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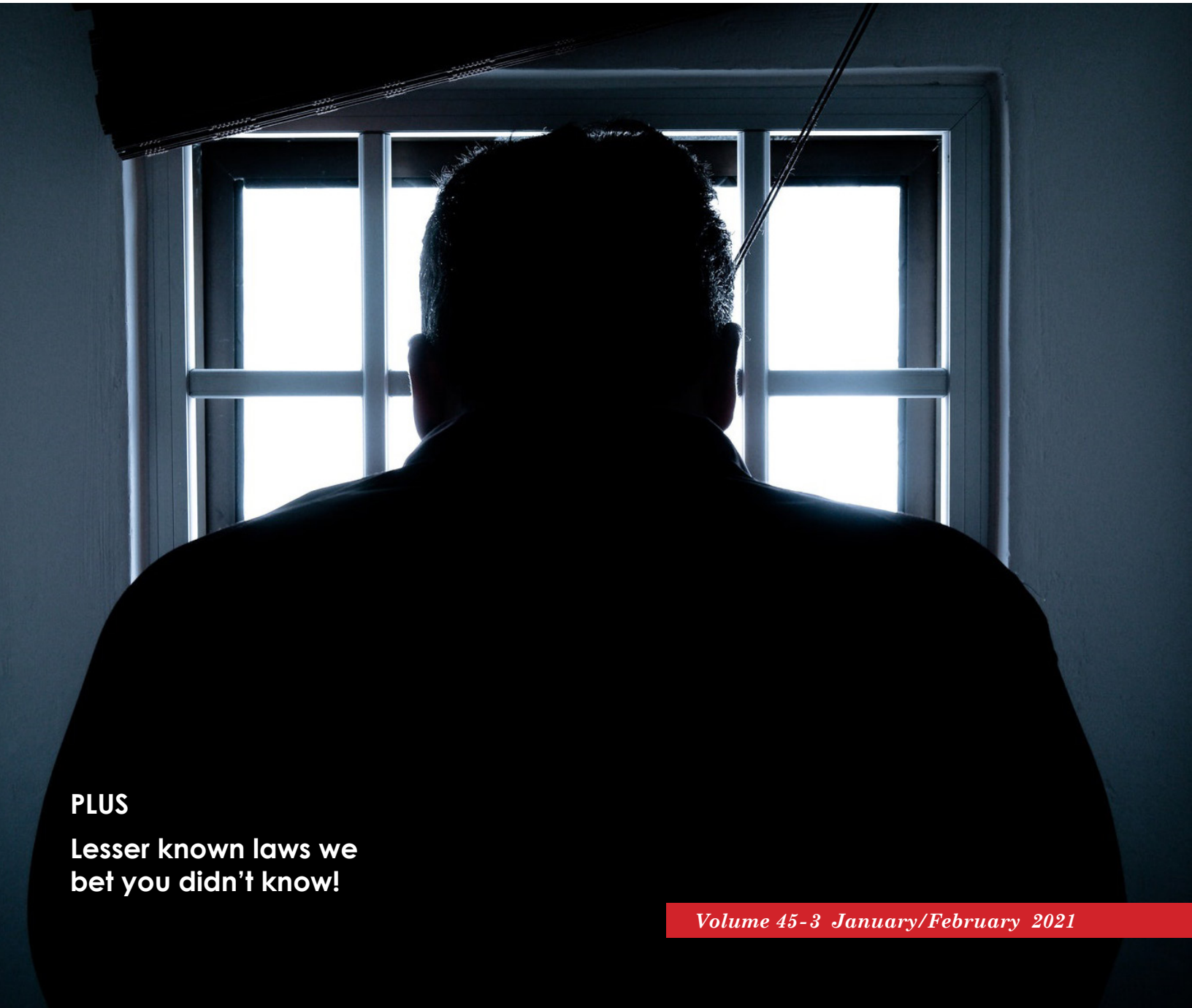
Behind Bars



PLUS

Lesser known laws we bet you didn't know!

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Publisher Jeff Surtees

Editor/Legal Writer Jessica Steingard

Designer Jessica Nobert

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Feature
Behind Bars

How Inmates in Canadian Prisons Suffer

John Cooper

- Mental health crises for which there are few resources
- COVID-19 lockdowns
- Overuse of solitary confinement
- A racialized justice system that criminalizes Indigenous Peoples and Black Canadians
- A lack of preparation for re-entry into society

These are the tip-of-the-iceberg issues faced by inmates in Canada's federal and provincial prisons. And according to advocates for better inmate treatment, much more needs to be done.

According to Statistics Canada, in 2017/2018, Canadian prisons held just under 39,000 adults:

- a little under 25,000 in provincial or territorial custody (83 per 100,000 population)
- 14,000 in federal custody (48 per 100,000)
- for a national total of 131 adults per 100,000 citizens.

Investigations by the prisoner advocacy group John Howard Society of Canada (JHS) show total spending on criminal justice in Canada (at all levels of government) is about $20 billion annually. Provinces and municipalities spend 70% of that total. Prisons and jails get $5 billion (55% provincial and 45% federal) with the balance going to police services and the court system.

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With that context in mind, let's look at four major issues of inmate treatment in Canadian jails.

1. Health issues

Health issues continue to devastate inmates' rights. Inmates are far more likely than the general population to suffer from HIV and AIDS, are more prone to psychiatric issues, and are more than 100 times as likely to suffer from Hepatitis C. Once released, inmates are 58 times more likely than the general population to have psychiatric episodes that land them in a health care facility. As well, inmates may be overmedicated. According to the Canadian Human Rights Commission, 46% of women in prisons are being treated with psychotropic drugs (used for conditions such as anxiety disorders, bipolar disorder and schizophrenia).

Catherine Latimer, executive director of the John Howard Society of Canada, says inmates receive far less health care than the general community does "and we see them

(inmates) as aging 10 years faster in the prison community than in the regular community."

In an email interview, Sandra Ka Hon Chu, a lawyer and the director of research and advocacy at Canadian HIV/AIDS Legal Network, says:

> *Health care for prisoners living with HIV (and hepatitis C or HCV, another virus transmissible by injection drug use) is a significant public health concern, especially in light of rates of HIV and HCV in prison that are considerably higher than they are in the community as a whole. A 2016 study indicated that about 30% of prisoners in federal facilities, and 15% of men and 30% of women in provincial facilities. are living with HCV, and 1–2% of men and 1–9% of women are living with HIV. Indigenous prisoners, in particular, have much higher rates of HIV and HCV than non-Indigenous prisoners; e.g. Indigenous women in federal prisons are reported to have rates of HIV and HCV of 11.7% and 49.1%, respectively. Not surprisingly, research shows that the incarceration of people who inject drugs is a factor driving Canada's HIV and HCV epidemics. Despite this, neither federal prisons nor provincial/territorial prisons provide prisoners with equivalent access to health care services, including key harm reduction measures.*

While inmates have access to HIV testing in federal prisons, "ongoing testing is another issue, which makes it more difficult to track HIV or HCV," says Ka Hon Chu. "Stigma and the very real risk of discrimination (from prisoners and prison staff alike) and the loss of confidentiality (in relation to one's HIV test results) remain an impediment to testing." And while HIV treatment is available, "a major issue consistently identified by people in prison is the prioritization of security over their health care needs," says Ka Hon Chu.

Ka Hon Chu adds that another significant health issue is prison officials too often misinterpreting harm reduction (giving inmates access to clean needles and syringes for injection) as tacit approval of drug use. "While a significant number of prisoners use drugs, harm reduction measures are always deemed secondary to purported security concerns and often characterized as being in opposition to the security of an institution."

Some developments in inmate care include the provision of naloxone (used to counteract the deadly effects of opioid overdoses) to prison staff and "introducing North America's first prison-based needle and syringe program," says Ka Hon Chu. Although, " these programs are still far from equivalent to what is available in the community outside prison, and remain inaccessible for many prisoners." Studies show up to 17% of male and 14% of female inmates using injectable drugs, and overdose deaths have increased over the years. A third of all overdose incidents involve Indigenous prisoners.

Access to sterile injection equipment in prison "is extraordinarily limited," says Ka Hon Chu. While acknowledging "the health benefits of needle and syringe programs in prison with the introduction by Correctional Service Canada of a Prison Needle Exchange Program (PNEP) in some federal prisons beginning in June 2018, details of the PNEP reveal serious deficiencies that are not in keeping with public health principles or professionally accepted standards for such programs." She adds:

> *Despite the fact that naloxone is an exceedingly safe medication to reverse opioid overdoses, no prisons in Canada provide prisoners with direct access to naloxone… prisoners are often the first on the scene of an overdose, and denying them with immediate access to naloxone could mean the difference between life and death, or irreversible damage.*

The COVID-19 pandemic added an additional layer of problems, says Latimer. The virus hit several institutions across Canada despite the Correctional Service of Canada taking proactive measures against its spread. In April 2020, the Criminal Lawyers Association and the John Howard Society petitioned federal and provincial governments to reduce the number of inmates during the COVID-19 epidemic. A spike in the number of cases in B.C., Ontario and Quebec (where during one week, cases doubled in the span of only two days), left both inmates and correctional officers vulnerable and in some cases infected. In Ontario, B.C., Newfoundland and Labrador, and the Northwest Territories, diversion tactics to avoid the potential spread of the virus in high-density institutions included early release or granting temporary absences. Prisoner rights advocates urged institutions to release low-risk inmates and those with compromising health issues in order to avoid the spread of the virus.

2. Solitary confinement

Solitary confinement (also called "administrative segregation") is a widespread practice overused not only for dangerous individuals but also as a population management tool.

According to JHS research, solitary confinement effectively allows prisons to "warehouse" individuals in overcrowded facilities. Fifty percent of federal female inmates in solitary confinement are Indigenous women. In Ontario, the issue of solitary confinement made headlines in 2016 when records showed Adam Capay, an Indigenous man, was held in segregation for 1,500 days (more than four years) under 24-hour-a-day lighting. That year, Ontario's Ministry of Community Safety and Correctional Services committed to reducing solitary confinement to a maximum of 15 days.

Alberta lawyer Amanda Hart-Dowhun, a member of the Criminal Trial Lawyers' Association and president of the Alberta Prison Justice Society, reports:

> *Solitary confinement continues to be a big issue. It becomes a bigger issue with COVID-19. Some inmates are bunked with other inmates so they cannot be distanced.*

The subject of solitary confinement has struck a chord with human rights groups, with "many prisoners basically being locked up for 22 hours a day," says the JHS's Catherine Latimer. In some cases, "the response to the (COVID-19) virus was basically to lock people down." A small victory of sorts for inmates came following an Ontario Court of Appeal ruling capping solitary confinement (the subject of a number of lawsuits) at 15 days. The court called the practice of long-term segregation unconstitutional and cruel-and-unusual punishment. The federal government first challenged the ruling but then gave up in April 2020. The ministries of public safety and justice followed with a statement that an investment in the system of almost $450 million would provide effective health care, infrastructure improvements and new staff.

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3. Uncaring attitudes

For Hart-Dowhun, the biggest issue in inmate treatment is an uncaring attitude:

> *Occasionally there are issues of malice toward prisoners but the biggest issue they*

suffer is the pervasive lack of caring, or lack of ability or resources to adequately care for them.

With respect to prison officials, she adds:

It's not that they want inmates to suffer, but they are unwilling or they lack the resources to properly care for them. Part of the issue is resources (and) how those resources are allocated – if the issue is safety of staff over anything else then the funding will go to that and that will be at the expense of programs and other proactive measures. You do see … a trend toward more riots and more inmate protests when conditions are very poor. When they're relatively well-cared for, they are less likely to riot.

Hart-Dowhun says there are problems with the system with respect to mental health problems. Inmates in segregation receive a "mental health check" – a guard peeping through a cell window and talking through the door for a minute. Her take? "[T]hey are checking the boxes but not doing it in a meaningful way."

"I think that in the past couple of years we've had a bit of a shift in terms of the standards for inmates," Hart-Dowhun adds. This includes "more [public] awareness of what the standards are; my impression is that for many people they assumed there was a basic level of care and sometimes those perceptions were not accurate."

4. Over-representation of Indigenous and Black people

Canada's prison system is also highly racialized. On an episode of TVOntario's *The Agenda* in the spring of 2020, Christa Big Canoe of the Aboriginal Legal Society noted that Indigenous people are overrepresented in the prison system. Over 25% of the prison population is Indigenous. And Indigenous women represent 35% of inmates in Canadian institutions. By contrast, Indigenous people comprise just under 5% of Canada's population.

On the same program, lawyer Nana Yanful of the Black Legal Action Centre noted the overrepresentation of Black people in the justice system due to anti-Black racism. This includes overt policing and over-surveillance of neighborhoods where people of colour live, a lack of discretion in the treatment of clients in the courtroom and during sentencing, and the funneling of people into the criminal justice system.

Hart-Dowhun is also frustrated with the continued over-representation of Indigenous people in prisons. A major milestone in cross-cultural respect and recognition came in the late 1990s, following the trial of Nanaimo, B.C.'s Jamie Gladue. Gladue is an Indigenous woman who pleaded guilty to killing her common-law husband in 1995. Sentenced to three years in prison, Gladue argued that the courts failed to think about alternative punishments that considered the history and condition of Indigenous offenders' lives. In 1999, the Supreme Court of Canada ruled that a judge must consider an Indigenous offender's history when sentencing them. According to Aboriginal Legal Aid in B.C., Gladue rights include "the challenges of colonization" faced by First Peoples, "such as racism, loss of language, removal from land, Indian residential schools, and foster care." They add:

Judges must keep this information in mind and consider rehabilitation and community-based sentencing options other than jail. The goal of a restorative justice approach is to balance accountability and rehabilitation.

Yet Gladue is "quite old at this stage," says Hart-Dowhun, and "statistically, the situation with Indigenous People being overrepresented in our prison system has only gotten worse." While Gladue legislation had good intentions, "it's not helping. We need to try something else. I think we probably need to look beyond the sentencing in the courtroom" for change.

"I don't think leaving it to judges on sentencing will work," adds Hart-Dowhun. "I think we need to look at the source and the way we're policing communities. Indigenous People and Blacks in Canada are over-policed and overcharged and we need to look at policing and start there. Diverting people away from the sentencing courtroom might be a good start."

Room for Improvement

There is no shortage of promises for improvement.

In March 2020, Legal Aid Ontario released a Racialized Communities Strategy outlining a 10-year plan with 17 initiatives. These initiatives include:

- access to justice,
- heightened services to racialized communities, and
- tackling systemic discrimination in the justice system, with a focus on "amplifying the voices of racialized communities".

JHS advocates a five-point plan to improve the corrections system. It includes:

1. respecting the presumption of innocence,
2. changing how we penalize addicts who commit crimes,
3. treating the mentally ill,
4. seeking proportionate and constructive penalties, and
5. looking at more effective ways to manage corrections.

Another major focus of the John Howard Society's work is to get the voices of inmates heard by the public in order to enhance public understanding of the issues. A podcast called "Voices Inside and Out" does just that.

In 2018, the federal government made a commitment to improve services to Indigenous inmates, inmates of Colour, and members of the LGBTQ2S+ community. They also committed to reducing the use of solitary confinement, improving rehabilitative programs, and providing better services for people with mental health issues as well as treatment for those with addictions. Finally, the federal government promised to improve nutrition and access to education.

Latimer notes that while federal funding may increase, money often goes towards more guards when there "should be more money for program officers." Program officers deliver initiatives focused on substance abuse reduction and violence prevention, helping guide inmates toward reintegration into society. Where we go from here remains to be seen.

John Cooper

John Cooper, EdD, is an educator and researcher who has taught journalism and corporate communications at Durham College and Centennial College.

Comparing Canada's Corrections to Europe, the United States and Aboriginal Communities

Charles Davison

How a society responds to and deals with its members who break or fail to follow its most basic rules is often rooted in its history and cultural values. Canada's background is intimately tied to British traditions and practices in light of our history as a colony from the 1760's up to the 20th century. In English history, crimes were thought of as serious acts committed against the King (or, on the rare occasion of having a female monarch, the Queen) and his efforts to keep peace among his peoples. As a result, criminals were punished severely in order to spread the word that such misconduct would not be tolerated. For centuries, minor crimes such as theft, poaching, and counterfeiting and forgery were punishable by death. (In 1805, a man was hanged for using a forged ace of spades in a card game). Other crimes brought gruesome public punishments such as drawing and quartering. Even when officials began restricting death and torture to the most serious offences, those punishments were often replaced by "transportation" – forcibly removing the convicted person to Australia or other British colonies. All of this was in the hope of ensuring that anyone tempted to engage in criminal behaviour would be persuaded not to do so.

Photo by Caroline Martins from Pexels

While some of the more extreme punishments had been abolished by the time the British were colonizing North America, the theme of harsh responses to any form of criminal misconduct continued (and, I suggest, even now continues). This provides the foundation for our response to criminal misconduct. To this day, "deterrence" remains a recognized goal of the sentencing process in Canada. Deterrence is the idea that by making punishments sufficiently harsh, persons tempted to engage in criminal behaviour will resist that urge, knowing they will suffer otherwise.

The United States and Europe

As is often the case, Canada now finds itself situated on a spectrum somewhere between the United States and Europe in the area of criminal sanctions and punishment.

The United States is infamous for prioritizing punishment of criminals. In many states the death penalty is still permitted and accepted. Imprisonment is often imposed on the basis that the convicted person will never be allowed out of a jail again while they are alive. This could be a sentence of "life without parole" or "consecutive life sentences". Or it could be a parole date set so far into the future (sometimes over 100 years) that the prisoner will be dead long before that date arrives.

On the other hand, in much of Europe the priority is on the rehabilitation and reformation of prisoners. A 2014 article compared the prison situations in the United States with those of the Netherlands and Germany. The article showed that conditions in those European countries were far more humane, and facilities were modern, properly heated and ventilated, and open. In the United States, prisons are often antiquated, run down and crowded.

Dutch and German prisoners were allowed to enjoy many of their every-day rights. They:

- wore their own clothing,
- made their own meals,
- worked or attended classes in the correctional facility, and
- often were allowed to be away from the institution to be with their families or seek employment.

In American jails and institutions, life is highly regulated and restricted. Prisoners:

- are issued jailhouse clothing,
- eat the meals prepared by kitchen staff (usually fellow prisoners) at the times directed by the authorities, and
- have limited opportunities for schooling or training which will be useful at the end of their sentences.

In the United States, even non-violent prisoners are often sentenced to very long terms of imprisonment. The use of mandatory minimum sentences is frequent.

The Situation in Canada

In many ways, the Canadian situation tends to follow that of our American neighbors, especially where the need for security is considered high. In high- and medium-security institutions, prisoners wear prison-issued clothing and all activities are closely regulated and supervised by prison staff. Security conditions are usually very restrictive. Some of our penitentiaries still use fairly old buildings. (Part of Stony Mountain Institution outside of Winnipeg was built in the 1870's, and Dorchester Penitentiary opened its doors in 1880. Both are medium-security institutions with minimum-security facilities attached.)

However, as the need for security decreases, the opportunities for both formal and informal efforts at rehabilitation increase. Over the years, some of Canada's minimum-security institutions have attracted attention (and sometimes political criticism) for the relative lack of supervision and amount of freedom granted to inmates. The descriptions of the Dutch and German prisons mentioned in the 2014 article could well match Canadian minimum-security facilities.

Aboriginal Concepts of Justice

Perhaps one of the starkest examples of a difference in how societies respond to wrongdoing and misconduct by their members can be found within Canada itself. We can compare our approach to punishment over the last 200 years with how Indigenous cultures and groups dealt with and addressed similar problems before the imposition of English-based laws and punishments.

As was common in other tribal settings around the world, the focus among Aboriginal communities in Canada was healing and reconciliation between the persons in the

community most directly affected by the misconduct of an offender. This is referred to as "Aboriginal concepts of justice". (I caution the reader that in such a brief article as this, I can only offer generalized descriptions. We must remember that among the many Indigenous groups across Canada there existed differences – sometimes fairly significant – in how misconduct was dealt with and addressed.)

Aboriginal societies usually placed less emphasis on concepts of punishment and instead attempted to ensure reconciliation between the offender and persons harmed by the misconduct. Such an approach was often necessary to preserve peace and unity within the community, whose long-term survival depended on harmony and cooperation among its members.

In at least some situations, the group's response to bad conduct was made by consensus among all members of the community. Sanctions could range from ridiculing the person and subjecting them to public shaming for their bad behaviour, through to requiring the offender provide restitution of some sort to victims. In some groups, theft was sometimes punished by allowing the victim and their family to take as much as they could carry away from the home of the thief.

In some situations, the sanctions were born by the entire family of the offender. And depending on the wrong done, sometimes the entire family of the victim was entitled to compensation of some sort. For example, sometimes when a murder had been committed, emphasis was placed on atonement and reparations on a family-wide basis. This was done to hopefully avoid a long-term blood feud between the families which would have had more devastating results for the survival of the entire community.

If a murderer (or their family) refused to abide by the group's decision as to how to make amends, more extreme measures, including violence and banishment, might be used to protect the overall well-being of the society. If the offending behaviour was serious enough and the survival of the group placed at risk, the community might have decided banishment and even death was appropriate. These steps were not taken as a form of punishment or retribution for the wrong-doing. They were more often considered necessary if the tribal group was to survive together over the longer term.

Time for Change

While the Canadian-English belief in deterrence to prevent crime has many supporters – and while it likely does work to reduce at least some misconduct – one has to wonder whether a healing-focussed approach would be better in the longer term. In many cases, imprisoning offenders – and especially Aboriginal offenders – in harsh conditions in a facility hundreds or thousands of kilometers away from their homes and community support leads to more harm than good. Family relationships are disrupted, children grow up not knowing their parents, and offenders often return home angrier and more hurt than before. Without effective support and help to avoid further criminal behaviours, the offenders often relapse into their old habits and sooner or later return to prison to serve another sentence.

In recent years, Canada has started to examine whether there might be more appropriate and effective responses to criminal conduct. We have begun to look to our Aboriginal communities and traditions for ideas of more meaningful solutions to reduce re-offending rates, not only among Indigenous offenders but across all sectors of society. It is clear that harsh punishments have not worked particularly well. It is time to examine more of a healing-based approach to repair the harm done to our communities by on-going criminal misconduct.

AUTHOR'S NOTE | A true comparison of correctional systems around the world would take many more words than available for this short article. The above are simply generalized comments and observations about corrections in Canada, Europe, the United States and Aboriginal societies. Sources consulted in preparing this article include:

- "6 Reasons Why Prison Is Better In Europe Than America" by Erin Fuchs, published May 31, 2014 in *Business Insider Australia*
- *Report of the Aboriginal Justice Inquiry of Manitoba* by the Aboriginal Justice Implementation Commission, November 1999
- *The World Until Yesterday: What Can We Learn from Traditional Societies?* by Jared Diamond

Charles Davison

Charles Davison is the Senior Criminal Defence Counsel with the Somba K'e office of the Legal Services Board in Yellowknife, N.W.T.

The Many Faces of 'Corrections': A call for universal reform

John Winterdyk

A call for universal reform

> *In my study of our court and prison methods, I found… a great wastage of human lives – a failure to reclaim and utilize them.*
>
> E.N. Foss, 1914

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Perhaps the least understood part of our criminal justice system is the correctional or prison system. Why? Primarily because, while everyone knows that prisons are places where we detain those who have committed one or more serious crimes, very few people have been inside one. That is, aside from what we might see on TV shows (such as *Orange is the New Black* and *Prison Break*), the odd documentary (such as the 2016 Netflix series *Inside the World's Toughest Prisons* and the 1998 award-winning documentary *The Farm: Life Inside Angola Prison*) or news articles. However, most of us have likely had some contact, for one reason or another, with the police (such as for a speeding ticket or traffic violation, reporting some type of property damage, etc.).

Many of us have been inside a courtroom, but few of us have been inside a prison. Of those who may have been inside a prison, it was likely to visit someone being detained. And in that case, we only had access to the visiting centre. It should be no surprise that what goes on in our prison system, and in systems around the world, remains 'hidden' from the public. Yet, according to the World Prison Brief, there are currently over 10 million inmates worldwide on any given day. According to data from the United Nations, over the last 20 years the number of individuals, whether in remand or serving sentences in prison, has increased in most countries. The consequence of this trend places a significant burden (i.e., economic & social) on all societies. And collectively it undermines the UN's Social Development Goal (SDG) number 16 – to by 2030 achieve 'peaceful and inclusive societies, access to justice and accountable institutions'.

Although there are several different legal systems worldwide, the structure of criminal justice systems internationally usually consists of three elements:

1. law enforcement (the police)
2. the courts
3. corrections

While there are different policing and court systems, there are even more variations of

prison systems. For example, some of the primary prison systems globally include:

- juvenile, minimum, medium, and high-security prisons
- military prisons
- psychiatric facilities
- federal vs. provincial prisons
- jails vs. prisons

There is a respectable body of cross-cultural or comparative studies about policing and judicial systems. However, there is comparatively less of such research on corrections or prison systems. Yet, imprisonment represents the most extreme restriction of a person's liberty. From a legal, governance and human rights perspective, imprisonment is deserving of greater scrutiny. For example, the recent attention given to 'defunding the police' leaves out the correctional system. Yet, as the Canadian Office of the Correctional Investigator's website shows, there is no shortage of 'complaints' and inquiries into what goes on within prison walls.

This article offers a brief overview of how prison systems have evolved and a snapshot of some of the different prison practices globally, before concluding with a recommendation for prison reform.

Penology an evolving construct

When one asks, "how should an offender be punished or held accountable?", there is no universal standard. (The United Nations' 1990 declaration Basic Principles for the Treatment of Prisoners has guidelines which are not legally binding on its signatory members.) Our response to 'bad' behaviour depends on our social, cultural, political and legal context. Overall, there is some sort of normative social or group disapproval. But this is a vague concept, especially in countries like Canada where there is considerable diversity in our values and norms.

There are three broad ideologies or responses to correctional practices internationally:

1. punishment
2. treatment
3. prevention

The practices are not mutually exclusive and may overlap, depending on the correctional program's level and type.

Punishment is the oldest and most used societal response to a wrongdoer. Punishments range from simple detention to the death penalty in some countries. There are three general rationales for using punishment:

1. retribution (getting 'just deserts' or accountability for one's crime)
2. deterrence (assuming we are capable of free will such that the risk of (severe) punishment deters possible offending)
3. incapacitation (removing the offender from society, such as by detaining them)

Treatment dates to the Enlightenment period (1715-1789), which saw a more humane response to criminal behaviour. During this period, criminals were seen to suffer from some ailment or 'sickness' that could be treated. There are four primary forms of the treatment approach:

1. medical model (programs that diagnose inmates' 'ailments' and use the appropriate treatment)
2. reformatory mode (programs that teach basic life and job skills)
3. reintegration model (programs that try to create mutually acceptable resolutions between the offender and victim(s))
4. treatment model (programs such as anger management or cognitive behavioural courses, family intervention initiatives, etc.)

(See Winterdyk & Manning, 2020, 20-21.)

Prevention is the most recent response that emerged as an alternative to the questionable effectiveness of treatment and punishment. There are three major categories of prevention strategies:

1. primary prevention (for example, targeting high-risk individuals living in socially-economically disadvantaged settings or communities)
2. secondary prevention (for example, youth programs in high-risk areas, neighbourhood dispute centres)
3. tertiary prevention (for example, community-based corrections)

Although beyond the scope of this article, I note that globally and regionally, the response to crime is like a pendulum whose weight is not perfectly balanced. Worldwide data shows that how a prison is governed depends on many factors, such as cultural values, political ideologies, crime trends, etc.

Not all justice is equal

A notable difference between prison system practices around the world is the incarceration rates. In Canada, the incarceration rate was 114 per 100,000 in 2020 – one of the highest in the 'developed' world. By contrast, the incarceration rate ranges from 800 per 100,000 in North Korea and 716 in the United States, to a low of 51 in Japan and 37 in Iceland. Several countries still have the death penalty (for example, Afghanistan, China, Egypt, Iran, Japan and the United States, among others). Overcrowding is also a universal issue, with it being a bigger issue in some countries than in others.

The signing of the United Nations' *Convention against Torture* in 1987 banned torture. However, according to Amnesty International, various forms of torture are still common in certain countries. Other countries have rejected torture, such as Norway, whose system is among the most humane. Even though Canada ratified the UN Convention, a 2016 report found that more than 1,600 inmates suffered solitary confinement at two Ontario jails over five months. Many were Indigenous people (Caplan, 2016).

Another example of detention variation, globally, is the use of pre-trial detention. In Canada, approximately 39% of suspected offenders are held in pre-trial detention before appearing in court. In the United States, only 22% of alleged offenders are held in pre-trial detention. At the other end of the spectrums, Venezuela detains up to almost 69% while the U.K. detains around 11%.

I could discuss many other issues. However, I would like to share a few basic facts that speak to the limits of all prison systems. Despite various rehabilitative initiatives in prisons around the world, reoffending rates remain high. Also, despite the array of models and philosophies used to detain and rehabilitate prisoners, the financial return on investment cannot be justified. This is especially when one realizes that corrections cannot fix problems that stem back to difficult childhood experiences.

However, rather than end on a pessimistic note, there is some evidence that it is possible to create prison environments with demonstrated success in 'correcting' inmate behaviour.

At the end of the day: dignity and decency

Without going into detail, there are isolated examples of prison practices that are 'relatively' effective. And ironically, as little as the public might know about the prison system, the positive indicators speak to a common theme that most global community citizens can relate to. In countries like Norway and Denmark, prisoners are treated with dignity and decency. For example, the prisoners and guards wear regular clothes and there are no evening lockdowns. The research

shows that reoffending rates are less than half of the more conventional prison models. Operating costs are also notably lower than in most other countries.

COVID may have given us an excellent opportunity to question many of the correctional practices we take for granted. It is perhaps time (if not long overdue) to re-evaluate what we mean by justice and corrections! Rather than focus on rehabilitation, the prison system needs to introduce reforms that ensure a humane treatment that respects prisoners' dignity and decency and align with the SDG number 16.

AUTHOR'S NOTE | The following resources were consulted in preparing this article:

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John Winterdyk

Prof. John Winterdyk is affiliated with Mount Royal University in Calgary, Alberta.

Transgender Inmates in Canada

Myrna El Fakhry Tuttle

Individuals may identify with a gender that goes along with their sex given at birth, they may identify with a gender that is different from their sex given at birth, or they may identify with a non-traditional notion of gender. "Transgender" characterizes those who identify with a non-traditional gender.

The Ontario Human Rights Commission (OHRC) defines **gender identity**:

> *It is [a person's] sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex.*

The OHRC also clarifies that **gender expression** can include "behaviour and outward appearances such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender."

Correctional institutions used to place transgender inmates according to their sex assigned at birth instead of the gender they identify themselves with (their gender identity). Transgender prisoners in Canada usually face discrimination and intimidation, and exposure to different forms of abuse.

So how do federal, provincial and territorial laws or policies protect transgender inmates?

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Federal

Bill C-16

On June 19, 2017, Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code*, became law. Bill C-16 amended the *Canadian Human Rights Act* and the *Criminal Code*. This Bill "protects individuals from discrimination within the sphere of federal jurisdiction, as well as protecting against hate propaganda and hate crimes, on the basis of gender identity and gender expression."

The Bill amended section 3(1) of the *Canadian Human Rights Act* by adding "gender identity" and "gender expression" among the prohibited grounds of discrimination. The amendment prevents the federal government from discriminating based on gender identity and gender expression, including in its prisons.

Bill C-16 also amended two parts of the *Criminal Code*:

1. It added "gender identity or expression" to section 318(4) of the *Code*, which defines an identifiable group for the purposes of advocating or promoting genocide (section 318) and inciting hatred (section 319).
2. It added "gender identity and expression" to section 718.2(a)(i) of the *Code*, which deals with sentences for hate crimes. This section allows courts that impose a

sentence to take into account evidence that the offence was motivated by bias, prejudice or hate based on a person's gender identity or expression. It means judges should consider hatred based on gender identity or gender expression.

The Correctional Service Canada

In 2017, Prime Minister Justin Trudeau promised to make sure transgender inmates are placed in prisons based on their gender identity. He stated:

> *I will make sure we look at it and we address it and we do right in recognizing that trans rights are human rights and we need to make sure we are defending everyone's dignity and rights in every way we can.*

After that promise, the Correctional Service Canada (CSC) – which governs the federal penitentiary – changed its transgender inmate placement policy. The CSC's old policy was to place transgender prisoners according to their sex assigned at birth.

About the old policy, Boyer, Odeyemi and Fletchers stated:

> *As recently as January 2017, the CSC policy dictated that trans prisoners be assigned to either men's or women's penitentiaries based on their pre-operative sex. Consequently, trans women who had not undergone gender affirmation surgery were forced to live in men's prisons instead of with the gender they identify with. This CSC policy has led to extreme difficulties for these women, who are often subjected to sexual harassment and assault. Frequently, they are sent to solitary confinement or are otherwise isolated for their protection.*

However, in December 2017, the CSC adopted an interim policy of placing transgender inmates according to their preference, "regardless of their anatomy (sex) or gender on their identification documents, unless there are overriding health or safety concerns which cannot be resolved." This interim policy gives transgender inmates in federal prisons the "same protections, dignity and treatment as others". According to the interim policy:

> *Steps must be taken to maximize the privacy and confidentiality of any information related to an offender's gender identity. Information about an offender's gender identity will only be shared with those directly involved with the offender's care, and only when relevant. Any conversations or consultations amongst staff or with the offender, including discussions regarding cell sharing and intake interviews, must occur privately, out of hearing range of anyone else that does not need to know.*

In addition, the 2017 Gender Dysphoria policy states that a prisoner is considered for sex-reassignment surgery if they have lived in an identity-congruent gender role for twelve continuous months and a specialist physician recommends the surgery. The CSC will pay the cost of the surgery and will proceed without delay to determine the timing of the surgery.

Also, under this new policy, "the Institutional Head will ensure that staff who have regular contact with trans prisoners have the necessary knowledge to effectively respond to their needs. Trans prisoners will be permitted to wear clothing appropriate to their self-identified gender."

In 2017, the federal prison service approved for the first time to move a transgender woman, Fallon Aubee – upon her request – to a women's prison based on her gender identity.

In the 2019 case of *Boulachanis v Canada (Attorney General)*, Justice Grammond of the Federal Court granted a transgender woman, Jamie Boulachanis', application for an interlocutory injunction requesting she be transferred to a women's prison. Her court application came after the CSC denied her transfer request. Justice Grammond stated:

> *Ms. Boulachanis's position is straightforward: keeping her in a men's institution is discriminatory, and in addition, this violates the interim policy. Since she is legally a woman, she has the strict right to be accommodated in a women's institution … The interim policy the Service adopted in December 2017 was also based on the idea that respecting the right to equality of trans people required that their choice to be in a men or women's institution be respected. (See paras 30 and 36.)*

Provincial & Territorial

Most provincial and territorial human rights legislation have added "gender identity" and "gender expression" to the list of prohibited grounds of discrimination. However, most provinces and territories do not have any particular guidelines on placing transgender inmates according to their sex given at birth or on their gender identity.

Photo from Pixabay

In 2012, Ontario was the first province in Canada to protect transgender rights. Ontario enacted *Toby's Act* (*Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression*). This Act amended the *Ontario Human Rights Code* by acknowledging gender identity and gender expression. And in January 2015, Ontario became the first province to allow transgender inmates, "who have not undergone gender affirmation surgery", to be placed in facilities based on their self-identified gender. Ontario allowed inmates to be referred to by their chosen names and preferred pronouns.

In 2016, British Columbia amended its *Human Rights Code* to add "gender identity or expression" as a prohibited ground of discrimination. Also in 2016, British Columbia became the second province to implement new policies that determine where to place inmates based on their gender identity. In addition, transgender inmates can "keep items with them that are necessary to expressing their gender and, when possible, they will be integrated into the general population, rather than being placed in solitary confinement."

In 2017, the Yukon amended its the *Human Rights Act* and *Vital Statistics Act* to protect transgender individuals from discrimination on the grounds of gender identity and gender expression. The *Vital Statistics Act* currently allows changing the sex on a birth registration without any surgery. Moreover, according to the Yukon Corrections *Adult Custody Policy Manual*, "trans prisoners are placed according to their self-identified gender or housing preference unless there are overriding and/or safety concerns that cannot be resolved." This policy grants trans prisoners the right to "choose to be strip searched by either a male or female staff member or choose a split search." (A split search is where a "female officer searches the top part of a transgender woman and a male officer searches the bottom part".)

No other province or territory has any specific policies for transgender inmates.

As for Alberta, it amended the *Alberta Human Rights Act* in 2015 to include "gender identity" and "gender expression" as prohibited grounds of discrimination. In 2018, the Lethbridge Public Interest Research Group, the University of Lethbridge Student Union's Pride Centre, OUTreach Southern Alberta Society, lawyer Miranda Hlady and others contacted the Alberta government to address "policies concerning transgender, binary and two-spirited inmates housed at provincial correctional facilities." Unfortunately, nothing has changed. Alberta still does not have any policies on the placement of transgender prisoners.

Conclusion

Alberta and other provinces and territories should follow Ontario, British Columbia and the Yukon. They should take steps to protect transgender inmates by placing them in institutions according to their gender identity and gender expression. Without any guidelines regulating the situation, provincial prison authorities have unrestricted powers in dealing with these inmates and may abuse these inmates' rights.

Most of the time, transgender prisoners are isolated and kept in more secure prisons for protection reasons. But that should not be the case. Transgender inmates should be able to live according to the gender they identify with and should be able to express their gender as they wish without fear or discrimination. These inmates should have the same protection, treatment and status as other inmates.

Myrna El Fakhry Tuttle

Myrna El Fakhry Tuttle, JD, MA, LLM, is the Research Associate at the Alberta Civil Liberties Research Centre in Calgary, Alberta.

Special Report Lesser-known Alberta Laws

What You Didn't Know was a Crime in Canada

Melody Izadi

Lesser known offences in the Canadian *Criminal Code* that are still on the books in 2020

***Disclaimer**: This article is not meant to be substituted for any legal advice.*

Photo from Pixabay

The Government of Canada recently gave the *Criminal Code* a legal face lift after conducting a detailed review to eliminate all the excess and outdated (err, weird) laws. Some of Canada's most archaic criminal acts were repealed recently and taken off the books. For example, up until December 13, 2018, sorcery, enchantment and fortune telling for pay was a criminal offence. But there still remains some interesting, unique and lesser known criminal offences. Here are a few of my favourites:

1. Moon crimes

You can be charged for a criminal offence when you're on the moon! That's right folks, section 7(2.3) of the *Criminal Code* says a Canadian crew member can be convicted if:

1. they commit an act or omission that, had it been committed on earth, would be an indictable offence, AND
2. they commit that act while on or in relation to a flight element of the Space Station or by any means of transportation to or from the Space Station.

So, if Sandra Bullock was a Canadian crew member, I wonder if the ending of *Gravity* would have been any different, hmm…

2. Seducing the military

Please don't seduce a member of the Canadian Armed Forces from their duty and allegiance to Her Majesty. If you do, sections 53(a) and 53(b) of the *Criminal Code* say you could face up to 14 years of jail. Attempting to incite or induce them to commit a traitorous or mutinous act is also a no, no!

3. Other military distractions

While we're on the topic of things not to do while interacting with a member of our Canadian Armed Forces: section 62(a) of the *Criminal Code* makes it an offence to interfere with, impair or influence the loyalty or discipline of a member of the force. No silly faces during cadet training, please!

4. Stealing ships

Did you know that if you are in Timbuktu and you steal a Canadian ship, you can face serious jail time? Whether you are in or out of Canada, if you steal a Canadian ship, it's an offence according to section 75(a). Leave your Jack Sparrow inclinations at home!

5. Fight clubs

Unless you're an amateur athlete or a boxer, no "Fight Clubs" allowed! According to section 83 of the *Criminal Code*, everyone who engages (whether as a fighter or a referee), advises, encourages, promotes, reports or aids in medical care at a prize fight can be found

guilty of an offence. And face up to two years of jail!

6. Fake terrorism

Now while we are all aware that terrorism is very illegal, did you know that inciting a hoax about a terrorist attack or terrorist activity occurring is also illegal? I guess you can get in trouble for fake news according to section 83.231 of the *Criminal Code*.

7. Lost guns

Do you remember your lost and found box at school where sad, lonely mittens waited until their rightful owner retrieved them? Well, tuck your inner child away because if you have lost or found a firearm and don't report it to the authorities, you can be jailed for up to 5 years per section 105 of the *Criminal Code*!

8. Burying bodies

If Norman Bates were on Canadian soil, he would probably be prosecuted for violating section 182(a) of the *Criminal Code*. If you bury a corpse or human remains incorrectly, you can face some serious jail time.

9. Setting traps

If you get inspired as you watch *Home Alone* this holiday season, please keep one thing in mind: don't try this at home! Setting a trap that is likely to cause death or bodily harm can land you a criminal record and up to 5 years in jail according to section 247(a) of the *Criminal Code*.

10. Used is not new

Thinking about starting your own store front? Great! Just don't pretend like used items are new ones when you sell them. Or you could go to jail for up to two years because you violated section 411 of the *Criminal Code*.

11. Growing gold

This one I'm just going to let you read for yourselves:

> ***451*** *Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years who, without lawful justification or excuse, has in their custody or possession, knowing that it has been produced or obtained by impairing, diminishing or lightening a current gold or silver coin,*
>
> *(a) gold or silver filings or clippings,*
>
> *(b) gold or silver bullion, or*
>
> *(c) gold or silver in dust, solution or otherwise.*
>
> *Section 451 of the Criminal Code*

12. Seditious libel

Finally, everyone who speaks seditious words, publishes seditious libel or is party to a seditious conspiracy can go to jail for 14 years via section 61 of the *Criminal Code*. What are seditious words you ask? According to section 59 of the *Criminal Code*, they are "words that express a seditious intention." Don't be seditious.

A few of my favourite things…

And there you have it! A who's who of lesser known and sometimes obscure criminal offences in Canada that are still currently on the books. Unfortunately, frightening or alarming the queen via section 49 and duelling via section 71 were only current until December 13, 2018. Otherwise, they would have definitely made my favourite things list.

EDITOR'S NOTE | Just in case you are still wondering, the definition of "seditious" is "inciting or causing people to rebel against the authority of a state or monarch" (*from Oxford Languages*).

Melody Izadi

Melody is a criminal defence lawyer with the firm Caramanna Friedberg LLP, located in Toronto, Ontario.

Property Laws You've Maybe Never Heard Of

Sherry Simons

Did you know that each province in Canada has different property laws?

Property laws deal with buying and selling land, dividing property at the end of a relationship, property liens and claims, registering interests in property, buying and selling goods, inheritances, etc.

The reason for each province having different property laws goes all the way back to the founding of our *Constitution Act* in 1867. In this Act, the legislators decided which areas of law the federal government would control and which areas the provinces would control. Property laws are listed as a provincial matter in this Act, which is why each province has different laws relating to property.

Property is categorized as real property or personal property.

Real property is land, homes, mine and mineral rights, etc. Personal property is all other property, such as vehicles, mobile homes, bank accounts, furniture, etc. Let's look at a few lesser-known real property laws in Alberta.

Land Registration Systems

Land registration systems are government registries that show who owns particular real properties.

There are two land registration systems in Canada:

1. title registration, and
2. deed registration.

Alberta, British Columbia, Saskatchewan, Manitoba and most of Ontario have a title

Photo by Kaboompics from Pexels

registration system based on the "Torrens" system. The Torrens system is a land registry method developed by Australian Robert Torrens in the mid-1800s. It was first used to keep track of the ownership of ships. The modern version of this system uses a centralized registry controlled by the government. The government guarantees the accuracy of its title registry and has a special fund to pay anyone who suffers a loss due to any errors in the system. It is the foundation of Alberta's *Land Titles Act*.

For example, when you buy a house in Alberta, your lawyer registers a Transfer of Title document with Alberta's Land Titles Office, which shows you as the new owner. The Land Titles Office produces a certificate of title that lists you as the current owner of the property. The certificate will also list any other person or company that has a current interest in your property, such as a mortgage registered by a bank.

Other provinces use the deed system. In this system, deeds to land and other documents that affect land (such as mortgages) are registered in a public registry system. However, the record is open to inspection, verification and challenges. The government does not guarantee ownership rights or

other claims to land under the deed system. Ontario, Nova Scotia and New Brunswick have made efforts to convert to the Torrens system. Quebec, P.E.I. and Newfoundland still operate using the deed system. For example, if you buy a house in P.E.I., you would register a document showing you are the owner but someone could challenge your ownership based on documents they have.

Land Ownership Rights

A person can have one of three ownership rights in land:

1. fee simple ownership
2. a leasehold interest
3. a life estate

"Fee simple" ownership gives an owner basic land rights. This basic ownership right is subject to public or government restrictions. For example, some land is designated for residential uses only, while other parcels of land are designated for commercial or farming purposes.

A leasehold interest is an exclusive right to use the land for a limited amount of time. If you have a lease interest in land in Alberta for longer than 3 years, you can register your interest with the Land Titles Office. The Land Titles Office can produce a certificate of title showing you as the current owner of a leasehold estate in that land.

Many do not know about another type of land interest, called a "life estate." This ownership right is valid for the lifetime of a particular person. Once that particular person dies, the right is extinguished and the ownership right to the land goes back to the original owner. A landowner can grant a life interest to someone else at any time. Life estates are not very common. We sometimes see these in estate situations where a life estate to land is given to a surviving spouse or other family member. For example, when a person passes away, their surviving spouse can have the right to live in their deceased spouse's house for the rest of their life.

Shared Ownership Rights

When there is more than one owner of a property, the owners should carefully document their type of ownership interest in order to avoid disputes in the future.

The first type of shared ownership is joint ownership or joint tenancy. The owners own the property together, and no owner has a distinct and separate interest in the property from the others. If one owner wants to sell or use the property, then all owners must agree. When one owner dies, the right to the property automatically passes to the surviving owners upon filing a proof of death document. This type of shared ownership is common for couples buying a house together.

Photo by Erik Mclean from Pexels

The second type of ownership is tenants in common ownership. In this case, the specific ownership right of each owner is separate and distinct. For example, two owners can own a parcel of land equally, with each described as an owner "as to an undivided ½ interest." The owners need to work together to maintain and protect the property and will be responsible for a share of property costs depending on how much of the property they own. Each owner can do as they wish with their separate share of property – the share can be sold, gifted, mortgaged, etc. As you can imagine, this can cause awkward problems. If one owner of a house decides to sell their share to

a stranger, the other owners have no choice but to share the property with the new owner.

If the certificate of title does not specify the type of ownership as between two or more owners, we assume the owners own the land as tenants in common.

Rights in Land

Height and Depth of Rights

Ownership rights to land historically included all rights to the surface of the land and extended below the surface all the way to the centre of the earth and up through the atmosphere to the boundaries of space. However, the government has restricted these rights over time. Land rights today typically exclude all rights to mines and minerals (e.g. gold, silver, precious stones, copper, iron, petroleum, oil, natural gas, coal, limestone, marble, quartz rock, sandstone, shale, sand, gravel, etc.). Instead, the government owns these rights. Therefore, if there is oil beneath your land, the government owns it, not you. Additionally, there are often height restrictions on parcels of land for the common good, such as when a parcel of land is on a flight path or when a building or structure must conform to local bylaws or building codes.

Interestingly enough, the government has not captured ownership in all mines and minerals. There are persons who still specifically own mine and mineral rights. These mine and mineral rights have typically been passed down through generations. The rights often have been split up between children and other family members over time, with each mine and mineral right share becoming smaller and smaller. For example, if a parent owned ½ of a mine and mineral right and passed the right to four children, then each child would have a 1/8 share. If each of those children pass their share to their children, the share splits into smaller shares among several more people. To combat a never-ending dilution of mine and mineral rights, Alberta's *Land Titles Act* has a rule restricting how small mine and mineral shares can get. Anyone who tries to register a transfer of land that would create less than 1/20th of an interest in a mine and mineral right can be refused by the registrar (see s.52).

Condos

Condo ownership is a relatively recent development and is described in condo laws. For standard condos, a person owns legal title to their own unit as well as a share of the common property of the building. Common property includes areas used by all of the condo owners, such as the parking lot, garden spaces, outdoor sidewalks, hallways, stairwells and elevators. Because all condo owners share the ownership of the common areas, condo boards are set up on behalf of all owners to manage the building and maintain the common areas. Sometimes, a condo building will have separate legal titles for parking stalls and storage units associated with a condo unit. In rare cases, the titles to these parking or storage unit titles are mistakenly not transferred when the condo unit is sold. This leads to complications tracking down the old owner to transfer the titles. Because these titles are separate and distinct from the main unit, owners will get a separate tax notice for any such parking or storage unit and will have pay property taxes accordingly.

Ownership of Water

Now picture this: you found your dream country property with a beautiful babbling creek. Think you own that part of the brook on your land? Well you would be wrong! Generally, the government owns and controls water as a resource. Rules vary between provinces. In Alberta, the *Water Act* allows landowners to use water on their property for ordinary household purposes, including water for farm animals up to a certain amount per year without charge.

Improvement of Other's Land

Let's consider a different scenario. You buy some land out in the secluded countryside with amazing sunset views. You build your dream house, only to find out later that you built your house in the wrong spot. Your house is actually located on your neighbour's parcel. You fret as your money and hard work have instead gone to improve someone else's land. But fear not! There are laws designed to protect the efforts of those uncareful individuals who accidently improve a neighbour's land. Under section 69 the *Law of Property Act* in Alberta, you are entitled to a lien against the land you improved up to the value of the improvement. In some cases, you may even be lucky enough to have a court grant you ownership of the part of the land that you improved, as long as you pay the owner for the land you acquire.

Adverse Possession

As a last point, let's talk about a term commonly known as "squatter's rights". More properly known as adverse possession, it is true that in some instances a person who lives on another person's property without permission for a certain amount of time (at least 10 years in Alberta) can actually gain ownership rights to that property. If you find someone living on your land who does not have permission to be there, your best course of action is to take immediate steps to have them removed.

Sherry Simons

Sherry Simons has been practising law in Edmonton since 2014. She has a successful practice focused on real estate, wills and estates, corporate matters, and policy drafting. In her spare time, Sherry likes to hike with her dog, bake, and travel.

You Can Officiate Your Friends' Weddings!

Victoria Chiu

Did you know you can officiate your friends' and family members' marriage ceremonies in Alberta? For a long time, only appointed civil marriage commissioners could officiate weddings in Alberta. The provincial government recently changed its policies to allow members of the public to perform these ceremonies. The new rules allow any Canadian permanent resident over the age of 18 to perform a non-religious ceremony in Alberta for one day free of cost by becoming a temporary marriage commissioner.

Who can officiate a marriage in Alberta?

Civil marriage commissioners appointed by the provincial government, registered clergy and temporary marriage commissioners can all perform in-person marriage ceremonies in Alberta. "Zoom" weddings and other teleconferencing arrangements where the officiant is not physically present to perform the marriage are not allowed in Alberta.

What is a temporary marriage commissioner? Who can become one?

Temporary marriage commissioners can perform one non-religious marriage ceremony on one specified day as long as they do not charge a fee. Any Canadian permanent resident over the age of 18 is eligible to apply. The application is free of charge.

The temporary marriage commissioner program has been around for a long time, but until very recently only certain categories of people could apply. These people included Members of Parliament, judges and lawyers. The general public could only apply to the program if they could prove no civil marriage commissioner was available on the marriage ceremony date. This was difficult to prove considering the large number of appointed commissioners. Because of these difficulties, the government opened these categories to include the general public.

Photo from Pixabay

How do you apply for a temporary marriage commissioner license? What materials will you receive?

You need to fill out a temporary marriage commissioner application. This application asks for your personal information, including your legal name, birth date and mailing address, as well as personal information for the people who want to be married. You will also need to give information about where and on what date the marriage ceremony will take place. You, as well as the to-be-married couple, must sign the application.

The application can take up to a week to process, but it is often faster than that. To account for potential delays, give yourself at least a week between the submission of your application and the proposed marriage ceremony date.

Once they have approved your application, the Alberta Vital Statistics office will email you a marriage commissioner license allowing you

to perform the marriage ceremony on the date you stated on your application. You will also receive:

- a suggested script for what to say during the marriage ceremony
- guidelines to follow before, during and after the marriage ceremony
- guides for filling out the Registration of Marriage and detaching it from the marriage license, and
- a blank Certificate of Marriage for you to fill out and print before the ceremony.

What is the difference between the Registration of Marriage, a marriage license and the Certificate of Marriage?

The couple whose ceremony you are officiating must get a two-page document from an Alberta registry sometime in the 3 months before the ceremony. The top part of this document is the Registration of Marriage, and the bottom half is the marriage license. The couple must give this document to you, the marriage commissioner.

Before performing the ceremony, you will fill in the witnesses' information and other parts of the document you are responsible for filling out. But no one may sign the document until after the ceremony. The people who will sign the document following the ceremony are the people who have just been married, both witnesses, and you.

After the ceremony, you must detach the marriage license from the Registration of Marriage. Then you have to mail the Registration of Marriage to Vital Statistics in Alberta as legal proof of the marriage within 48 hours of the ceremony. You must keep the marriage license for your own records.

The Certificate of Marriage is a separate document prepared by you as the marriage commissioner. You must sign this document immediately after the ceremony and give it to the married couple. Vital Statistics does not get a copy of the Certificate of Marriage.

What do you need to do to prepare?

Preparing for a marriage ceremony as a temporary marriage commissioner is simple. You should:

- print the Certificate of Marriage in colour on stiffer paper, and
- figure out what you would like to say during the marriage ceremony.

Although Vital Statistics gives you a suggested script of what to say during the ceremony, you do not need to follow it word for word. You must ensure each person getting married says both of the following legally binding statements in their vows:

- "I do solemnly declare that I do not know of any lawful impediment why I, (name) may not be joined in matrimony to (name)."
- "I call on those persons present to witness that I, (name), do take you, (name) to be my lawful wedded (wife/husband/spouse)."

However, beyond these statements, you are not required to say any particular passages. You must ensure that the couple is fluent in the languages spoken during the ceremony in order for the marriage to be valid.

As a temporary marriage commissioner, you cannot say any religious statements, including blessings and prayers, during the marriage ceremony. Locate a member of the clergy if the couple would like these kinds of statements made during the ceremony.

Additionally, ensure there are two credible adult witnesses available for the marriage ceremony. These individuals will also need to be fluent in the languages spoken at the marriage ceremony. They cannot be cognitively impaired and must fully understand the forms they will sign related to the marriage.

You should fill in the names of the witnesses on the Certificate of Marriage and Registration of Marriage (without signatures) before the ceremony. All relevant parties will sign the Registration of Marriage after the ceremony is finished.

What do you need to do after the ceremony?

After the ceremony, the newly married couple and their witnesses must sign the Registration of Marriage. As the marriage commissioner, you must also fill out a portion of the Registration of Marriage certifying that you performed the ceremony.

Once the Registration of Marriage is complete, detach the marriage license portion at the bottom of the document. Keep the marriage license for your own records. You must forward the Registration of Marriage portion of the document to Vital Statistics within 48 hours of the marriage ceremony. You typically do this through regular mail.

You can correct errors with an amendment through Vital Statistics. Vital Statistics will ask for evidence to support the correction and prepare an affidavit for you to sign.

Of course, you cannot marry people who are not eligible to be married in Alberta.

What do couples need to get married?

As previously mentioned, to get married in Alberta, you need a valid marriage license. This license costs $40, plus a service fee based on your registry agent. A couple can apply for a marriage license together at the registry agent office. Each person getting married will have to provide acceptable identification, swear one or more affidavits, and provide required personal information. You cannot be heavily medicated or under the influence of other drugs or alcohol.

Marriage licenses are immediately valid once they are issued—meaning you can have a marriage ceremony on the same day the license is issued. Marriage licenses stay valid for three months from the day they are issued. A couple can be married at any date within that three-month period as long as the marriage ceremony takes place in Alberta.

Who can get married in Alberta?

To get married without anyone else's consent, both people getting married must be at least 18 years old. If you are older than 16 but younger than 18, you can get a marriage license if both your parents or legal guardians give their consent to the marriage. Both people must be currently unmarried. Both people cannot be related to one another as grandparent, parent, child, sibling or grandchild, by whole blood, half blood or adoption. There are no citizen or residency requirements—neither person is required to be an Albertan or Canadian, but the marriage itself must take place in Alberta.

If either of you are divorced, you must have proof of divorce to apply for a marriage license. This proof of divorce must be the final document (such as a Certificate of Divorce), and the document must be in English. If either of you are widowed or have never been married, no additional documents are required.

Victoria Chiu

Victoria Chiu is a law student at the Faculty of Law, University of Alberta and a volunteer with Pro Bono Students Canada.

HAVE YOU HEARD? | Upcoming Webinars & New Resources

Lesley Conley

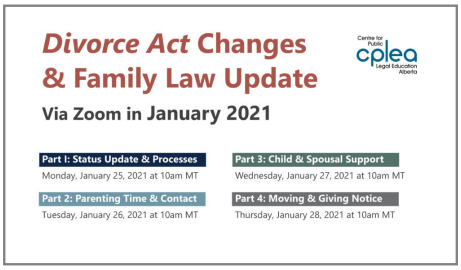
Upcoming Webinars

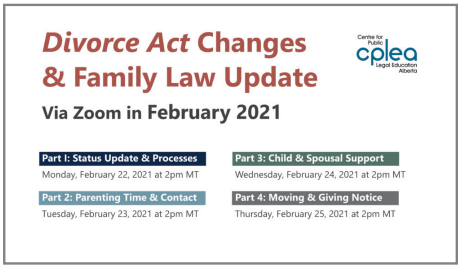
This webinar for intermediaries discusses common landlord and tenant issues. Register online on Eventbrite.

Changes to Canada's *Divorce Act* come into effect on March 1st. This 4-part series educates intermediaries on these changes and provides a general family law update.

This series is offered in January and again in February. Register online at Eventbrite. *(Please note, you must register for each of the 4 parts separately.)*

COMING ATTRACTIONS | Webinars on other topics such as Sexual Violence, Planning for the Future and Employment Law are in the works for the Spring of 2021. **Stay tuned for more details!**





Domestic Violence and Access to Justice

Law Professors Jennifer Koshan, Janet Mosher and Wanda Wiegers have released a new ebook called ***Domestic Violence and Access to Justice: A Mapping of Relevant Laws, Policies and Justice System Components Across Canada***. This comprehensive resource is freely available on CanLII.

This book was written with the goal of being paired with Linda C. Neilson's *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* to create a comprehensive set of information needed to navigate this area of law.

Families & the Law Series

With the *Divorce Act* changes coming into effect on March 1st, we've updated and revamped our popular Families & the Law series. **Watch for it to be released on March 1st.** It will be available in print or to download – for free! French versions are also coming!

Lesley Conley

Lesley Conley is a Project Coordinator with the Centre for Public Legal Education Alberta.

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Worker Status Pending Arbitration

Peter Bowal

Unionized employees terminated for cause from their jobs can – and often do – ask their unions to grieve the termination. A termination for cause means the employer has grounds (cause) to terminate the employee. This is different from a termination without cause.

Photo by BRRT from Pixabay

After filing the grievance, an arbitration process tests the grounds (cause) for termination. The Collective Agreement in force usually sets out the number of arbitrators, timelines, opportunity for mediation, exchange of documents and other procedures the arbitration will follow.

Every arbitration is different. But today it still looks much like regular civil litigation in the courts and generally takes a lot of time to complete. Few arbitrations wrap up within a year of the termination. The arbitration can even take several years to complete where there is more than one arbitrator, procedural wrangling or a long indulgence to write the decision.

So, is the fired worker still an employee after the termination until the end of arbitration?

We will call this limbo period the "interregnum".

Why is Interregnum Status Essential to Know?

Everyone wants to know what personal status they hold, as a matter of identity. We want to know whether we are a citizen, a manager, a member, a parent, a party to a lawsuit, a spouse or an employee.

Employment is a formal legal status. Many laws confer rights and benefits based on this status alone. For example, treatment under some legislation – such as employment insurance, taxation, human rights, employment standards, occupational health and safety, health care, privacy and workers' compensation – depends on employment status.

Common law and contractual rights and obligations are also impacted. Is one bound by post-employment obligations such as desisting from competition, solicitation and employer disparagement? Can one claim the corporate pension and other group benefits during the interregnum?

If a subordinate asks you for a reference, can you state in that reference that you are still employed at the same organization with the same job title? When someone asks you socially what you are doing, is it honest to say that you are employed? If you apply for another job during the interregnum, can you accurately represent that you are currently employed in that job (despite having been terminated)?

The employer also needs to know your status during the interregnum as it will want to keep its records current. A significant suite of rights and obligations characterize employment. Employers have a very limited legal relationship with ex-employees, and vice versa. Former employers do not continue to control terminated employees.

Individual Contract of Employment versus Collective Agreement

Approximately 70% of all Canadian workers are non-unionized. Their legal status when terminated for cause is clear: they are no longer employees from the moment of termination. The employer's termination decision is final and the worker has no right to review by an arbitrator.

The fired worker can still negotiate a settlement if the former employer is willing, as a way to avoid litigation and mutually end the matter. Frequently, fired workers, usually with the help of a lawyer, negotiate small paid notice periods and change of the reason for termination (to resignation or lay off).

Or the fired worker may sue for wrongful dismissal to challenge the factual grounds for cause. If the worker wins in court (sometimes years after the firing), the judge usually orders compensatory damages (money). Reinstatement is rare.

In any event, the firing completely severs employments not governed by a Collective Agreement.

The question posed by this article, of employee status during the interregnum, therefore, only presents itself in a unionized workplace.

Determination Based On Collective Agreement and Facts

The first place to turn is the language of the Collective Agreement that covers the employee. What does it say, if anything, about the worker's interregnum status? A sample Collective Agreement reads as follows:

> *Where an Arbitration Board has been established, the staff member shall retain his or her appointment and the applicable salary and benefits unless and until the earlier of:*
>
> *a) the Arbitration Board determines that the staff member be dismissed and the Board of Directors act upon such decision, and*
>
> *b) one year following the termination decision.*
>
> (emphasis added)

Several observations flow from this provision. There is a short break in employment between the termination and establishing the arbitration board, although that period would likely not exceed a few months. Not only does the fired worker remain an employee for the lesser of a year or until the arbitration decision is rendered, but that fired employee also receives full pay and benefits throughout that time. In Collective Agreements that favour employees, pay and benefits sometimes continue until the arbitral decision has been issued.

The word "benefits" may need clarification. To what benefits does it refer? Can the employer withhold any benefits? The language above sets no restrictions and a reasonable interpretation would embrace all benefits the employee previously enjoyed (such as general pay raises, expense allowances, career development opportunities and access to software and an office).

If the job continues through the interregnum, pay and benefits should naturally follow, even without saying they do. This is why Collective Agreements also generally say that the employer can suspend (with or without pay/benefits) the fired worker until the arbitration is complete. This is a new leave or suspension after termination, and most Collective Agreements require new independent reasons for that. Usually this relief "of duties" does not also revoke "privileges". It may be challenging to enforce one's Collective Agreement rights during the interregnum, but the arbitration

hearing can address any breaches and a request for remedies.

In the absence of Collective Agreement direction on interregnum status, the post-termination actions of the employer will speak loudly. Listing the fired worker on the directory of employees, keeping the position open, and retaining the fired worker's office, phone number and email account all contribute to the impression that the employer considers the fired worker to enjoy an implicit ongoing relationship during the interregnum, even if on leave or suspended. Employer controls over the worker in some way, such as expressly declaring a suspension or leave (employers do not issue suspensions to strangers) and regulating speech or actions, imply an employment relationship.

Conclusion

Once employers fire employees, they usually seek to limit the fired worker's access to the worksite, servers, customers and other employees for operational morale and security reasons. Normally, they strenuously deny that the fired worker retains any kind of employee status for what could be a few years while the grievance arbitration on cause plays out.

The status issue is more pertinent for the fired worker who is otherwise powerless throughout the arbitral interregnum. The possibility of reinstatement and back pay further complicate the matter.

Overall, the Collective Agreement determines the worker's interregnum status. To the extent it is silent on the issue, the employer's actions and attempts to exercise any form of control over the fired worker may be telling.

Peter Bowal

Peter Bowal is a Professor of Law at the Haskayne School of Business, University of Calgary in Calgary, Alberta.

Famous Cases

Fraud in 3D: VisuaLABS

Peter Bowal

Between 1993 and 2001, VisuaLABS Inc. – the company built in Calgary, Alberta by Sheldon Zelitt – attracted thousands of investors, raised hundreds of millions of dollars in capital and grabbed the attention of the global technology press. The promise of two technologies Zelitt developed generated excitement.

Photo by XXSS IS BACK on Pexels

In 1998, Zelitt patented a method to modify cathode ray tubes, liquid crystal display (LCD) monitors and plasma display panels to produce three dimensional images. This 3D technology represented a highly awaited potential next-step in the display and broadcast industry. The ability to add depth to televisions and computer monitors without the need for special glasses or headgear, and without the vertigo often experienced with stereoscopic displays, was very attractive to the display and broadcast industries.

The second "GroutFree" technology was a method for joining smaller LCD panels into a single large display without visible seams. When GroutFree was unveiled by press release in 2000 at the height of the technology bubble, it was enthusiastically received. In 2000, display manufacturers were unable to make large LCD screens in a cost effective manner. These large LCD displays would offer better image quality, lighter weight and lower power consumption than the then-popular plasma display panel model. In 1999, the large flat panel display market was expected to grow from $250 million to $5 billion by the year 2005.

Zelitt grew his new company, VisuaLABS Inc., around these two technologies. At its height in early 2000, the company enjoyed a market capitalization of $300 million and thousands of investors.

However, none of this technology existed. It was all hype and deception.

This article describes how the justice system dealt with this major commercial fraud.

The Fall

Zelitt kept investors and the press informed of every development by issuing press releases, filing annual reports and maintaining a conspicuous presence at trade shows. However, Zelitt was also obsessed with security. Virtually no one saw detailed demonstrations. He claimed components came from a secret military lab in the United States. The technology was stored in a vault more secure than most banks. Security guards patrolled Zelitt's house.

Zelitt made other false claims of personal heroism. Yet he was a charismatic and fanciful storyteller, which elevated his promotions and product demonstrations.

The story started to unravel at VisuaLABS' Annual General Meeting on July 3, 2001. Sharp-eyed directors noticed that the Zelitt prototype was a store-bought 42" Sony plasma display panel with a thin line inscribed down the centre of the screen and a VisuaLABS label on it. The Board promptly fired Zelitt and share prices immediately

dropped by 98% – from $4.00 to 10 cents per share.

The next year, the Board of Directors settled with the Zelitts, allowing the Zelitts to keep one million VisuaLABS shares that were subject to harsh restrictions. If they sold these shares, the first proceeds would repay the $1.5 million borrowed by the Zelitts from the company in 2000 to purchase a mansion in Brázdim, Czech Republic. Soon VisuaLABS Inc. dissolved.

Regulatory Charges

Six months after Zelitt was busted, the Alberta Securities Commission (ASC) charged him with 11 Alberta *Securities Act* violations related to unlawful misrepresentations in press releases, annual reports and ASC filings. He pleaded 'not guilty' through his lawyer and fled with his family to his Czech mansion. A warrant was issued for his arrest.

At the trial *in absentia* on November 14, 2002, the Crown presented damning testimony through 23 witnesses, including VisuaLABS employees and technical experts, over seven days. Zelitt was convicted on all charges.

The judge said general deterrence, denunciation and the protection of the public were the overriding objectives in Zelitt's sentence. He said Zelitt fell into the category of maximum punishment for "the worst sort of offence by the worst sort of offender" because:

- Zelitt's actions were planned, deliberate and spanned more than six years,
- he breached his fiduciary duty to VisuaLABS, and
- his offences significantly impacted shareholders.

Zelitt had pocketed $5.7 million from his deception. He flouted the law by missing his own trial. Zelitt was sentenced to four years in jail and $1.85 million in fines, or a total of 8 years if the fines were not paid.

Zelitt continued during this time to live well and *incognito* with millions of dollars swindled from VisuaLABS investors in his mansion in the low cost Czech Republic – beyond the reach of Canadian law and its enforcement. There, he set up another company with advanced television displays and 3D technology that seemed familiar to VisuaLABS shareholders.

Since Zelitt had ignored its prosecution, the ASC pushed for criminal charges. More than a year after conviction on the provincial regulatory offences, Zelitt was charged with one count of fraud over $5,000 under the *Criminal Code* of Canada.

On March 22, 2004, Canadian officials requested the extradition of Zelitt from the Czech Republic, based on the serious criminal charge of fraud over $5,000. Fourteen months later, the Czech Republic confirmed the extradition. Zelitt was returned to Canada to begin serving his eight-year sentence at the Grand Cache Correctional Facility in western Alberta.

On July 18, 2005, Zelitt pleaded 'not guilty' to the criminal fraud charge. Later he changed his plea to 'guilty' and was sentenced to "time served" since he was already convicted of, and serving prison time for, similar provincial offences.

Fresh Appeals

On March 27, 2006, Zelitt applied to court to have his detention declared unlawful under the *Charter* rights to "life, liberty and security of the person" (section 7). He claimed he had been unlawfully extradited from the Czech Republic. The Court of Queen's Bench judge, with extensive reasons, concluded the extradition lawful.

Zelitt also returned to court in September 2006 to appeal his sentence, almost four years after the sentence was imposed and well after the deadline to challenge that sentence. On October 26, 2006, a different judge in the Court of Queen's Bench of Alberta reduced the

total imprisonment to 4 years and the fine to $1 million (less than the public cost of dealing with Zelitt).

Conclusion

In Canada, convicts are often released after they have served only one third of their sentence, and often less for non-violent crimes. Zelitt was released after 18 months in jail. It is thought he never paid his fine.

Upon release, Zelitt settled in British Columbia. This was around the arrival time of the unregulated online financing method known as "crowd-funding" to support new ventures. Zelitt wanted back in. According to a news report, in 2010 he registered a new company on Vancouver Island. Outside the reach of the British Columbia securities regulator, he solicited money to develop a "3-D optical inspection tool". In 2012, he refused to discuss his capital raising for his newest venture, promising: "you'll see them when they emerge."

After the initial conviction on all charges, the ASC had crowed, "we believe this is a major accomplishment." Most Canadians will not see any accomplishment. They will only see the massive failure of oversight and justice on the part of the corporate managers, the regulator, law enforcement and the judiciary. No one was held to account. From all apparent reckoning, with the exception of VisuaLABS employees and investors, everyone seems content with the legal process in this case.

As for Zelitt, and serving 18 months for his estimated $5.7 million loot, crime pays. If there was any "major accomplishment", that would be it.

Peter Bowal

Peter Bowal is a Professor of Law at the Haskayne School of Business, University of Calgary in Calgary, Alberta.

Human Rights

SCC Rules on Intellectual Disabilities and Equality

Linda McKay-Panos

A recent Supreme Court of Canada (SCC) case, *R v Slatter*, 2020 SCC 36, provided a strong statement about the treatment of evidence provided by witnesses who have intellectual or developmental disabilities.

Thomas Slatter was convicted at trial of sexually assaulting an intellectually disabled 21-year-old woman (J.M.). The defense appealed the decision to the Ontario Court of Appeal (ONCA). They argued, among other issues, that the trial judge erred by: "not properly assessing the reliability of J.M.'s evidence and failing to address the expert evidence of her suggestibility" (para 56).

At the OCNA, the defence counsel argued that, "while the trial judge thoroughly examined J.M.'s credibility, he failed to address his mind to the reliability of her evidence, especially her propensity for suggestibility" (para 57). The defence asserted that the trial judge's reasons were therefore insufficient (para 57).

Photo by MiamiAccidentLawyer from Pixabay

At trial, the Crown introduced evidence from expert Dr. Jones to prove elements of the two offences for which Mr. Slatter had been charged. However, defence counsel thoroughly cross-examined Dr. Jones on J.M.'s suggestibility (para 61). Further, in his closing submissions, defence counsel repeatedly stressed the importance of this aspect of Dr. Jones' evidence (para 62).

The majority of the ONCA stated (at para 70):

> *As the Crown correctly submits, a trial judge's findings on the credibility and reliability are entitled to deference … The problem in this case is that there is nothing upon which to defer on the issue of suggestibility. The trial judge made no finding. He may have found this evidence to be inconsequential. He may have inadvertently overlooked this aspect of Dr. Jones' evidence. It is a matter of speculation. The Crown essentially asks this court to review the record and, even in light of Dr. Jones' evidence, find that J.M.'s reliability was not compromised by her suggestibility during the early stages of the investigation. This was a matter for the trial judge. It is beyond the scope of proper appellate review.*

The ONCA majority allowed the appeal and ordered a new trial.

Madam Justice Pepall (ONCA) dissented. She noted that, in particular, the appellant relied on the testimony of Dr. Jones that people with intellectual disabilities are more likely to be suggestible, especially when the questioner is in a position of authority or trust.

Justice Pepall continued (at para 121):

> *Dr. Jones' evidence was that the complainant was suggestible to biased questions as compared to the "normative" population at the 75th percentile. An average "normal" person is at the 50th percentile; the complainant was at the*

> *75th percentile. Dr. Jones also testified that if the information is personal, significant, and emotive, a person with an intellectual disability is less suggestible. A sexual assault would decrease suggestibility because it is not only personal and significant, but it is also highly emotive.*

In concluding that this ground of appeal should not succeed, Justice Pepall provided five reasons (para 151):

> *(1) a review of defence counsel's closing submissions reveals that the trial judge was alive to the issue of the complainant's reliability, and its subset of suggestibility; (2) a review of the trial judge's reasons also reveals that the trial judge was alive to the issue of the complainant's reliability, of which suggestibility is a subset; (3) a review of the transcript of evidence at trial undermines the allegation of suggestibility; (4) there was a paucity of evidence to form the foundation for suggestibility; and (5) the evidence of the BBQ incident lends support to both the accuracy and veracity of the complainant's testimony.*

The Crown appealed the ONCA majority's ruling to the SCC.

In allowing the appeal, SCC Justice Moldaver (speaking for seven justices) stated:

> *We are all of the view that the appeal must be allowed, for the reasons of Justice Pepall, with which we agree.*
>
> *We would simply underline that when assessing the credibility and reliability of testimony given by an individual who has an intellectual or developmental disability, courts should be wary of preferring expert evidence that attributes general characteristics to that individual, rather than focusing on the individual's veracity and their actual capacities as demonstrated by their ability to perceive, recall and recount the events in issue, in light of the totality of the evidence. Over-reliance on generalities can perpetuate harmful myths and stereotypes about individuals with disabilities, which is inimical to the truth-seeking process, and creates additional barriers for those seeking access to justice.*

The SCC's judgment has been viewed favourably by equality and ability advocates. For example, Kerri Joffe, staff lawyer at ARCH Disability Law Centre and co-counsel with Suzan Fraser on the intervention, told *Canadian Lawyer*:

> *The Supreme Court's reasons really highlight the key principle that this coalition wanted to establish, namely that judges must assess the reliability and credibility of evidence given by women labelled with intellectual disabilities based on that woman's own individual ability to recall and recount the events, and not based on expert evidence that generally having an intellectual disability makes a person less reliable.*

Again, substantive equality requires that each witness be assessed based on their individual capacities rather than stereotypical generalities about people with disabilities.

Linda McKay-Panos

Linda McKay-Panos, BEd, JD, LLM, is the Executive Director of the Alberta Civil Liberties Research Centre in Calgary, Alberta.

Law & Literature

Stateless but Not Powerless

Rob Normey

A novel of Kurdish resistance and the quandary of human rights in our time

The most compelling new novel I read in 2020 is *Daughters of Smoke and Fire* from debut Kurdish-Canadian novelist Ava Homa. This dynamic advocacy piece for Kurds and women's rights in the Middle East was also the inaugural recipient of the PEN Canada Writers in Exile Scholarship.

Much of the novel is set in the Kurdish region of Iran. The story's fiery protagonist, Leila, is an aspiring filmmaker. Her journey is very much a coming of age tale, but one occurring amidst ongoing oppression and misogyny. Early on in the novel, we meet her vital friend Shiler, named after a flower that grows in abundance in the region. We are told the shiler flower knows no borders. It symbolizes the hope of a world one day that overcomes the mental borders of so many nation states, and the ethnic and racial discrimination faced by vulnerable minorities. In this novel, we see the incredible efforts to erase and discredit one particular minority, the Kurds of Iran. Kurds in other countries of the Middle East are also frequently on the minds of Leila and Shiler.

In a fascinating interview available online, Homa emphasizes her struggle to find a publisher for her manuscript. Apparently, the subject of Kurds – and particularly the role of Kurdish women standing up for their nation's dignity and fundamental rights in Iran – was an exotic tale too difficult to market. Eventually she found a publisher in Overlook Press. A further skirmish ensued over the cover. In the end, Homa prevailed in her effort to picture the shiler. The story she tells of the arm wrestling nicely encapsulates the extraordinary efforts Homa has made over many years to

Photo by Kelly Lacy from Pexels

identify and dramatize the Kurds. This large population remains stateless at this time and subject to widespread oppression in each of the Middle East countries where they reside.

The Kurds represent the largest national grouping in the world that has been denied its own nation-state.

This leads us to consider the rights (or the lack of rights) that adhere to those who are stateless. Hannah Arendt and others wrote in the mid-20th century of Jews, Roma and Spaniards (who, as supporters of the democratic Republic, were *persona non grata* after Franco's assent to power) who were, or who became, stateless. In the postwar era, one can point to other national groups denied statehood. This would include Tibetans, Uyghurs, Palestinians under occupation, the Rohingya and the Kurds. The list is of course not an exclusive one.

Those of us who are "believers" in human rights and belong to various human rights organizations (like Amnesty International, Human Rights Watch and PEN Canada) necessarily must support the notion that all humans in some sense possess rights. We believe refugees – or those like the Kurds, Tibetans or Palestinians who have inexplicably been denied a state of their own – must surely possess rights that they, as well as others, acting in solidarity, can point to.

In Arendt's 1951 *The Origins of Totalitarianism*, she sets forth her case that those who are participants and members of a political community (most obviously, the nation-state) possess rights. The rights she reflects upon are those that the state guarantees or affirms and is in a position to enforce. Arendt's central point is that there is a "right to have rights". She concludes though that there is something hollow about abstract proclamations of human rights. The Declaration of the Rights of Man and of the Citizen of 1789 appears to have done nothing, on her view of history, to protect those most in need of such safeguards in the growing tide of ultra-nationalism and fascism in the 1930s and 1940s (and beyond) in Europe and elsewhere. Rights can only be protected through government action or legal enforcement, within the sphere of a sovereign state.

Let's return to the plight of the Kurds and the lives of Leila, her beleaguered parents, and her much-loved brother Chia. As a Canadian, it is a sobering experience to read this novel. It asks the reader to cross a very long bridge to an unfamiliar world. In contemporary Iran, there are no legislated protections, far less a Charter of Rights and Freedoms, that Leila, her friends and family can lean on as they face discrimination daily. They are harshly punished for exercising their "right" to free speech and to associate in demonstrations to protest the unfair and degrading conditions they are expected to endure.

Photo by Markus Spiske from Pexels

There are riveting scenes in the novel that will be of particular interest to law students and those interested in the ways law and an authoritarian "rule by law" (instead of rule of law) can operate to deny the most basic of freedoms and dignity. The Iranian legal system is shown to be an alien force and makes a mockery of a just legal trial. After one such trial, Leila is depicted impulsively punching a decorative glass scale (of justice) on a lawyer's table.

Despite this massive adversity, the despised Leila still finds a way to promote her brother's writings and his cause, as a wrongfully imprisoned political inmate in Tehran's notorious Evin Prison. She suffers repeated setbacks but finds the resolve to pursue her dream to become a filmmaker. For her and other close companions, it is vital to tell the central stories of Kurds and deliver these to a world that has either not heard the news or has until now remained indifferent.

Homa leaves me wondering, however, which destination her courageous protagonist arrives at. Are a stateless people, and a vulnerable ethnic group like the Kurds in Iran, in a position to seek out an affirmation of their rights? In reality, do they possess human rights? The question is a troubling one and certainly yields no easy answers.

Arendt's philosophical tour de force cannot be the final answer. It surely cannot be that some have the right to have rights and others do not.

We cannot have left a whole swath of humanity with no fundamental rights where they are stateless, and a distinct "other" within a nation state like Iran that seems to want little to do with them and treats them with much disdain. The point of the human rights movement, as represented by great organizations like Amnesty International and Human Rights Watch, and others in civil society, is that we can and must document

human rights abuses. We must proclaim the need to take meaningful actions to protect the lives and wellbeing of those whom various governments around the globe are unwilling or unable to protect. Kurds, like the memorable characters in *Daughters of Smoke and Fire*, call out for a compassionate response.

In the Afterward, Homa recounts how Farzad Kamangar, a schoolteacher in rural Iran who became a human rights icon, was the foremost inspiration for her writing the novel. From his vantage point in an impoverished village in Kurdistan, Iran, the government accused him of the most improbable offences. Despite vehemently denying the charges, he was denied even the semblance of a fair trial and was tortured repeatedly before being sentenced to death. Amazingly, he was able to recount his ordeal but also his inner feelings, his love of the life that the prosecution and his torturers robbed him of. Certainly, Kurds opposed the trial and sentence. Further, groups such as Amnesty International compiled reports and denounced the violation of his basic rights. Amnesty International calls upon human rights activists to remain inspired by Kamangar's tireless advocacy for Kurds and to act on behalf of other Kurdish activists at risk.

In a world where various governments deny that some people are entitled to rights, we must find a way to affirm these vulnerable persons do have rights. And we must never forget this.

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.

Not-for-Profit

New Insolvency Resource Available

Peter Broder

It is sometimes said that there are "too many charities." The logic that drives that observation does not seem to apply in the for-profit realm, where the increase of firms in a particular subsector is more likely to prompt comments about the importance of choice and the value of competition. The COVID-19 pandemic has, if anything, sharpened worries about the disappearance of small business. On the voluntary sector side, some continue to welcome "rationalization". The bigger worry should be about the impact on Canadian's quality of life that significant shrinkage of the sector will have.

Leaving aside theory, the hard fact is that the pandemic and its economic fallout have thrown many organizations into difficult financial straits. Therefore, the number of charities and other voluntary sector groups is likely to drop markedly in 2021 and beyond. Few sector groups had the reserves or other resources to weather the hit to their income caused by the health emergency or had access to additional funding to address spikes in the need for their services stemming from the crisis.

Government relief programs provided some help, but their scope could never be expected to make up the shortfalls faced by the majority of organizations. As the pandemic resurges, the time organizations need to scrape by lengthens, and inevitably more won't be able to make it.

Faced with these realities, the Muttart Foundation, in collaboration with the law firm Miller Thomson LLP, has produced a resource to assist groups in coping with financial

Photo from Pixabay

hardships. ***Paths Forward in Financially Troubled Times – A Restructuring and Insolvency Guidebook for Charities and Non-profit Organizations*** is now available through the Foundation's website. (Full disclosure, the author of this column contributed to the writing and development of the Guidebook.)

The Guidebook lays out a number of avenues that financially-stressed groups can explore.

These range from continuing operations in a different legal form or in a collaboration, to revamping finances to survive immediate threats to viability, and to wrapping up the organization and its functions in a prudent and reasonable manner. No one option will be right for every organization. The Guidebook attempts to provide an even-handed look at the merits and drawbacks of the various paths. It does, however, warn against informally abandoning operations. This can lead to exposure to liability and may alienate stakeholders in a way that makes it difficult to restart programs or services down the road.

Insolvency law is federal, so many of the observations in the Guidebook apply across the country. To a large extent, the legal tools available to groups in financial difficulty are the same whether the organization is a charity or non-profit. The Guidebook can be helpful regardless of what status an entity

has under the *Income Tax Act*. Where special considerations apply because a group is a charity, the additional or different steps that must be taken are flagged.

If an organization uses one of the available formal legal processes to get itself out of trouble, there may be fear of a stigma attached to doing so. But, as those with experience in this area know, that is not the correct lens through which to look at things. Insolvency statutes are a lifeline to entities at risk of shutting down and a way to treat stakeholders equitably given the available resources. They are not punitive or a way to second-guess past decisions.

What's more, the pandemic is perhaps the perfect example of how organizations can get into financial difficulty through no fault of their own. For many voluntary sector groups, the health emergency and economic downturn merely brought to a head years of underfunding and stretching of resources that never adequately addressed community needs. The potential to subsidize staffing or program costs through philanthropic revenues has evaporated with the curtailment of fundraising events necessitated by social-distancing rules. Earned income streams of many groups have also been devastated. As with many other societal flaws, the pandemic has exposed the fragility of the voluntary sector funding model.

The Guidebook describes some practical steps, both about revenues and expenses, which can improve organizational viability – either before or instead of taking legal steps under insolvency legislation.

It also discusses a range of tools available, either under the *Companies' Creditors Arrangement Act* or the *Bankruptcy and Insolvency Act* (depending on the indebtedness of the organization), to deal with or delay fulfilling obligations to creditors.

Although revenue-generation and cost-cutting are familiar topics for lots of voluntary sector groups, the tools available to deal with creditors may be new to many in the sector. Knowing about them can only put groups in a stronger position when they set out to negotiate with landlords and other suppliers.

In post-pandemic Canada, it is likely that many of the programs and services offered by charities and their non-profit counterparts will be more needed than ever. If for no other reason than that, the loss of organizations resulting from the COVID-19 pandemic is hugely regrettable. The Guidebook is intended as a small step toward mitigating that loss.

EDITOR'S NOTE | This is Peter Broder's last column given his retirement. We thank Peter for his generous and valuable contributions to LawNow over the years!

Peter Broder

Peter Broder retired as General Counsel and Policy Analyst for The Muttart Foundation at the end of 2020. The views expressed do not necessarily reflect those of the Foundation.

Youth & the Law

I'm Turning 18, Now What?

Jessica Steingard

You can hardly wait. You are just a few days (weeks?! months?!) away from turning 18. Freedom! You are dreaming of all the things you can legally do:

- Buy alcohol (if you are in Alberta, Manitoba or Quebec)
- Get a credit card
- Purchase cannabis (if you are in Alberta only)
- Sign things for yourself

Basically, anything you want without your parent's permission. (Unless of course you live at home and will likely still have to follow house rules.) The opportunities are endless!

Turning 18 is seen as a rite of passage. The journey into adulthood. The world sees you as an adult. But being an adult also means you are responsible for your own actions. If you commit a crime, you will face the consequences as an adult. If you rack up credit card debt or max out lines of credit, you are responsible for paying the money back. If you buy a vehicle and cannot make the monthly payments, the dealership may seize it. If you do not pay your rent, your landlord can evict you. If you do not show up to work, your employer may terminate you. Then how would you pay your bills? If you do not pay taxes, the Canada Revenue Agency might be on your tail.

Does becoming an adult suddenly seem a lot less appealing?!

I am not writing this article to scare you. But I do want to make you aware of some legal consequences of becoming an adult. And give you a few tips on how to survive young adulthood – legally at a least!

Photo by Maria Lindsey
Multimedia Creator from Pexels

Over the next few columns, I'll dive into different legal topics you should think about when you turn 18. For this column, we are going to talk about the *Canadian Charter of Rights and Freedoms*. Maybe you remember learning about it in school?

The *Canadian Charter of Rights and Freedoms* (*Charter*) became law in 1982. Definitely long before your time. This document is not actually a standalone document. It is Part I of the *Constitution Act, 1982*, which is Schedule B to the *Canada Act 1982*. Confusing? Probably. The main point is it exists as law in Canada.

The *Charter* sets out our rights and freedoms in Canada.

It protects us from unreasonable and unjustified government (federal, provincial and municipal) action. These rights and freedoms include:

- Freedom of conscience and religion
- Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication (this is how fake news can happen)
- Freedom of peaceful assembly
- Freedom of association
- Right to vote
- Right as Canadian citizens to enter, remain in and leave Canada

- Right as Canadian citizens and permanent residents to move between and live in any province, and to work in any province (with some limitations)
- Right to life, liberty and security of the person. And the right not to lose life, liberty and security except in accordance with the principles of fundamental justice (a fancy way of saying legal rules or principles that society agrees are fundamental in how our legal system operates fairly)
- Right against unreasonable search or seizure
- Right not to be detained or imprisoned without good reason
- When arrested or detained, the right to be told why and the right to get a lawyer (and to be informed of your right to a lawyer)
- If charged with a criminal offence, the right to know the details of the charge, to be tried in a reasonable time, not to have to be a witness in your own case, and to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial judge or jury. You also have a right not to be denied bail without good reason and the right not to be tried again for the same crime if you were acquitted (found not guilty).
- Right against cruel and unusual treatment or punishment
- Right not to have incriminating evidence used against you in another proceeding
- Right to an interpreter, including if you are deaf, in a legal proceeding
- Right to equal protection and equal benefit of the law without discrimination. In particular, you cannot be discriminated against based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Phew! That's a lot of rights and freedoms!

However, these rights are not absolute.

Section 1 of the *Charter* both guarantees these rights and freedoms AND says that these rights can be reasonably limited by law. The law must be "demonstrably justified in a free and democratic society". In other words, the law must have good reason to limit rights. The courts use a strict legal test (called the *Oakes* test, after the case that created it) to analyze whether a limit is okay.

For example, some people believe current masking laws infringe on their right to life, liberty and security. If someone brings the issue to court, the court can decide if the law infringes on our rights. And if so, if the infringement is justified (perhaps in the context of collective action in a global health crisis?).

With these rights and freedoms also come responsibilities.

We have the right to vote, but we also have a responsibility to vote. If we do not exercise that right, it's not worth a whole lot. We also have freedom of religion – that is, we can believe what we want to believe – but that right does not allow us to persecute others because of their beliefs. The *Charter* also says the rule of law is supreme in Canada. That means no one is above the law and everyone must obey the law. That's a big responsibility too!

The point I want to leave you with is this: In Canada, our laws give us lots of important rights and freedoms. We can stand up when the government is infringing on these rights. But these rights and freedoms have limits. And we also have a role to play!

P.S. Tune in next time for a discussion about wills, personal directives and enduring powers of attorney. They're not just for old people!

Jessica Steingard

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

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