roadmap on the issue of crowdfunding, and more specifically internet fundraising. This is timely and helpful.

The 2005 ULCC Uniform Charitable Fundraising Act (UCFA) did not cover activity of non-charities. So, a decade ago the ULCC initiated a project on regulation of fundraising not falling under the UCFA.

The effort led to release of the 2011 Uniform Informal Public Appeals Act (UIPAA). Saskatchewan adopted a version of the UIPAA. It was used in resolving problems related to administration of the Humboldt Broncos Memorial Fund.

The Uniform Law Conference of Canada (ULCC) is a body that develops model legislation ...

The rapid rise of online crowdfunding over the last decade, however, lead to a need to revisit some of the provisions and update some of the definitions from 2011. Developments in case law and a U.S. effort to craft model crowdfunding legislation were also factors prompting a new look at the UIPPA.

Informed by these considerations, the ULCC has updated and renamed the 2011 model statute. It is now called the **Uniform Benevolent and Community Crowdfunding Act (UBCCA)** and was released in August. It is available online.

The UBCCA, like its predecessor, deals with spontaneous or ad hoc public appeals by individuals or groups for funds for a specified purpose, and the trust obligations that can arise from such appeals. The concept of a trust arising from any appeal made within the scope of the UBCCA is central to the model legislation.

Photo by Markus Winkler from Pexels

The UBCCA is intended to cover appeals for humanitarian or public purposes, rather than those of a private nature. The approach taken in the model statute lessens the distinction between appeals for charitable and non-charitable purposes, essentially by extending the mechanisms used in the charitable realm to non-charitable appeals. But these changes only apply to appeals that fall within the model statute.

Not covered by the UBBCA are appeals:

- made by some entities (qualified donees under the federal *Income Tax Act* – this includes registered charities – and their intermediaries);
- for certain ends (e.g. partisan politics, investment); or
- with particular features (where the funds are intended for the organizer, or a

contributor is rewarded with more than public recognition or a perk of token value).

The legislation provides default rules and procedures for appeals within its scope. These can be supplemented or replaced by documents or provisions put in place by an individual or group organizing an appeal.

The legal term "trust" is more known than understood. Trusts can be established in a number of ways, but most commonly they are created by a trust document. Importantly, they can also arise through circumstances and representations. As it is often the case that public appeals are made with no or only partial documentation, an important role of the model legislation is to clarify that a trust relationship is created by the appeal within the scope of the UBCCA.

The model statute makes those directing "management and disbursement" of an appeal fund (or those with authority to do so) trustees. This has implications both for dealings with donors and for stewardship of funds raised. The model statute outlines various obligations, such as the need to maintain a segregated bank account for the funds, stemming from the proceeds of an appeal being a trust.

The UBCCA is intended to cover appeals for humanitarian or public purposes, rather than those of a private nature.

Additionally, powers of public appeal trustees to administer funds and of the courts to oversee fund administration are set out in the UBCCA. Historically, under what is known as *cy-pres* power, courts have had the authority to make schemes where the purpose of charitable trust cannot, or cannot any longer, be fulfilled. This allows the court to substitute a similar purpose for the original purpose.

It also allows the courts to deal with surpluses. The model statute expands this authority to trusts for a non-charitable purpose and sets a threshold for when court approval for distribution of a surplus is required. As well as providing for expanded court oversight authority, the model statute also refines certain other aspects of existing law on UBCCA non-charitable purpose trusts.

Various means for dealing with surpluses are set out in the model legislation and apply based on whether the amount in issue exceeds the court threshold and was generated for a charitable or non-charitable purpose and based on the documentation in place.

The UBCCA provides for the ability of various persons or bodies, including (in a departure from existing law) donors, to go to court to enforce the trust.

... an important role of the model legislation is to clarify that a trust relationship is created by the appeal within the scope of the UBCCA.

Importantly, the UBBCA addresses what court has oversight authority when the appeal takes place across jurisdictions. Determining appropriate jurisdiction is particularly crucial given the rise of internet crowdfunding platforms.

Another area of abiding concern was where organizers want to change the terms of the appeal over the course of a campaign. The UBBCA allows this in limited circumstances:

- to deal with disposition of an unforeseen surplus; and
- to replace a fundraising goal that proves unrealistic.

In the first case, disposition of the surplus must accord with the s. 10 provisions of the UBCCA on that topic. In the second case, the spirit

of the new goal must accord with that of the original goal.

Finally, the UBBCA features a Schedule setting out a Trust Declaration template to encourage organizers to document in writing the terms of their appeal.

With information on online crowdfunding initiatives now so often a feature of news and social media about community and personal disasters or hardships, the ULCC work on this new model statute should be welcomed and commended. Provinces should be encouraged to adopt the UBCCA as quickly as feasible.

Peter Broder

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Youth & the Law

Money, Money, Money!

Jessica Steingard

Maybe you have a part-time job. Maybe your parents pay you an allowance. Maybe you make money shoveling snow or cutting grass. In any case, you've got money!

Opening a Bank Account

First step, where do you put this money? Have you outgrown your piggy bank? Maybe a bank account would be more appropriate!

If you are under the age of majority, some banks require your parent or guardian to be a joint account holder on the account.

Banks in Canada must follow certain laws. Some banks are governed by Canada's *Bank Act* – generally those with locations across the country. Banks with locations in one province must follow provincial banking laws. For example, the *ATB Financial Act* governs ATB Financial bank in Alberta.

Credit unions are similar to banks except that they are non-profit institutions. Customers must first qualify as a member and then become owners, meaning they share in any profits the credit union makes. The *Bank Act* regulates some credit unions. Provincial credit unions are regulated by provincial laws, such as Alberta's *Credit Union Act*.

The *Bank Act* says that any natural person (an individual, not a company) can deposit money in a federally-regulated bank, regardless of whether they are allowed by law to enter into contracts. The underlined part is important. Canadian common law (judge-made law) says that individuals under the age of majority (in the province where they live) or who do not have mental capacity generally cannot enter into contracts. There are exceptions. Contracts are agreements between you and another person where you give each other something. But the B*ank Act* makes it clear that a minor *can* open a bank account even if they cannot enter into a contract.

If you are under the age of majority, some banks require your parent or guardian to be a joint account holder on the account. A joint account holder has the same rights to access your money and manage your account as you do, unless the bank allows for different controls. Some banks will let you open an account on your own if you are at least 12 or 13.

Photo by Skitterphoto from Pexels

For example, let's canvas a few banks and credit unions, both in Alberta and across Canada:

- ATB's Generation Account is for youth under 19 but parents must be joint account holders for youth under 12.
- RBC has student accounts for youth aged 13 or older.
- TD Youth Accounts are for youth aged 18 and under to help them learn the benefits of saving.
- Servus Credit Union offers free banking for persons aged 17 to 25. It also offers a Youth Plan 60 account for youth aged 16 and younger (and youth aged 12 and up

can open and operate the account with a parent).

What about a credit card? Well, a credit card is a contract that is not to be taken lightly. To get a credit card on your own, you must be the age of majority in the province or territory where you live. In Alberta, that's 18 years. If you are under the age of majority, the bank will require that your parent or guardian co-sign for the credit card. If you do not pay the money back, the person who co-signed will be responsible for repayment of all outstanding balances and debts.

Check with different banks about their rules for youth and the benefits of their youth accounts.

Filing Taxes

Have you heard adults in your life complaining about having to pay taxes? The government collects taxes on different things – income, goods and services (GST), property and more – to help pay for government services, such as healthcare facilities, education, courthouses, registry services, etc.

Filing a tax return means to report your income (and other amounts you earn) each year to the government.

Income tax is tax on employment income. Employment income is amounts you receive as salary, wages, commissions, bonuses, tips and gratuities. Your employer deducts this tax from your pay cheque, along with amounts for Employment Insurance (EI) and Canada Pension Plan (CPP) contributions. By law, your employer must collect income tax and deductions. Look at your pay cheque to see if your employer is deducting these amounts.

Both the federal government and provincial governments collect income taxes – the federal government under the authority of the *Income Tax Act* and provincial governments under provincial laws, such as the *Alberta Personal Income Tax Act*. The amount of the tax varies by government and by income levels (called tax brackets).

Filing a tax return means to report your income (and other amounts you earn) each year to the government. The deadline to file taxes is April 30 of each year. You may be eligible for deductions (amounts you can subtract from your income) or credits (amounts subtracted from the amount of income tax you owe). The most common tax credit is the basic personal amount tax credit.

Employment income is amounts you receive as salary, wages, commissions, bonuses, tips and gratuities.

Both federal and provincial governments have a basic personal amount tax credit. The effect of the tax credit is that individuals who earn income equal to or less than the basic personal amount (BPA) get back the income taxes they paid. Individuals who earn more than the BPA get a credit for an amount equal to the BPA multiplied by the tax rate for the lowest tax bracket. Math? I know, my brain hurts too. For 2020, the federal BPA is $13,229 for individuals with net income of $150,473 or less. The BPA decreases for individuals who earn more than that, with the lowest BPA being $12,298 for individuals with net income greater than $214,368. The Alberta BPA is $19,369. Individuals can apply both the federal and provincial BPA tax credits to lower the amount of taxes they owe. ATB Financial has an article called "Understanding your personal taxes in Alberta" with more detailed information.

So, do youth have to file tax returns? The Canada Revenue Agency's website has a list of individuals who must file tax returns. If your employer has deducted income tax from your pay cheques but you make less than the BPA (combine the federal and provincial BPAs), then you may get back the taxes you have already paid. That's a reason to file!

Taxes can be confusing! That is why accounting programs and accountants exist to help us! For a fee of course. Around tax season, there are also tax clinics that help people file their taxes for free. For more information on taxes generally, see the Government of Canada's website and your province's website.

Do you have other questions about laws that apply to youth? Check out CPLEA's Law FAQs website for more information.

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