

March/April 2013

Westward — How?

Civil Disobedience

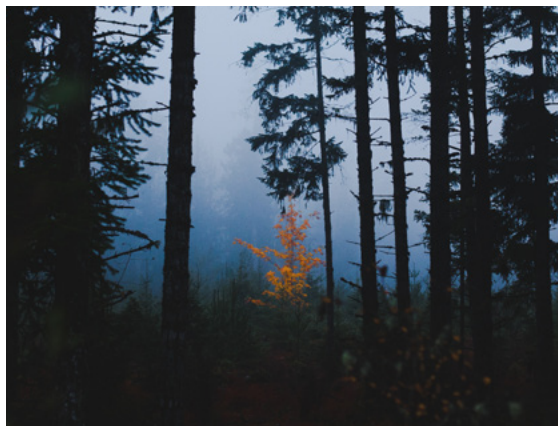
Help Yourself!

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## Environmental Causes and the Law



Canadians treasure their environment, and for many, preventing its degradation becomes a cause. The law can be used in some interesting and unique ways to help the cause.

Cover image: © Grady Mitchell

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In your September/October, 2011, issue of **LAWNOW**, there was an article, "Whatever Happened To ... The Prosecution of Susan Nelles," by Peter Bowal and Kelsey Horvat, discussing one of Canada's most fascinating and significant medico-legal cases. It noted in the final paragraphs, the possibility that a chemical, MBT, from the natural rubber components of syringes, drug ampoules and IV apparatus, caused false high readings on the medical tests. This article alluded to a November 1994 article I had written in *The Lawyers Weekly*, "It's Time for Justice for the Sick Kids Nurses." It was written under the heading, "Opening Statement," giving an opportunity for arguments against the presented facts. Gordon Killeen, a respected judge in London told me that, in terms of jurisprudence, this article became the "final word" on the subject, since no letters were received by the editor criticizing the conclusions.

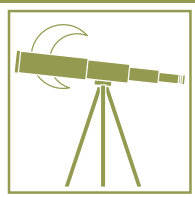
You are probably unaware that I wrote a book, *The Nurses are Innocent – The Digoxin Poisoning Fallacy* (Dundurn Press, Toronto), which was published the month following the publication of the Bowal/Horvat article. This book reads like a medical science mystery, but is indexed like a law article. It details how the false interpretations of autopsy digoxin came about.

What may be fascinating to **LAWNOW** readers is that there was ample evidence to prove that there were no murders and that it appeared that someone behind the scenes was strongly promoting the murder theory and could have been responsible if Susan Nelles had been wrongfully convicted of murder. As pointed out in the final chapters, a young pathologist, Dr. Charles Smith, had been hired by the hospital at the very beginning of the false digoxin poisoning theory, with an expressed desire to do autopsies on children who had died suddenly. As Judge Gouge pointed out in "The Inquiry into Pediatric Forensic Pathology" in Canada, October 2008, Charles Smith's forensic testimony for the prosecution was responsible for many false accusations of murder and many false guilty convictions and imprisonments.

I thought you and your readers would have an interest in this material. I believe law libraries have copies of my book.

Sincerely,  
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# The Economy and The Environment

*Senator Grant Mitchell*

**T**he economies that will dominate in the future will be those that embrace environmental challenges and see them as opportunities and not cost.

For the longest time, the message has been that dealing with environmental issues incurs a cost to the economy that will harm our competitiveness. More and more, however, there is a growing understanding that economic and environmental interests are two sides of the same coin; that we cannot really have one without the other.

The economic and other risks of the most threatening of environmental issues, climate change, are literally infinite. For those concerned that dealing with it will kill jobs, consider the number of jobs that have been killed because we have not dealt with it. Canadian forests have been diminished by the spread of the pine beetle, which is impeded by the kind of sustained cold weather that we no longer see. Canadian fisheries are producing only 40% of the harvest that they produced just years ago, stocks being damaged, at least in part, by climate change impact on their habitat. The increasingly violent, climate-change-fueled storms are creating enormous damage. Drought and floods are damaging our agricultural industry. How many jobs were lost and how much cost was incurred in New York as a result of Hurricane Sandy? The insurance industry estimates that increasingly violent storms are causing \$170 billion in annual damage world-wide, four times the cost of just decades ago.

On the other hand, dealing with climate change can stimulate a productive, creative, 21st century economy. Consider the economic diversification and jobs that would be created by a focus on renewable energy development, retrofitting for conservation of energy, and the "energy" that would be generated in our country and economy by leadership inspiring us to meet this challenge.

With relatively little government investment, Ontario has created a \$42 billion solar industry. And, we should not underestimate the economic significance of our tourism and outdoor recreation industries, both profoundly reliant upon a pristine environment. In addition, and ironically, getting really good on climate change and other environmental issues may be the only way to sustain our traditional oil and gas economy. Canada's single international market for oil and gas is the U.S., and the U.S. is likely to be self-sufficient in both within 10 to 15 years. Moreover, as long as we are limited to North American markets, we are losing as much as \$35 per barrel compared to international prices. There is tremendous pressure to diversify our markets.

It's a new era. The delays to the Gateway and Keystone projects have underlined that we need to earn the social licence – society's permission – to build our oil and gas projects and sell our traditional oil and gas products

It's a new era. The delays to the Gateway and Keystone projects have underlined that we need to earn the social licence – society's permission – to build our oil and gas projects and sell our traditional oil and gas products if we are to sustain this industry which is so critical to our economy. To do this, we have to demonstrate that we are serious about dealing with climate change and other environmental issues related to the industry.

There are some encouraging signs. President Obama, in his inaugural speech, emphasized the devastating impact of climate change. New York's Mayor Bloomberg endorsed Obama in the recent election based upon his assessment that Hurricane Sandy was a consequence of climate change. The president of the IMF stated recently that the single greatest challenge to world economies is climate change. These are important calls to action.

Many leaders in Canada's oil and gas industry are calling for a carbon tax as the most efficient way to provide them with some sense of certainty, focus the economy's attention on reducing emissions and send a particularly powerful message to earn social licence. Increasingly, there are signs that Canadian political leaders are understanding how the environment, earning social licence and sustaining our oil and gas industry are inextricably linked.

While there are many reasons to respect and promote our environment, its importance to the economy is especially compelling. Understanding and acting upon this relationship is not an economic threat; it will herald the emergence of a competitive, sustainable economy that will be the envy of the world.

Senator Grant Mitchell is the Vice-Chair of the Senate's Standing Committee on Energy, the Environment and Natural Resources.



### 1. Interest in Access to Justice

Francis LeBlanc was injured in a traffic accident when he was 17. He was successful in recovering damages for his injuries, but he had to borrow money to finance his litigation. He claimed the borrowed money plus interest as disbursements. The Clerk of the Court rejected the interest on the loans, which amounted to over \$12,000. So did a New Brunswick trial judge. However, Justice Drapeau of the N.B. Court of Appeal awarded Mr. LeBlanc his interest costs. He said, “The loans granted ...were essential to allow Mr. LeBlanc access to justice.” He further commented, “As the Chief Justice of Canada, the Honourable Beverley McLachlin, regularly reminds us, access to justice is one of the cornerstones of the rule of law, and it behooves courts, whenever possible, to do their part in fashioning means conducive to its improvement. Courts must walk the talk”.

LeBlanc v. Doucet and the New Brunswick Power Corporation, 2012 NBCA 88 (CanLII)

### 2. Denunciation, Deterrence, and Death

The British Columbia Court of Appeal recently almost doubled the sentence of a man convicted of possession of child pornography and sexual assault from 3 years and 3 months to 6 years. The Court wrote “...the sentence imposed on Mr. Allen ought to have communicated society’s condemnation of his conduct...the reasons for sentence did not fully state the seriousness of Mr. Allen’s conduct, nor did the global sentence of three and one-half years imprisonment adequately denounce that conduct.” Before this judgment was released, the Court of Appeal learned that Mr. Allen had died. Nevertheless, the Court gave its judgment increasing the man’s sentence, stating that it was in the interests of justice to do so.

R. v. Allen, 2012 BCCA 377 (CanLII)

### 3. No Jury-vetting, We’re Canadian

Canadians are used to reading American books and watching TV programs where lawyers for parties in court actions amass material about potential jurors. John Grisham’s *The Runaway Jury* comes to mind. However, in Canada, the Ontario Court of Appeal recently overturned a murder conviction because it ruled that the Crown prosecutors had inside information about potential jurors which gave them an advantage over the defence. The Court wrote “ This mismatch came about in large measure because of breaches by the Crown of its own policies, misuse of police databases and breaches of privacy legislation. There can be no doubt that the public and an accused would view with grave suspicion a jury selection process that unfairly favours the Crown.” A memorandum of practice dating back to 2006 advised Crown counsel that they could only request police criminal record checks and that if the results indicated that a potential juror might not be impartial, that the information should be disclosed to the defence. Shortly after the Court of Appeal decision, the Supreme Court of Canada weighed in on the issue. It ruled that authorities should be allowed to

do limited background checks on potential jurors for past criminal convictions and pending criminal charges, and that relevant information the Crown receives must be turned over to the defence.

[R. v. Spiers](#), 2012 ONCA 798 (CanLII)

[R. v. Yumnu](#), 2012 SCC 73 (CanLII)

#### 4. The Defence of Duress

A young Nova Scotia mother was in a violent and abusive marriage. She asked for help repeatedly from the police to no avail. Finally, in fear of her life and that of her child, she tried to hire a hit man to kill her husband. The hit man turned out to be an undercover RCMP officer. She was charged with counseling the commission of an offence. At trial, she argued the defence of duress, arising from intense and reasonable fear. She was acquitted at trial and the Court of Appeal upheld her acquittal. However, the Supreme Court of Canada ruled that the defence of duress was not available to her. The Court ruled that duress can only be used when a person commits an offence under the compulsion of a threat of death or bodily harm made for the purpose of making him or her to commit that offence. The Court listed the following components of the defence:

- an explicit or implicit threat of present or future bodily harm or death;
- the accused must reasonably believe that the threat will be carried out;
- there must be no safe avenue of escape;
- there must be a close connection in time between the threat and the harm threatened;
- there must be a proportionality between the harm threatened and the harm inflicted by the accused; and
- the accused cannot be party to a conspiracy or criminal association and must actually know that the threats were a possible result of this criminal activity.

Although the Supreme Court overturned her acquittal, it stayed all proceedings against her, noting that the protracted abuse she had suffered had taken an enormous toll on her, and it would not be fair to subject her to another trial.

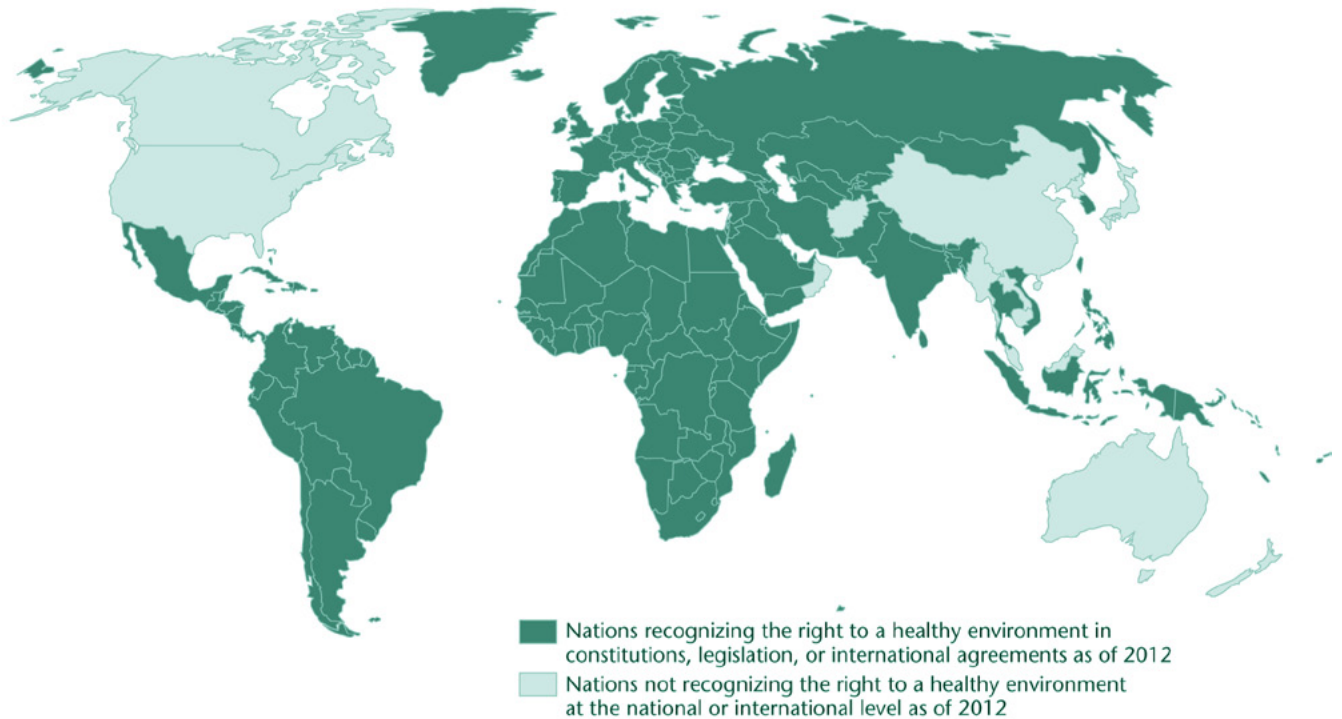
[R. v. Ryan](#), 2013 SCC 3 (CanLII)

#### 5. A Dog Divided?

Richard Kitchen asked the B.C. Provincial Court to rule on the ownership of a Border collie after the breakup of his relationship. It was a sad affair: a letter on file from the dog to “my daddy” says the dog is unhappy they cannot be a family but that “I know there is no way mommy would ever keep you from seeing me – that’s just not the kind of mommy she is. She wants us both to be happy.” It appears the dog’s optimism was sadly misplaced. Judge Frame of the B.C. Provincial Court ruled that he did not have the jurisdiction to grant custody or access orders for pets. Looking at the roles each party played in acquiring and caring for the dog, Judge Frame ruled in favour of the defendant. He decided that Mr. Kitchen’s interest in the dog was merely sentimental and did not give him joint ownership or a right to possession.

[Kitchen v. MacDonald](#), 2012 BCPC 9 (thanks to Rosemarie Boll for this case)





*David R. Boyd*

## The Constitutional Right to a Healthy Environment

**F**ifty years ago, the concept of a human right to a healthy environment was viewed as a novel, even radical, idea. Today it is widely recognized in international law and endorsed by an overwhelming proportion of countries. Even more importantly, despite their recent vintage, environmental rights enjoy constitutional protection in over 100 countries. These provisions are having a remarkable impact, including stronger environmental laws, better enforcement of those laws, landmark court decisions, the cleanup of pollution hotspots, and the provision of safe drinking water.

Canada, unfortunately, is a holdout. Our Constitution does not mention the environment, and Canada is one of a dwindling number of countries that refuse to recognize the right to a healthy environment. There are six compelling reasons why Canada needs to modernize its Constitution to include this fundamental human right.

First, Canada trails behind other countries when it comes to protecting the environment. According to the Conference Board of Canada, we rank 15<sup>th</sup> out of 17 large, wealthy, industrialized countries on a comprehensive index of environmental performance indicators. A study done by Simon Fraser University researchers ranked Canada's environmental record 24<sup>th</sup> out of 25 nations in the Organization for Economic Cooperation and Development. Our magnificent natural heritage is at risk.

Second, our poor environmental record inflicts a high cost on human health and well-being. The World Health Organization estimates that 30,000 premature deaths in Canada each year are caused in whole or in part by environmental hazards. This eye-opening figure is consistent with research done by the Canadian Medical Association estimating that air pollution alone causes tens of thousands of premature deaths (and billions of dollars in preventable health care costs) annually.

Third, the Constitution's silence on environmental protection has been acknowledged as problematic for more than 100 years. Back in 1912, Prime Minister Laurier's Commission on Conservation reported that constitutional uncertainty about environmental protection was undermining efforts to address water pollution. In 1997, the Supreme Court of Canada came within a whisker of striking down critical provisions of the *Canadian Environmental Protection Act* because of the absence of a clear constitutional basis for the law.

Fourth, environmental rights and responsibilities have been a cornerstone of indigenous legal systems for millennia. For the Haida, the Anishinabek, and the Mi'kmaq, the Earth's sentience creates corresponding rights and obligations for both humans and Nature. As the Supreme Court of Canada has repeatedly observed, incorporating indigenous law into the Canadian legal system is an important step toward reconciliation with Aboriginal people.

Fifth, as of 2012, 177 of the world's 193 UN member nations recognize this right, either through their constitutions, environmental legislation, court decisions, or ratification of an international agreement (see Map 1). The only remaining holdouts are the U.S., Canada, Japan, Australia, New Zealand, China, Oman, Afghanistan, Kuwait, Brunei Darussalam, Lebanon, Laos, Myanmar, North Korea, Malaysia, and Cambodia. The rapid spread of this right is remarkable, given that its first formal articulation came just 40 years ago in the *Stockholm Declaration* that emerged from the first global earth summit. Today, citizens in 108 nations – from Argentina to Zambia – enjoy a constitutionally protected right to a healthy environment. In more than 100 countries, the right is explicitly recognized in environmental legislation. As well, 120 countries – in Europe, Latin America, Asia, and Africa – have signed legally binding human rights treaties that include the right to a healthy environment.

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Sixth, an overwhelming majority of Canadians – over ninety percent – believe that governments should recognize their right to a healthy environment. Indeed, a majority of Canadians erroneously believe that the right to a healthy environment is already included in the *Charter of Rights and Freedoms*.

Would constitutional recognition of environmental rights and responsibilities make a difference in Canada? Based on our own experience with advances in respect for human rights since repatriation of the Constitution in 1982, and the experiences of other nations where the right to a healthy environment enjoys constitutional status, the answer is definitely yes. There has been tremendous progress in protecting certain human rights in Canada since 1982, as demonstrated by the sea change in respect for Aboriginal rights and the affirmation – both legal and, more importantly, cultural – of same-sex marriage.

New evidence from across the globe demonstrates that constitutional environmental rights and responsibilities are a catalyst for stronger environmental laws, better enforcement of those laws, and enhanced public participation in environmental governance. Most importantly, there is a strong positive correlation between superior environmental performance and constitutional provisions requiring environmental protection. For example, nations with green constitutions have smaller ecological footprints and have reduced some types of air pollution up to ten times faster than nations without environmental provisions in their constitutions. Ultimately this means people are breathing cleaner air, drinking safer water, and living in healthier environments.

For example, citizens living in what was once one of the most polluted watersheds in Argentina used their constitutional right to a healthy environment to compel federal, provincial, and municipal governments to undertake an unprecedented cleanup and restoration effort. Collectively, these governments are spending more than \$1 billion annually over a period of ten years to upgrade drinking water and sewage treatment infrastructure, improve environmental monitoring and enforcement, and restore the health of both residents and the Riachuelo River. By comparison, Canada's efforts to clean up pollution and contaminated areas around the Great Lakes are slow and grossly inadequate, creating ongoing environmental hazards for people living in that region.

Although Canada's Constitution is silent on environmental protection, the right to a healthy environment is recognized in five provinces and territories. Quebec put the right into its *Environmental Quality Act* in 1978 and added it to its provincial *Charter of Human Rights and Freedoms* in 2006. Ontario enacted a comprehensive *Environmental Bill of Rights* in 1993. The Yukon, NWT, and Nunavut have modest environmental rights legislation. In 2011, with the unanimous support of the opposition parties, Parliament came very close to passing Bill C-469, the *Canadian Environmental Bill of Rights*.

While these laws are better than nothing, they are far weaker legally, politically, and symbolically than constitutional recognition of the right to a healthy environment. The Constitution is our highest and strongest law, as all laws, regulations, and policies must be consistent with it. On

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a deeper level, constitutions reflect the most deeply held and cherished values of a society. As a judge once stated, “a Constitution is a mirror of a nation’s soul.”

There are three ways that the right to a healthy environment could gain constitutional recognition in Canada:

- direct amendment of the Constitution, requiring Parliament’s approval and the support of seven of the ten provinces, secured within a three year period;
- litigation resulting in a court decision that there is an implicit right to a healthy environment in s. 7 of the *Charter* (the right to life, liberty, and security of the person); and
- a judicial reference resulting in a court decision that there is an implicit right to a healthy environment in s. 7 of the *Charter*.

Constitutional change is always difficult in Canada, though not impossible. There have been 11 amendments since 1982 including two revisions of the *Charter*. However, given the position of the current majority government, an environmental amendment is unlikely in the short term.

There is a case before the courts in Ontario in which Ada Lockridge and Ron Plain, members of the Aamjiwnaang First Nation, are arguing that the Ontario government’s decision to allow additional pollution from a Suncor refinery near their community violates their rights to “life, liberty, and security of the person” and equality under the *Charter*. In essence, their argument is that the *Charter* contains an implicit right to a healthy environment. Although they face an uphill battle, their case is buttressed by the fact that courts in at least twenty other nations have concluded that the right to life includes an implicit right to a healthy environment.

The judicial reference is a uniquely Canadian legal process through which the federal, provincial, and territorial governments have the power to ask courts to answer important legal questions. The process has been used over a hundred times to address controversial issues including the ownership of offshore natural resources, the legality of Quebec secession, and same-sex marriage. The most famous judicial reference is the *Persons’ Case*, brought in the late 1920s in response to a compelling public campaign led by Nellie McClung. The federal government asked the Supreme Court of Canada to determine whether women were persons for purposes of being eligible for appointment to the Senate. The Court, infamously, said no. Fortunately, at that time Supreme Court decisions could be appealed to the Judicial Committee of the Privy Council in the U.K. Common sense prevailed, women were recognized as persons, and the case marked a watershed moment in the battle for women’s rights in Canada. A Canadian government could ask the courts whether the right to a healthy environment is implicit in the right to life. An affirmative answer would result in constitutional recognition of this fundamental human right, consistent with the stated values of the people of Canada.

In light of the remarkable international developments, widespread public support, and compelling reasons for Canada to move in this direction, now is the time to lay the groundwork for constitutional recognition of environmental rights and

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responsibilities. This may include enacting environmental bills of rights at the federal, provincial, territorial, and municipal levels as stepping-stones towards the ultimate goal of constitutional reform.

Enshrining environmental rights and responsibilities in the Constitution is not a magic wand that would instantly solve Canada's complex ecological challenges. However, doing so would force Canadians to make sustainability a genuine priority, resulting in changes that would make Canada a greener, cleaner, wealthier, healthier, happier nation in the long run.

**For additional information, please see**

David R. Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012)

David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012)

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David R. Boyd is an environmental lawyer and adjunct professor at Simon Fraser University in Vancouver, British Columbia. He is an international expert on human rights and the environment.





*John Edmond*

## The Oil Sands: Westward – How?

**L**ast summer, I mentioned to our editor that I couldn't understand why Enbridge chose to route Alberta oil via its Northern Gateway line to Kitimat, with its long and narrow channels to open water, when the Port of Prince Rupert had no such obstacles and was closer to Asia. She told me to find out. Of the three troubling factors about Northern Gateway that I saw at the time, that was the most troubling.

Northern Gateway would send oil sands product almost 1200 km from a collection point at Bruderheim, 60 km northeast of Edmonton, to tidewater at Kitimat at the head of Douglas Channel. 525,000 barrels a day (bpd) of bitumen, thinned with condensate to facilitate flow, would be sent through a 36" line, and 193,000 bpd of condensate would be returned by a 20" line. Thinning is needed because the oil sands don't produce oil; they give up bitumen, a viscous substance described as like cold molasses, from which crude is produced by upgrading. The lines would be buried a metre underground in a 25 m-wide corridor. Cost is now estimated at \$6.5 billion. Shipping from Kitimat

would require tankers to negotiate the narrow waters of Douglas Channel to reach open water. Freight has travelled to and from Kitimat by water since an aluminum smelter was built there in the 1950s, but oil is another matter.

Objections to Northern Gateway were three-fold:

- It provided a market for the oil sands, which should, environmentalists say, be discouraged;
- It was to be a pipeline through pristine wilderness; and
- A marine spill is inevitable in the long and narrow Douglas Channel.

I saw the last as the most serious objection. As to the others, whatever one's judgment of the oil sands, their future does not turn on Northern Gateway's completion. The merits of their development are a topic in themselves, and not for this article to assess. The pipeline, in part through wilderness to be sure, would be certain to be built to the highest modern standards; Enbridge, embarrassed by spills from older lines, mainly into the Kalamazoo River in Michigan, could hardly afford any risk. Spills may be less of a concern than the effect of a corridor on wildlife. Caribou are reluctant to cross open areas, where wolves lie in wait. Nevertheless, many pipelines already criss-cross this country, as do, of course, transmission and rail lines and highways. It may turn out that the currently vocal but not unanimous First Nation objections can be met and accommodated, or silenced by equity participation. So if the terminus could be moved to the open water of Prince Rupert, perhaps this project would be less the disaster some predict.

Enbridge tells me the Prince Rupert route is "not impossible," but its litany of engineering hurdles is lengthy. It asserts that a 150 km route down the Skeena River from Terrace would be 65 km longer and entail a 20 km tunnel and a river crossing, and that the route is susceptible to flooding from the Skeena freshet and prone to landslides and seismic activity. It claims negligible navigational risk for Kitimat using double-hulled towed and escorted tankers, and that the narrowest point in a 36 m-deep, 130 km long channel, 1.4 km, does not present undue risk. A Transport Canada review, acknowledging "there will always be residual risk," has endorsed the scheme. So the trade-off for Enbridge favours Kitimat. It is apparently prepared to weather the gale of objections already raging to the carriage of oil in B.C.'s coastal waters, though last November Al Monaco, the new president, said the decision was not final. For organizations such as Greenpeace, ForestEthics and Ecojustice, and much of the public, any risk in these waters is too great.

In the context of alternative ports, Enbridge's pipeline competitor TransCanada Corporation has just announced a line to transport B.C. shale gas to a liquid natural gas terminal to be built at Lelu Island, just south of Prince Rupert, probably the closest mainland-accessible point in Canada to Asia. However, it may not follow the Skeena River to its destination. While the route has not been announced, there is speculation, so far unconfirmed, that the line may take a more northerly Nass Valley route to tidewater, then by a long underwater line to the terminal. If TransCanada is

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A break in a gas line is not a disaster; the gas dissipates. A large oil spill in a major fast-flowing river is apocalyptic.

indeed considering this expensive bypass of the Skeena for a gas line, Enbridge's wariness is understandable. Pacific Northern Gas has operated a natural gas line in the Skeena valley since 1968, but it has ruptured from slides more than once. A break in a gas line is not a disaster; the gas dissipates. A large oil spill in a major fast-flowing river is apocalyptic.

A few months ago, there seemed to be just three main issues. Since then, things have gotten more complicated. The federal government has become ever more determined to find off-shore markets for Canadian crude since the completion of TransCanada's Keystone XL line to the Texas gulf coast was put in doubt by the U.S. election. President Obama's emphasis on the environment in his inauguration speech did not help. The possibility of off-shore sales would result in a major increase in revenue; the current price for Alberta oil is well short of the world price because of the "captive market discount": the market is landlocked to central North America. 99% of Canada's crude oil exports are to the U.S. *The Globe and Mail* reported recently that the price for Canadian heavy oil was nearly \$37 (U.S.) below the North American benchmark West Texas Intermediate, resulting, according to Alberta's Energy Minister Hughes, in a subsidy to the U.S. of \$20 to \$30 billion annually. The development of "fracking," hydraulic fracturing, whereby previously unavailable hydrocarbons are now recovered by the injection of water under high pressure to induce their release, has led the International Energy Agency to predict that the U.S. will become "all but self-sufficient in net terms" in energy by 2030. Though environmentalists tell us that fracking will lead to contaminated water tables and aquifers, it is now widely practised, and U.S. self-sufficiency is not good news for Alberta. Given the importance of the oil sands to Canada's current economy, bad news for Alberta is bad news for Canada.

First Nation objections to Northern Gateway have the most impact. Under the consultation and accommodation obligation on government laid down in 2004-05 by the Supreme Court (see *LawNow* November/December 2007), First Nations must be consulted in advance of any activity that might adversely affect their Aboriginal right to hunt or carry out other traditional activities, and valid concerns must be reasonably accommodated. These will be formally identified in the National Energy Board and Canadian Environmental Assessment Agency's Joint Review Panel process. While the duty to consult and accommodate is the Crown's, to be carried out prior to granting any authority to proceed, in practice a proponent will typically offer a variety of advance inducements to secure Aboriginal support. While Enbridge declines to disclose detail, its public position is that it expects its offers of equity positions to attract the support it desires. It also funds participation in the consultation process.

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First Nations must be consulted in advance of any activity that might adversely affect their Aboriginal right to hunt or carry out other traditional activities, and valid concerns must be reasonably accommodated.

Under the Supreme Court's doctrine, First Nations do not have a veto, but court challenges to the adequacy of consultation and appropriateness of accommodation could tie matters up for years. The issue is further complicated by the perhaps sincerely-held but incorrect belief that the UN *Declaration on the Rights of Indigenous Peoples*, is binding in Canada. Canada's endorsement in the absence of ratifying legislation has no legal force (see *LawNow* March/April 2011), but may have a good deal of political weight.

Northern Gateway has attracted much of the public's attention, not to mention opposition, perhaps because it was the first proposal to connect Alberta to Asia. Enbridge, though, is by no means alone in trying to fill that need – if indeed it is a need. Oil sands objectors would vehemently disagree. Kinder Morgan, a huge Houston-based energy company, operates the 1150 km Trans Mountain oil pipeline that has transported both crude and refined oil in “batches” at 300,000 bpd since the 1950s. In January, Kinder Morgan announced plans to expand and twin Trans Mountain to 890,000 bpd. As the only existing oil pipeline to Canada's west coast, expansion has a great competitive advantage over a new line. The corridor and terminal already exist, though expansion to increase capacity three-fold would be an undeniably major project. Nevertheless, the environmental assessment and aboriginal consultation requirements for expansion within an existing corridor would be far less than for the new largely wilderness corridor needed for Northern Gateway – “brownfield,” as they say, rather than “greenfield.” A major issue would be the increase in tanker traffic the full length of Vancouver Harbour – Burnaby to English Bay – from five vessels a month to 34, more than one a day. The proposal can be expected to meet stiff opposition in the Lower Mainland. Kinder Morgan's spill record is less than perfect: it won't help that six hours elapsed before an operator attended to a 90,000-litre spill at its Sumas tank farm in the Fraser Valley a year ago. As a “mere” upgrade, Trans Mountain has so far evaded much scrutiny, criticism remaining focussed on Enbridge. The least that can be said now is that Northern Gateway has a full set of challenges, both for approvals and from competition.

Pipelines are not the only route to offshore markets. Some odd alternatives are mooted. A First Nations-endorsed company called G Seven Generations Ltd. wants to build a 2,400 km rail line to haul oil from Fort McMurray to connect with the Alaska North Slope line to Valdez, Alaska, where it would take advantage of existing infrastructure and supplant the apparently declining supply of Alaska crude. G7G claims a single track could carry an incredible three times the capacity of Northern Gateway, and says it has major support for the route. Rail is a less efficient, more costly, more polluting and far riskier means of shipping oil than pipelines, but has acquired appeal for shippers as a result of environmental opposition to pipelines, as well as its flexibility in moving oil quickly to markets to which no pipeline exists. The advantage of building an \$8.4 billion rail line to Alaska

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when CN's line through Edmonton to Prince Rupert presumably stands ready is not obvious. G7G's answer may be that only a dedicated line would have the needed capacity. In any case, rail is another competitor to Northern Gateway. So are proposals to move oil eastward by new or redirected pipelines, either to Churchill or to Saint John – closer to India, it has been pointed out, than is Kitimat. Finally, the Alberta government has recently said it would like to see a refinery built in the province, though in March 2012 it rejected a First Nations proposal to build one. This would increase revenue and produce jobs, and eliminate the shipping of bitumen and the twinning of lines, though the major cost of refinery construction makes it unlikely. In August, David Black, a B.C. newspaper magnate, proposed a refinery for Kitimat, though nothing has been heard of this since. Certainly crude is safer to ship than bitumen, but it makes sense to upgrade at the initial stage rather than the midpoint, if only to obviate the need for twin lines.

Like so many Canadian energy projects, Northern Gateway cannot escape constitutional wrangles. British Columbians see more risk than reward in a new pipeline, especially given the tortuous Douglas Channel route to the Pacific. B.C. Liberal Premier Christy Clark, facing an election in mid-May in which she will have an uphill fight against the NDP headed by Adrian Dix, has to balance Aboriginal opposition and the strong environmental sympathies of many British Columbians with the pro-development weight of the business lobby. Clark, arguing that the rewards are Alberta's while the risks fall to B.C., famously demanded a share of Alberta's royalties as the price for allowing Northern Gateway to proceed. Premier Redford told her to get lost, at which point she turned to Enbridge for compensation based on the risk to B.C. Clark wants to gain enough from Enbridge to ensure the survival of her government. Dix is resolutely opposed. The federal government badly wants access to Asia for Alberta oil, so if Dix becomes premier and sticks to his guns, a federal-provincial battle is inevitable. While the overall project is federally regulated, many provincial permits will be required at various stages. Under s. 92.10 (a) of the *Constitution Act, 1867*, works connecting provinces are excluded from provincial jurisdiction. If, however, Ottawa were to dispute the permitting authority B.C. will certainly attempt to assert, the Conservatives will see a donnybrook to rival that of the National Energy Program of 1980, this time alienating B.C. to favour Alberta.

Despite the array of obstacles, Enbridge appears to be confident of NEB – or Cabinet – approval. Beyond the \$300 million the review process is said to be costing, it plans to gamble another \$150 million on pre-approval engineering studies. Under the *Canadian Environmental Assessment Act, 2012* (part of omnibus “budget” Bill C-38), Cabinet can now approve a

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project rejected by the NEB. Asked about the government's position on Northern Gateway, Prime Minister Harper, in a startling conversion, promised that any decision would be based on "science." One is entitled to be sceptical; as one right-leaning columnist put it recently, "the Conservatives [have] revealed an almost monomaniacal obsession with easing resource extraction for purposes of bolstering future economic growth."

Increasingly, though, the focus is shifting to a Canada-wide petroleum strategy. Northern Gateway is now far from the only game. Premier Redford has called for a national energy strategy, though she insists on calling it "Canadian" to stress the role of the provinces. Gil McGowan, President of the Alberta Federation of Labour, has argued for oil being sent to central and maritime Canada. Not to be left behind, Enbridge plans to reverse the flow in its "Line 9" from Sarnia to Montreal to allow western crude now reaching Sarnia to be refined in Quebec. Natural Resources Minister Oliver says this would show eastern Canadians the benefits of Alberta oil sands development. TransCanada, too, is considering converting its underused 1950s-built "Mainline" gas line from Alberta to the east to oil. It is reported to be exploring the economics of supplying China from Canada's Atlantic seaboard. In a speech in May, David Dodge, former Bank of Canada Governor, said Northern Gateway faces too many obstacles, and Alberta oil should be shipped east. In June, Frank McKenna, former premier of New Brunswick and deputy chair of TD Bank Group, called for a coast-to-coast pipeline. Regions would no longer be at odds; "each region would be a winner." Pointing to the irony that eastern refineries process only imported oil, while Canadian oil is captive to discounted U.S. prices, he argued that a national oil connection would be the 21<sup>st</sup> century equivalent of the C.P.R. This would eliminate reliance on imported oil, yet provide for export of surplus. The economics of this await analysis. Perhaps Canada will yet choose to upgrade our resources so that we will no longer be known as just hewers of ore and drawers of oil.

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*Janet Keeping*

# Civil Disobedience, Environmental Protest and the Rule of Law

## What is civil disobedience?

Civil disobedience involves intentional violation of the law to achieve a result the law-breakers believe is in the public interest. Civil disobedience is a form of protest intended to draw attention to a wrong or injustice which the protesters believe is sufficiently serious to morally justify violation of the law. In 2008 Greenpeace activists unleashed a banner at a political meeting which said “Stelmach: the best Premier oil money can buy” during a speech by then Premier Ed Stelmach. In doing so, the

protesters intentionally violated several laws, including criminal trespass – they had no legal right to be at the meeting or do what they did. But in their view, their actions were morally justified because the government led by Stelmach was complicit in the environmental harm caused by oil production.

According to Roberta Lexier civil disobedience is typically defined as “a public, non-violent and conscientious breach of law undertaken with the aim of bringing about change in laws or government policies.”<sup>1</sup> As Lexier says, the goals of civil disobedience are “to publicize an unjust law or a just cause” and “to appeal to the conscience of the public” so as “to end complicity in the injustice which flows from obedience to unjust law.” Sometimes the goals are more strategic, that is, aimed at pressuring the authorities to take a particular step towards alleviation of the injustice, for example, in Lexier’s words, “to force negotiation with recalcitrant officials.” Recent road obstructions by some Aboriginal groups as part of Idle No More were undertaken with the goal of pressuring government officials – in particular, the Prime Minister and the Governor General – to agree to meet with certain chiefs. Civil disobedience can also be aimed at disrupting the process by which people who have violated an unjust law are prosecuted, for example, by encouraging so many people to defy the law that the authorities are overwhelmed by their number. As Lexier puts it, the goal in this context is to “clog the machine.”

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### Direct versus indirect civil disobedience

Sometimes the law violated in a civilly disobedient action is the very law that protesters seek to change. This was the case in an iconic instance of civil disobedience when in 1955 a young black woman, Rosa Parks, defied the Montgomery, Alabama law requiring city buses to be racially segregated by confining black passengers to the back of the bus. When she was asked to vacate her seat, in the first row of the back section, because a white man wanted to sit as close to the front of the bus as possible, she refused. Her conviction for violating the law led to a boycott of the city’s bus system and eventually to repeal of that law.

But the wrongness of a law or government policy cannot always be highlighted directly, that is, by violation of that very law or policy. Take for example, the recent legislative changes which weaken protection for Canadian waterways and are of particular concern to the Idle No More movement. Bill C-45, the 2012 omnibus bill removes many bodies of water from consideration under the *Navigable Waters Protection Act*. Unlike a legal command, such as “black people must sit at the back of the bus,” a law which removes statutory protection cannot itself be violated. Other means

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must be found, such as obstruction of roads or the occupation of government offices. The latter technique was used in 2009 when protesters sought to convince then federal environment minister, Jim Prentice, to take serious measures to counter climate change by illegally occupying his constituency office in Calgary.

### Public opinion and civil disobedience

Non-violence, as Lexier notes, is usually cited as a defining characteristic of civil disobedience. Some challenge this requirement. However, not only is violence probably contrary to the very concept of *civil* disobedience, it is also likely to prevent achievement of protesters' goals. Thinking strategically, are ordinary people more or less likely to be inspired to demand the legal or policy change protesters believe is needed if the disobedience is violent? In stable democracies such as Canada, the U.K. and the U.S. – where mass disorder and public displays of violence are rare – the public's response to violence is likely to be highly negative, and thus, violence is likely to hinder rather than help advance protesters' goals. If it is important to appeal to "the conscience of the public" and to "end complicity" with injustice, then how the public is likely to react to the protest must be taken into account.

Also important is that public opinion changes over time. For example, when suffragettes broke laws to protest the fact that women did not have the right to vote, many people were horrified and denied that what protesters had done was justified in the name of achieving reform of Canadian voting laws. But of course, it was not long before the fact that women had ever been denied the right to vote seemed ludicrous, itself completely beyond the pale.

### The law on civil disobedience

From one point of view, the law on civil disobedience is quite straight-forward. By definition civil disobedience involves a deliberate breaking of the law. The activists occupying the environment minister's Calgary office had no authority to obstruct the use of that office. Such protesters, if prosecuted, will be convicted, unless a court decides the law in question is unconstitutional, which happens only rarely. The fact that the law was broken to point to a serious problem – Canada's refusal to take significant steps to limit climate change – would not be relevant to a conviction. It is well-established in Canadian law that motive – the reason people break the law – is irrelevant to guilt or innocence.

But other legal issues about civil disobedience are more difficult. For example, when civil disobedience is non-violent and respectfully undertaken – for example, by giving the authorities advance notice of actions which will inconvenience the public – is it in the public interest that activists should be charged? What should the answer depend upon: how long the protest goes on; how many people are inconvenienced by it; whether there is damage to property as a result; or some other factor?

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### Civil disobedience and environmental issues

The history of civil disobedience shows it has been used to advance some of the most pressing public policy issues of the day – for example, the right of women to vote, desegregation of the American South and the need to end Apartheid in South Africa. When legal measures – such as petitioning, legal marches and political campaigns – have been exhausted, people convinced their cause is just may resort to violation of the law to try to move the consciences of their fellow citizens. Currently, many Canadians believe the environmental crisis is so severe they are prepared to break the law to prevent further degradation, for example, by obstructing the construction of additional pipelines, or at least to support those willing to do so.

Civil disobedience has upon occasion contributed a great deal to improving the human condition. It will do so again.

### Civil disobedience and the rule of law

Part of what makes Canada a better place to live than many other countries is that Canadians have a relatively strong commitment to the rule of law. Disputes in the public realm – for example, whether houses will be torn down to make room for a new transit line or highway – are settled with reference to publicly agreed upon laws made by democratically elected representatives. Many disputes in the private realm – for example, which parent gets custody of the children upon divorce – are also subject to decision according to law.

A recognition that civil disobedience can play a healthy role in Canadian society does not undermine the rule of law. Quite the reverse, actually. For the citizens of a country to respect law, their legal and governmental systems must, on the whole, seem legitimate to them. When a law is so offensive to the conscience of a significant number of people that they are willing to engage in or support the breaking of that law, then society as a whole is put on notice that change may well be needed.

Our legal and governmental systems are not perfect, and they never will be. But where imperfections are serious, it is right – not wrong – to take a stand against them. A conscientious citizen should not abide by a law or policy that is profoundly unjust. Civil disobedience can strengthen the rule of law by leading to the correction of unjust or seriously wrong laws before disrespect for the system as a whole has a chance to take hold.

### Notes

1. See Roberta Lexier's presentation: "What is civil disobedience? How has it be used historically? which was presented in 2012 at events organized by the Sheldon Chumir Foundation for Ethics in Leadership.

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*Brenda Heelan Powell*

## The Difference a Year Makes: Changes to Canadian Federal Environmental Assessment Law in 2012

*I*n 2012, the landscape of Canadian federal environmental assessment law was completely altered. Following on the heels of a truncated statutory review process in late 2011, federal environmental assessment law was re-written with the passage of Bill C-38 (the federal omnibus budget bill).

This article will provide an overview of the statutory review process and the legislative changes to federal environmental assessment law and introduce *A Model Environmental and Sustainability Assessment Law* recently published by the Environmental Law Centre (ELC). The Model Law is available with or without annotations on the [ELC website](#).

### The Statutory Review Process

The first statutory review of *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (*CEAA*) was commenced in 2000. That process took over a year and included extensive consultations with the public, stakeholders, Aboriginal communities and governments, and provincial and territorial governments throughout Canada. The process was used as an opportunity to conduct a thorough review and to learn from experience under *CEAA*.<sup>1</sup>

The second, most recent review of the provisions and operation of *CEAA* was due to be conducted in 2010. The statutory review process got off to a late start and was conducted over a very short period in late 2011. In stark contrast to the first statutory review, the most recent review process took a matter of weeks resulting in a cursory, scattered review of *CEAA*.

The House of Commons Standing Committee on Environment and Sustainable Development issued its report entitled *Statutory Review of the Canadian Environmental Assessment Act: Protecting the Environment, Managing our Resources* in March 2012. The report contains 20 recommendations which are ostensibly designed to “streamline” the federal environmental assessment process.<sup>2</sup> Ultimately, many of the Standing Committee’s recommendations made their way into the new federal environmental assessment law.

### Changes to Federal Environmental Assessment Law

With the passage of Bill C-38, the previous *CEAA* was repealed and replaced with the *Canadian Environmental Assessment Act, 2012* Ch. 19, s.52 (*CEAA 2012*). The *CEAA 2012* – along with the *Regulations Designating Physical Activities*, the *Prescribed Information for the Description of a Designated Project Regulations* and the *Cost Recovery Regulations* – came into force on July 6, 2012.

### The New Federal Environmental Assessment Process

The new federal environmental assessment process adopts a project list approach for determining which projects will be

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a federal environmental assessment may not proceed because the Agency determines that there are no adverse environmental effects. As well, the federal government may decide not to conduct its own environmental assessment on the basis that the project is being assessed using a provincial process that is substituted for or deemed equivalent to the federal process.

subject to environmental assessment. Under *CEAA 2012*, only those projects designated by the *Regulations Designating Physical Activities (RDPA)* or designated by the Minister of Environment on a discretionary basis may be subject to federal environmental assessment.

A project that is not on the *RDPA* but is designated by the Minister of Environment on an *ad hoc* basis **must** undergo a federal environmental assessment.<sup>3</sup> As well, a limited number of projects on the *RDPA* are linked to either the Canadian Nuclear Safety Commission (CNSC) or the National Energy Board (NEB) and **must** undergo a federal environmental assessment by the CNSC or NEB as appropriate.<sup>4</sup>

All other projects on the *RDPA* are linked to the Canadian Environmental Assessment Agency (CEA Agency) and **may or may not** undergo a federal environmental assessment. Proponents of such projects must submit a project proposal to the CEA Agency, the contents of which are dictated by the *Prescribed Information for the Description of a Designated Project Regulations*. Once the project proposal is complete, the CEA Agency determines whether or not a federal environmental assessment ought to occur.

At this point, a federal environmental assessment may not proceed because the Agency determines that there are no adverse environmental effects. As well, the federal government may decide not to conduct its own environmental assessment on the basis that the project is being assessed using a provincial process that is substituted for or deemed equivalent to the federal process.

If the CEA Agency has determined that a federal environmental assessment is required, one of two kinds of environmental assessment may occur: a standard environmental assessment<sup>5</sup> or assessment by review panel (s.38). Once the environmental assessment is complete, the appropriate body (the CEA Agency, CNSC, NEB or the review panel) must prepare a report, which is used to determine whether or not the project will cause significant adverse environmental effects.

If the project is determined to cause significant adverse environmental effects, the matter is referred to the federal Cabinet to decide whether or not those effects are justified in the circumstances (s.52). Finally, a decision statement which indicates the decision made in relation to the project (including any conditions that must be met by the project proponent) is issued (s.54).

#### How Does *CEAA 2012* compare to the previous *CEAA*?

There are several significant differences between the previous *CEAA* and *CEAA 2012*. The number and scope of assessments conducted under *CEAA 2012* will be reduced compared to the previous *CEAA*. There are also significant procedural differences between the previous *CEAA* and *CEAA 2012*, including changes to the types of environmental assessment, the federal authorities conducting assessments and public participation opportunities. As well, *CEAA 2012* introduces legislated timelines and the mechanisms of substitution and equivalency.

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### Changes to the Number and Scope of Assessments

The previous *CEAA* applied to all projects that had a federal trigger (unless specifically excluded). This meant that a federal environmental assessment was required for all projects which triggered *CEAA* by virtue of involving the federal government as proponent, federal lands, a prescribed federal permit or federal financial assistance. In contrast, under *CEAA 2012*, only those projects designated by the *Regulations Designating Physical Activities* may be subject to a federal environmental assessment. In addition, the Minister has the discretion to designate a particular project for federal environmental assessment on an *ad hoc* basis.

The effect of these changes to federal environmental assessment law means that fewer projects will be assessed. Fewer projects will fall into the purview of *CEAA 2012* than with the previous *CEAA*. Further, even those projects which do fall into the purview of *CEAA 2012* may be excused from a federal environmental assessment at the discretion of the CEA Agency or the Minister.

The scope and content of federal environmental assessments is also reduced under *CEAA 2012*. Consideration of environmental effects under *CEAA 2012* is limited to effects on fish and fish habitat, aquatic species at risk, migratory birds, federal lands and aboriginal peoples. As well, a federal authority<sup>6</sup> must consider changes to the environment that are “directly linked or necessarily incidental” to that federal authority’s exercise of power in relation to the project. This contrasts to the previous *CEAA*, which considered effects to all aspects of the environment: land, water, air, organic and inorganic matter; all living organisms; and interacting natural systems.

While the factors that must be considered in the course of a federal environmental assessment remain largely unchanged from the previous *CEAA*, there are a few significant differences. The previous *CEAA* required consideration of the **need for the project** and **alternatives to the project**. There is no longer a requirement to consider these factors in the course of a federal environmental assessment despite both factors being key considerations for achieving sustainability. As well, the requirement to consider the **capacity of renewable resources** that are likely to be significantly affected by the project to meet present and future needs is removed from *CEAA 2012*.

### Procedural Changes under *CEAA 2012*

As mentioned above, there are two kinds of environmental assessment under *CEAA 2012*: a standard environmental assessment or assessment by review panel. This contrasts with the previous *CEAA*, which had several forms of environmental assessment: screenings, comprehensive studies, panel reviews or mediation.

Under the previous *CEAA*, numerous federal departments were responsible for conducting environmental assessments. In contrast, under *CEAA 2012*, a federal environmental assessment may be conducted only by the CEA Agency, CNSC, NEB or review panel.<sup>7</sup>

... there are two kinds of environmental assessment under *CEAA 2012*: a standard environmental assessment or assessment by review panel. This contrasts with the previous *CEAA*, which had several forms of environmental assessment: screenings, comprehensive studies, panel reviews or mediation.

Legislated timelines for completion of an environmental assessment have been introduced by *CEAA 2012*.<sup>8</sup> The Act requires that a standard environmental assessment be completed within 365 days, an environmental assessment by the NEB be completed within 18 months and an environmental assessment by a review panel be completed within 24 months.<sup>9</sup>

Under *CEAA 2012*, a federal environmental assessment may be avoided by allowing a provincial assessment process to be substituted or deemed equivalent. In the case of substitution, the federal government considers the provincial environmental assessment and makes its own decision (i.e., the provincial assessment alone fulfills the requirements of *CEAA 2012*). In the case of equivalency, the federal government relies entirely upon the provincial environmental assessment, including the ultimate decision (i.e., the project will be exempt from *CEAA 2012*). The mechanisms of substitution and equivalency under *CEAA 2012* are a marked departure from the use of coordination and harmonization under the previous *CEAA*.

The previous *CEAA* required that environmental assessments were to provide opportunities for public participation. The term **public** was not restricted in any manner. In contrast, under *CEAA 2012*, public participation in environmental assessment processes conducted by the NEB or a review panel is limited to interested parties.<sup>10</sup> An **interested party** is defined as any person who is directly affected by the project or has relevant information or expertise.

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### The ELC's Model Environmental and Sustainability Assessment Law

Recently, the Environmental Law Centre published *A Model Environmental and Sustainability Assessment Law*. It is the ELC's goal that the model law will be used by both provincial and federal governments to improve Canada's environmental assessment processes. The ELC thanks its funders – the **Alberta Ecotrust Foundation** and the **Alberta Law Foundation** – for supporting this project.

The Model Law:

- incorporates environmentally sound principles, enabling sustainable decision-making to become part of Canada's landscape;
- embraces sustainability as its core objective;
- provides strong rights for public participation;
- provides fair, predictable and accessible assessment procedures; and
- provides a legal framework for strategic and regional assessment. These types of assessments enable consideration of environmental and sustainability impacts at a policy, planning or regional level to provide a strategic framework for subsequent project-based assessments.



## Notes

- 1 For a brief description of the statutory review process conducted in 2000, see Arlene Kwasniak, “[Canadian Environmental Assessment Act: Five-Year Review](#) (2000) 15 *Newsbrief* 1.
- 2 For the ELC’s discussion of the Standing Committee’s Report see our March 21, 2012 blog post entitled Standing Committee on Environment and Sustainable Development issues its Report on the *CEAA* Seven Year Review (<http://environmentallawcentre.wordpress.com/2012/03/21/standing-committee-on-environment-and-sustainable-development-issues-its-report-on-the-ceaa-seven-year-review/>).
- 3 *Ibid.*, s. 15.
- 4 *Ibid.*, ss. 13 and 15.
- 5 Conducted by the CEA Agency, the CNSC or the NEB.
- 6 Federal authority is defined by s. 2, *supra*. note iii. A federal authority includes Ministers, government agencies, parent Crown corporations, departments or departmental corporations, and designated bodies.
- 7 Currently, the only designated authorities are the CEA Agency, CNSC and NEB. The Act leaves open the possibility of other federal authorities being designated by the *RDPA*.
- 8 Under the previous *CEAA*, there were no timelines set by the Act itself. However, the *Establishing Timelines for Comprehensive Studies Regulations* did place timelines on the completion of comprehensive studies.
- 9 If a review panel fails to meet this timeline, the review panel is terminated and the environmental assessment is completed by the CEA Agency (*supra*. note iv at ss. 49 and 50). The legislated timeline for the CNSC is 24 months as set by the *Regulations Amending the Class 1 Nuclear Facilities and Uranium Mines and Mills Regulations (Legislated Timelines)* SOR/2012-288.
- 10 This definition is not applicable to environmental assessments by the CEA Agency or by the CNSC, see *supra*. note iv at s. 2(2) and s. 15(b).

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*Peter Bowal and Sean Keown*

## Nickel Shower: An Environmental Class Action

### Introduction

The recent **Smith v. Inco Limited** case is the first Canadian environmental class action lawsuit to proceed through a trial and appeal. It shows how the courts mediate between the interests of industry and of private landowners.

Inco refined nickel near the small southern Ontario city of Port Colborne on the north shore of Lake Erie from 1918 to 1984. It was for many years the major employer in the area, employing as many as 2,000 people. Inco emitted nickel oxide into the air from its 500-foot smoke stack, mostly before 1960.

Inco acknowledged it was the source of the nickel particulates found in the residents' soil. In March 2001, approximately 7,040 residents brought a class action to recover damages from Inco for what they perceived was a decline in their real estate values attributed to Inco's earlier nickel refining operations.

On July 6, 2010, a trial judge determined that Inco must pay \$36 million to the landowners.

## Facts

The plaintiff class was divided into three subclasses according to their proximity to the Inco refinery, which was reflected in the degree of nickel contamination. The Ontario Ministry of Environment (MOE) conducted five soil analyses from 1972 to 1998. The last test, not publicly released until 2000, showed that in many parts of Port Colborne the level of nickel in the soil far exceeded the MOE guideline. The final draft of the Human Health Risk Assessment in 2002 ordered Inco to remediate the most contaminated properties although the MOE also reported it was unlikely the nickel levels posed any risks to human health.

The class action could not prove adverse health effects suffered by any class members. Instead, it was certified on the basis of the decline of property values only. The three related intentional tort causes of action were trespass, *Rylands v. Fletcher*, (strict liability) (1866), L.R. 1 Ex. 265, *aff'd* (1868), L.R. 3 H.L. 330) and nuisance.

## Trial Decision

The tort of trespass relates to any voluntary direct physical intrusion onto plaintiff land. Was the Inco discharge of nickel particulates that accumulated on plaintiff land a "direct and physical intrusion" or merely indirect or consequential? The residents could not prevent the contamination, but Justice Henderson concluded that this was not a trespass by Inco against these landowners: "the intrusion onto neighbouring properties in this case is indirect, not direct".

What about the 1868 *Rylands v. Fletcher* doctrine? If the Inco refinery was a "non-natural use" of its land, it may be strictly liable to the residents.

In the 1989 Supreme Court of Canada case of *Tock v. St. John's Metropolitan Area Board*, the basement of the Tock home was flooded following a heavy rain due to blockage in the storm sewer. The Court considered the provisioning of an indispensable service such as a water and sewer system as a natural use.

Justice Henderson distinguished his *Inco* case from the *Tock* case on the basis that an urban sewer system was "necessary to support urban life" but a nickel refinery was a "private, for-profit, corporation." He continued:

The nickel was not naturally on the land, and the nickel particulates were not naturally on the land or in the air over the land. Further, the refining of nickel was not an ordinary use of the land; it was a special use bringing with it increased danger to others. This satisfies the first element of a *Rylands* claim.

The class action could not prove adverse health effects suffered by any class members. Instead, it was certified on the basis of the decline of property values only.

There is debate about whether a *Rylands* claim is restricted to a single, isolated escape, or whether it includes ongoing escape. Inco argued that a *Rylands* claim should be restricted to isolated events, and since the refinery emissions occurred over a period of 66 years, this class action should be dismissed. Justice Henderson decided to interpret *Rylands* as including the Inco-type continuous contamination and ruled that Inco was strictly liable under the *Rylands* doctrine.

A unanimous decision of the Ontario Court of Appeal was released 15 months later, on October 7, 2011. On essentially every ground, the Court of Appeal reversed the lower court decision.

Was this nickel contamination also a private nuisance? For this intentional tort, the harm may be indirect, and actual damage is required. The damage might be physical (such as this nickel contamination) or a significant interference with the use of the premises. Since it was proven that “nickel has accumulated on class members’ properties to the extent that the property values have diminished,” private nuisance was established.

### Calculation of Damages

Justice Henderson considered the adverse publicity from 2000 relating to the nickel contamination of the land and how that affected the property values. Real estate agents began to inform buyers about the nickel in the soil and started inserting nickel warnings into purchase and sale agreements. The MOE then requested residents to bring their garden produce and well water in for testing. Concerns were raised about the possible carcinogenic effects of nickel. Media coverage expanded from local to national. Justice Henderson concluded: “the public mood was one of extreme concern about nickel levels in the soil that could affect everything from vegetation to human health to real estate values.”

The plaintiffs did not claim that property values decreased, but rather that they did not increase commensurately over time. Experts on both sides analyzed the impact on property values using nearby Welland, Ontario, a similar city, as the benchmark. The judge said the publicity adversely affected property values. The average property value in Port Colborne should have been \$169,412 in 2008 had there been no nickel contamination. The average loss was \$4,514 per property. For 7,965 properties, the total amount of damages was rounded to \$36 million. Inco was not assessed punitive damages.

### Appeal Outcome

A unanimous decision of the Ontario Court of Appeal was released 15 months later, on October 7, 2011. On essentially every ground, the Court of Appeal reversed the lower court decision. The class of resident plaintiffs lost their claim to damages for reduced property values. Their class action was dismissed and Inco was reimbursed some of its costs for successfully defending this litigation.

The Court of Appeal found errors in every important conclusion of the trial judge. It found this not to be an actionable nuisance, and Inco was not liable under *Rylands v. Fletcher*. The Court said the plaintiffs did not even prove that their properties had lost any value after September 2000. Even if one assumed devaluations did occur, the Court said those devaluations would not necessarily have been caused by Inco's discharge of nickel particles on their land. In short, the residents had failed to prove any damages.

The Court said it is better for the legislature to regulate such business activities than having judges do it through the common law.

Inco had not operated its refinery unlawfully or negligently. It complied with all the environmental and other governmental regulatory schemes applicable to its refinery operation. The emissions from the refinery did not contravene any laws.

The actual physical damage only became material more than 15 years after the refinery closed, when public anxiety negatively affected the property values. The trial judge had considered the nuisance to be caused by public alarm and not by any real physical harm. The landowners never claimed the nickel particles in the soil interfered with the use or enjoyment of their property, but only that the nickel particles was "physical injury" to their property which translated to lower property values. The Court of Appeal said that this could not be characterized as damage to the property. The trial judge was wrong to conclude the nickel particles in the soil caused actual, substantial, physical damage to the plaintiffs' lands.

As to the *Rylands v. Fletcher* claim, the nickel particle emissions could not be considered to have "escaped" from the Inco refinery – they were an integral part of refinery operations and were released intentionally on a daily basis for 66 years. These refinery operations and emissions were not extra-hazardous activities or fraught with danger. They did not present an abnormal risk to neighbours. This was a natural use of Inco's property. The Court said it is better for the legislature to regulate such business activities than having judges do it through the common law.

The Court of Appeal agreed with the trial judge that *Rylands v. Fletcher* should not be limited to a single isolated escape. Single escapes and continuous escapes produce the same kind of damages. But the landowners also did not sufficiently prove damages, an essential component of both causes of action.

The harm in this action related to the negative effect on property values as matched to the comparable community of Welland, Ontario. The difference of 4.3% in appreciation rates over ten years between Welland and Port Colborne calculated at trial was within the range of variance to be expected in comparable communities. Overall, the Court of Appeal, comparing the data, concluded that Port Colborne either outperformed or almost equaled Welland in terms of property appreciation over the period of comparison.

The trial decision was set aside. The residents' application for leave to the Supreme Court of Canada was dismissed on April 26, 2012.



## Conclusion

This class action case of a large group of private landowners against a powerful mining company received much publicity and many people hoped it would be the first of many similar environmental class actions prosecuted against large corporate polluters.

In the end, several lessons were learned.

- A plaintiff always needs good evidence to win the case. Emissions, particulates and deposits on your land or your body must be clearly shown to be harmful in some way in order to win damages. Businesses that exceed government guidelines for emissions do not suffer automatic civil liability. Widespread public concern, adverse publicity and controversy will not furnish a legal remedy without further legal or causal foundation.
- Legal remedies can't be based on emotion. A chemical alteration in the content of soil may not amount to physical harm or damage to the property. Businesses, factories and refineries – especially those that operate in the community for a long time under the law – may not be inherently dangerous or making non-natural uses of the property upon which they are operating. It may be hard to win devaluation of property lawsuits in Canada without strong evidence and data sets must be accurate and complete.
- Finally, one must be aware of the impressions created, especially in a large class action lawsuit. The Ontario Court of Appeal noted that Inco remediated 24 of the 25 properties it had been ordered to do by the MOE. Ms. Smith, the owner of the last property named in the MOE order, never permitted remediation as ordered by the MOE, never sold her property and therefore never actually suffered any actual loss of value. As the lead plaintiff in this class action, her own claim may not have appeared particularly strong.

This class action case of a large group of private landowners against a powerful mining company received much publicity and many people hoped it would be the first of many similar environmental class actions prosecuted against large corporate polluters.

Peter Bowal is a Professor of Law at the Haskayne School of Business, and Sean Keown recently graduated with a B.Comm. from the University of Calgary in Calgary, Alberta.

A stylized illustration of a person in a dark blue silhouette, juggling three orange spheres. The person's arms are raised, and the spheres are in various positions around them. A long, light gray shadow of the person is cast to the right, suggesting a light source from the left.

## How to Avoid Your Day in Court

*Carole Aippersbach*

*W*hen people think of needing legal help, they often think of lawyers, court forms, and court rooms. As those who have been there already know, it isn't nearly as glamorous as it seems on television, and quite to the contrary, it can be quite scary. The good news is that not every legal issue has to end up there. Think of the law as a long time-line, or "spectrum", of possibility: court is at the very end of the line. The key to maximizing your chances of not ending up there is taking a proactive approach to address the issue as soon as you catch the first glimmer of a problem (or earlier!). But where do you begin? More good news! In this day and age, there is a great deal of information available at your fingertips (or at the local library). It's just a question of knowing when you need such information and exactly how to go about getting it.

The first step in trying to avoid the courthouse is recognizing when there is a problem that needs to be addressed. This can often be much harder than it seems. After all, legal problems don't just walk into a room and identify themselves. The law, and its application, has an amazing ability to surprise. Let's look at a few examples.

The law, and its application, has an amazing ability to surprise. Let's look at a few examples.

We'll start with the far end of the legal spectrum: the "What do you mean the law does *not* cover this situation?" or "What, there's actually a law about that?" kinds of scenarios.

- You are a post-secondary student, and you move into a room in someone's home. You would think that standard landlord/tenant law (which, by the way, is sometimes called "residential tenancies") applies to your rental situation, right? Not necessarily. For example, in Alberta, it does not. Instead, the situation is governed by contract law (which is not a "law", *per se*, but common law). No contract can mean lots of trouble. Surprise.
- You move in with your best friend. Your children have grown and your husbands have passed on, so why not save on expenses? After all, you already do just about everything together. After three years, you might become adult interdependent partners (the Alberta version of common law). Yes, even without any conjugal relations. Surprise.
- The daycare to which you send your child has asked you to sit on its board of directors. It is such a great organization; helping out is the least you could do. While this is true, if the board does not have the right documentation in place, you, as a director, could be held personally financially liable for the mistakes of the daycare centre. Surprise.

As you can see, just about anything can give rise to a legal issue. You never know when you'll find yourself on that line. So stay aware. Start by assuming there is some kind of law involved, and look into it. This is especially true in situations in which you have some kind of responsibility to someone else, or situations in which you hear a little voice in your head saying "well, this could lead to a bunch of trouble". So ...are you letting someone else drive your car? Have a look to make sure that is covered by your insurance. Dumping things into the creek on your property? Remember, that water flows to somewhere else, and those property owners may have some rights. As an aside, it is important to remember that, not *knowing* about a law is irrelevant; if you break that law, you will have to face the consequences.

The next set of situations on the legal spectrum are of the 'false assumption' variety: the "well, that is what the law used to be 20 years ago" or "well, I've heard (or seen on TV) that this is what the law says", or "well, surely the law will say <this>, it is only logical."

A few hints in this regard.

- Laws change. Some laws change every few years, others remain the same for decades. You should never assume that the law is the same today as it was 20 years ago, or even as it was yesterday. Even lawyers always have to

it is important to remember that, not *knowing* about a law is irrelevant; if you break that law, you will have to face the consequences.

double-check. For example: a few years ago, it was not a problem to talk on a hand-held cell phone while driving. Today, it is illegal and it can lead to serious penalties.

- Laws are different in different places (sometime *vastly* different). They can change from city to city, province to province and country to country (this is known as “jurisdiction”). Do not assume that you know the law because a distant relative told you all about their experience. Also, American television is *not* a good way to do legal research. As far as the law is concerned, the U.S. is a foreign country, and the legal differences can, at times, be enormous. For example: in the U.S. there is a tax on gifts, in Canada, there is not. Another: in Alberta, one can write a will entirely in hand-writing, with no witnesses, and it can be valid Will. In B.C., however, it would *not* be a valid will, because in B.C., even a handwritten Will requires two witnesses.
- Laws do not necessarily match each individual’s concept of logic. Just because you, or I, think something is logical (or just, or fair), does not make it ‘the law’. Even if 1 million people think it is fair, that does not make it ‘the law’. An Alberta example: “If I cannot make my own health decisions any more, surely everyone will just take instructions from my spouse”. Right? Wrong. That *would* be logical, but it is not usually how the law works. Health care workers need to know who you choose as your decision-maker, and they need the correct piece of paper to do that. Imagine for a moment a situation in which your spouse and, say, your child, are providing different instructions. Whose instructions are to be followed? No one’s. Instead, someone will have to prove that they have the legal authority to make decisions on your behalf (either because you assigned them that job before you lost capacity, or because they’ve gone to court to get someone appointed). That is the law: an individual’s perception of logic or fairness are irrelevant.

A final set of situations to consider are those of the ‘burying one’s head in the sand’ variety: the “well, I’ll just ignore this for now, as it might go away” or “it can wait, my rights won’t change” or “I’m sure the law has a back-up plan, I’ll just rely on that” kind. Let’s examine this in further detail.

- As is usually the case in life, burying one’s head in the sand, is *rarely* a successful strategy. In fact, when it comes to the law, it is often the opposite: if you ignore it, it might get worse. For example: You were unemployed for two months and you missed a payment or two on your new 60-inch television, and you decide that you will just make a big lump sum payment when your income tax refund arrives. They are still getting all of their money, right? No problem, right? Wrong again. Chances are, when you signed the financing agreement, you agreed that if you miss even one payment, the creditor can come

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and take back the TV. The bank does not care what your plans are – it wants its money, on time. Plus, now your [credit rating](#) has just gone down (where it will stay for a while).

- A while back, you were in a car crash. You were seriously injured, but everything has taken so long, and you are still trying to determine the exact extent of the injuries and the final cost. In every jurisdiction, there is a [time limit to legal actions](#) – if you wait too long, you might lose your right to sue.
- You are young, estranged from your family and, should something happen to you, your friends all know what you want. So why write a Will – that will just bring the family out of the woodwork, right? And if you write a Will you have to leave something to your family members, right? Wrong and wrong. When it comes to Wills, the law does have a back-up plan, but, in this case, it is the opposite of what you want. If you write a Will, you could leave things to your friends. If you don't, succession law will give it to family.

So what to do? Assume for the moment that you find yourself at any one of the above points on the line. In the following article by Adriana Bugyiova, who describes Alberta's *LawCentral* websites, there are organizations to help with this sort of thing: and the information and resources they provide are often free. In Alberta, there is the [Centre for Public Legal Education](#). Similar organizations exist in almost every province and territory. For example:

- in British Columbia, there are [Clicklaw](#), the [Justice Education Society](#) and the [People's Law School](#);
- in the Yukon, there is the [Public Legal Education Association of the Yukon](#);
- in Saskatchewan there is [Public Legal Education Association of Saskatchewan](#);
- in Manitoba there is the [Community Legal Education Association](#);
- in Ontario, there are the [Ontario Justice Education Network](#) and the [Community Legal Education of Ontario](#);
- in Québec, there is [Éducaloi](#);
- in New Brunswick, there is the [Public Legal Education and Information Service](#) of New Brunswick;
- in Nova Scotia, there is the [Legal Information Society](#) of Nova Scotia;
- in Prince Edward Island, there is the [Community Legal Information Association](#) of P.E.I.; and
- in Newfoundland there is the [Public Legal Information Association of N.L.](#)

As is usually the case in life, burying one's head in the sand, is *rarely* a successful strategy. In fact, when it comes to the law, it is often the opposite: if you ignore it, it might get worse.



Plain-language legal information is also available on all government websites. They may have a separate public legal education department, as does the [Northwest Territories](#). Alternatively, each department may choose to offer some information in the format that it sees fit. Even law firms and courthouses are beginning to provide such information.

To find public legal information, you need only search. If you can Google, you are well on your way. Even you don't know how to Google, go to your local library and ask a librarian for help. Courthouse and law school libraries are also helpful, however, be aware that the resources there are generally not in plain language.

If you are going to go down this route, here are a few things to keep in mind:

- Make sure the information that you are examining is current, from the right jurisdiction, and published by a reliable source. You can find more information about that [here](#).
- Sometimes, public legal information is available in [numerous languages](#).
- Look for information that can also help you navigate process. This could be general information such as: [7 steps to Solving a Legal Problem](#). Or it could be information about a more specialized process: for example, how to [file a complaint](#) about a guardian or trustee in Ontario.
- Keep in mind that this is general information only, you may still need to see a lawyer to help deal with the issue.
- Look into dispute resolution alternatives. There is much information on this topic in Margo Till-Rogers' online law column in this issue.

The last thing to remember? If, after all of this, you do find yourself on the court end of the legal spectrum, at least you know that you did all that you could to solve the problem in other ways first. There is much good legal information out there and, when accessed, especially in a timely manner, it can help avoid that ominous end of the line: the courthouse. Hopefully it will help you, too.

To find public legal information, you need only search. If you can google, you are well on your way. Even you don't know how to google, go to your local library and ask a librarian for help.

Carole Aippersbach is a staff lawyer with the Centre for Public Legal Education Alberta (CPLEA) in Edmonton, Alberta.



## Helping yourself: where do you start?

*Adriana Buggiovà*

**W**owadays, many Albertans are representing themselves in court. But where can they (or where do they) get reliable information?

To respond to the growing demands of litigants without lawyers, Alberta Justice brought together in 2005 members of the judiciary, representatives from criminal justice, legal and court services, as well as various advocacy and research groups. By early 2007, the group had identified available services and in April, the first **Legal Information Centre (LInC)** opened in Edmonton and Red Deer. A branch followed in Grande Prairie and the Calgary branch opened in January 2009. All centres are located in the courthouses and their services include: referring litigants to legal and other resources in the community, providing information about legal advice options, providing information about alternatives to court, providing legal information, explaining court procedures, explaining the

steps to take in making legal applications and helping litigants locate and fill out court forms. In order to contact a LInC, litigants [fill out a form online](#) or visit the center in person. Furthermore, to accommodate a rising numbers of family law inquiries, [Family Law Information Centres](#) (FLIC) were created in Edmonton, Calgary, Red Deer, Lethbridge, Grande Prairie, and Medicine Hat.

For those who are trying to get information online, undoubtedly the best place to start would be the [LawCentralAlberta website](#). It provides access to a wide range of information to help people make informed decisions about going to court and represent themselves or about seeking a lawyer's assistance. To start with, the site gives access to laws of Alberta, Canada and to resources on Canadian legal structure. Next, one can select resources which are based on specific interests or developed for specific a group of people (such as seniors, people with disabilities, refugees). And of course, the ['Preparing for Court'](#) section contains vital information that will help with the decision to:

- go to court;
- use an alternative process;
- self-represent; or
- retain a lawyer.

Its resources are free and cover issues like renting, writing a will, reverse mortgages, debt, psychological abuse, grandparents' rights, child support, etc. It also provides contact information for courts, government services, agencies and organizations, and police services. The ['Videos and Games'](#) section has an interesting selection of resources about the law and the legal system. Also worth mentioning is the website's French-language equivalent, the [LawCentralFrançais](#).

Another very helpful source to consult is the [Alberta Courts website](#), in particular, the "How do I ..." section, which answers questions about small claims, rights of tenants, being a witness, emergency protection orders and mediation, among many others. For families who are involved in parenting disputes and are living separate and apart, Alberta Courts' [Family Justice Services – Court Counsellors](#) offers a wide range of free services including: information on options and services for resolving family issues; referrals to services and programs including mediation; information on the effects of separation and divorce on children; help to negotiate agreements; assistance with court applications; arranging court dates and presenting a case in Provincial Court.

[Student Legal Services](#) in Edmonton is a student-managed, non-profit society dedicated to helping low-income individuals understand their legal issues and solve their legal problems. Its resources cover topics in



criminal law, like "How do I run my own trial" or "Speak to sentence", but also answer questions about impaired driving, domestic abuse or trespass. Civil (human rights, immigration

law, wills, etc.) and family law matters (common questions about divorce, marriage, matrimonial property, etc.) are also covered.

And last, [Supreme Court of Canada](#) also has online resources available for unrepresented litigants. Besides the very useful Q & A section, the site gives access to sample books on applications for leave to appeal, reply and motion. Also, it provides forms and guidelines on how to prepare documents, and has a checklist for documents to be submitted. One interesting feature on this portal is the 'Glossary of terms', which provides definitions for the most-used legal terms.



Besides these online resources, LInC and FLIC, there are many agencies and organizations (like Centre for Public Legal Education, Legal Aid Alberta, Edmonton Community Legal Centre, *Pro Bono* Law Alberta, and Volunteer Lawyers Service, just to name a few) that provide support to anyone in need of help with legal matters.

Adriana Bugyiowa is a Public Services Librarian at the University of Alberta Libraries (Bibliothèque Saint Jean) in Edmonton, Alberta.



## Doin' It Your Own Way . . . Unsuccessful Succession

*Doris Benora*

**T**his is the age of the YouTube video. Want to know how to build Ikea furniture, bake a soufflé, change the oil in your car? YouTube can help. We are geared to thinking that we can do anything for ourselves and so, of course, many are led to thinking that they can do their own Wills. "How hard can that be?" they say. "Let's just get some forms off the Internet".

When I am asked if people can do their own Wills I always reply that, of course, they can. Everyone can attempt to do their own legal work. The question is really, "How much trouble will occur if someone prepares his or her own Will?" There is a chance that no trouble will occur. However, there is also a chance that the estate of the do-it-yourselfer, will end up in litigation and then all the legal fees that have been saved by trying to be their own lawyer will be eaten up tenfold by the legal fees to sort out the mess.

When I am asked if people can do their own wills I always reply that, of course, they can. Everyone can attempt to do their own legal work.



A Will is valid if it is typewritten and the person who made the Will and two witnesses sign it in front of each other. In some provinces, a Will is also valid if it is entirely in the person's own handwriting and they date it and sign it. The problem arises in what is written above the signature. If it cannot be deciphered because the wording is awkward or if there are ambiguities, these cannot be ignored. They must be determined and usually that is done in court. One significant factor in court cases about Wills is that often a problem is only discovered after the maker of the Will has died. After the death, the Will is read and cryptic remarks the maker made are discovered, but there is no opportunity to ask them what they meant. Not even a good séance will help. Therefore, in Wills litigation it is often said that in interpreting the Will the "best" witness is always dead ... because the best witness is the person who made the Will.

... in Wills litigation it is often said that in interpreting the will the "best" witness is always dead... because the best witness is the person who made the Will.

So you might ask, what kind of troubling comments made in a Will could lead to problems? There are many cases involving problems. One example is a woman who wrote "Be sure to give something to the little ones". Of course, now we have a problem of determining what is "something" and who are the "little ones". In that case there were several people who claimed that the deceased called them a "little one". We will never really know what she wanted but we do know that a large amount of her estate was spent sorting out this little ditty.

In another case a farmer relied on his accountants and lawyers to incorporate and transfer his land into his corporation. He listened but he never really understood that that meant that he no longer personally owned the land and, instead, he owned shares in his corporation. He wrote his own Will and gave specific pieces of valuable land to certain individuals and then gave the residue of his estate to other people. The court found that he could not give away the land in the Will because he did not own it and thus, the people who inherited the residue inherited the company shares and the company with all the land in it. This is probably not what the farmer wanted, but again, we will never know. We do know that a lot of money was spent in litigation fighting about it.

Your Will is an important legal document that determines who inherits your property. It will be pivotal in determining if your children will get together for Christmas the year after you die. It is penny wise and pound foolish to make your own Will. The cost of a lawyer to prepare your Will is a small fraction of what it will cost to litigate your Will after you die. Lawyers might make a lot more money litigating your Will than they ever would preparing it.

Of course you can prepare your own Will but if your goal is successful succession, happy families and no litigation then you will seek expert advice on that all important document called your Will.

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## Standing Up for Your Rights

*Linda McKay-Panos*

Standing is a legal principle that addresses who is entitled to bring a case before the court for a decision. Although standing (in a legal sense) may sound like a technical legal issue, it is very important to rights litigation in Canada. After the *Canadian Charter of Rights and Freedoms (Charter)* was passed in 1982, there was an increase in public interest in the outcome of constitutional cases. Courts had to impose limitations on standing to ensure that they were not overburdened with marginal or redundant cases, to screen out “busybody” litigants, and to ensure that courts could hear the various points of view of those who are most directly affected by the outcomes of legal cases (see: *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at 631).

A recent decision of the Supreme Court of Canada (SCC) provides some guidance for the courts on the issue of public interest standing. In *AG (Canada) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (“DESW”), the DESW, whose objects include improving working conditions for female sex workers, and an individual who currently worked with sex workers (together) sought a declaration that sections 210 to 213 of the *Criminal Code*, RSC 1985 c C-46, which deal with prostitution matters, violate *Charter* sections 2(b) freedom of expression; 2(d) freedom of association; 7 right to life, liberty, and security of the person and 15(1) equality rights.

Justice Cromwell wrote the decision for the Supreme Court of Canada. He noted that since the advent of the *Charter*, a number of legal decisions had provided guidance on standing, resulting in the development of a three-factor test in public law cases. These factors are:

1. whether the case raises a serious justiciable issue;
2. whether the party bringing the action has a real stake or a genuine interest in its outcome; and
3. whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court. *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236.

These factors are to be assessed in a “large and liberal” fashion.

The DESW case raised the issue of whether these three factors are to be treated as a rigid checklist, or rather as considerations to be taken into account when exercising judicial discretion with respect to granting standing. In *Canada (Minister of Justice) v Borowski*, [1981] 2 SCR 575 (a pre-*Charter* case), the court had phrased the third factor a little more stridently: “there is *no other* reasonable manner in which the issue may be brought to court” [emphasis added].

The SCC discussed the three factors.

#### Whether the case raises a serious justiciable issue

The SCC noted that *justiciability* (the question is such that the court possesses the ability to provide a legal resolution to the dispute) is related to the constitutional relationship of the court to the other branches of government and also the concern about the allocation of “scarce judicial resources”. Courts that are exercising their discretion to grant standing must stay within the bounds of their proper constitutional role should analyze whether the statement of claim reveals at least one serious constitutional issue.

#### Whether the party bringing the action has a real stake or a genuine interest in its outcome

In DESW, the SCC held that this factor is concerned with whether “the plaintiff has a real stake in the proceedings or is engaged with the issues they raise”.

#### Whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court.

In DESW, the SCC noted that although this factor has often been expressed as a strict requirement (e.g., “*no other* reasonable and effective manner in which the matter may be brought before the court”), it has not always been expressed that strictly. It listed a number of considerations that assist with interpreting the third factor in a manner that “reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court’s decisions in this area”.

A recent decision of the Supreme Court of Canada (SCC) provides some guidance for the courts on the issue of public interest standing.

1. The Court has not always expressed and rarely applied this factor rigidly;
2. This factor must be applied purposively; and
3. A flexible approach is required to consider the ‘reasonable and effective’ means factor (DESW, paras 45 to 51).

The SCC noted that the third factor should be applied in “light of the need to ensure full and complete adversarial presentation and to conserve judicial resources.” The court should have the benefit of hearing the contending views of the people who are most directly affected by the issues; whether the proposed action is an economical use of judicial resources; whether the issues are presented in a context suitable for judicial determination in an adversarial setting; and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality”.

The SCC also provided an illustrative list of some examples of matters that courts could find useful when assessing the third discretionary factor. These include:

- the plaintiffs’ capacity to bring forward a claim – their resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed manner;
- whether the case is of public interest – does it transcend the interest of those most directly affected by the challenged law?
- the lack of realistic alternative means which could favour a more efficient and effective use of judicial resources; the existence of other potential plaintiffs, particularly those who would have standing as of right; will the plaintiff bring any particularly useful or distinctive perspective to the resolution of the issues? and
- the potential impact of the proceedings on the rights of others who are equally or more directly affected.

Thus, the SCC concluded that the third factor should be expressed as: “whether the proposed suit is, in all the circumstances, a reasonable and effective means of bringing the matter before the court” rather than the stricter requirement set out in *Borowski*.

In the circumstances of the DESW case, the SCC noted that there was generally no dispute that the action raised serious and justiciable issues.

As for the second factor, the SCC held that both the DESW and the individual applicant have a genuine interest in the outcome of the current claim and are “no busybod[ies].”

The chambers judge in the original application raised a number of concerns that weighed against granting public interest standing. The SCC dealt with each of these concerns.

- that the existence of a civil case that raises many of the same issues in another province is not necessarily a sufficient basis for denying standing. Decisions of the courts in one

Thus, the SCC concluded that the third factor should be expressed as: “whether the proposed suit is, in all the circumstances, a reasonable and effective means of bringing the matter before the court” rather than the stricter requirement set out in *Borowski*

province are not binding on the courts in others. Further, the issues raised in *Bedford* are not identical to those raised in this case.

- that the existence of a potential or actual parallel claim is not conclusive to the issue of standing. The practical realities of the issues are such that it is very unlikely that these accused persons would bring a claim similar to that of DESW and the individual.
- that being a witness and a party are two different things. Sex workers in the area were not willing to bring forward a comprehensive challenge because they feared loss of privacy and safety and increased violence by clients among other concerns.

The SCC concluded that none of the three concerns raised by the chambers judge were entitled to the weight that he gave them in arriving at his decision to deny standing.

The SCC also assessed the other considerations that should be taken into account with respect to the “reasonable and effective means” factor. The parties raise issues of public importance that transcend their immediate interests. The challenge is comprehensive as it related to nearly the entire legislative scheme and may prevent a multiplicity of individual challenges. The claim is being advanced with thoroughness and skill. The presence of an individual respondent ensures that there is both an individual and a collective dimension to the case. Thus, the present litigation constitutes “an effective means of bringing this issue to court” so that it may be presented in a suitable adversarial context.

The SCC concluded that all three factors favoured the Court exercising its discretion to grant public interest standing to the DESW.

The relaxation of the third factor is a welcome change to those public interest groups who, in the past, have encountered difficulties in obtaining standing.

The SCC concluded that all three factors favoured the Court exercising its discretion to grant public interest standing to the DESW, and, in addition, the Court did not need to address the issue of whether the individual litigant had private interest standing.

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





# Words Without Weight — Enforcing Parenting Orders

*Rosemarie Boll*

**T**wo years after they separated, Stacey and Glen Haywood still argued bitterly about parenting arrangements for their three children. Glen accused Stacey of abusing alcohol and wanted sole custody. He filed six complaints and involved the police three times. The Office of the Children's Lawyer, the Children's Aid Society and the police investigated but turned up nothing. Glen finally relented, and he and Stacey signed a consent order. Stacey would have sole custody and Glen would have specified access. The consent order included a police enforcement clause. Stacey sighed with relief and hoped that everything would be okay.

Not so. Barely a month later, when Stacey arrived at Glen's house to pick up the children, Glen refused to let them go home. There was a minor scuffle and Glen told their 11-year-old daughter Kasia to call the police. When the police arrived they charged Stacey. They held her in jail overnight. This was the start of Glen's campaign to brainwash Kasia into believing that her mother was an unfit parent. Although Stacey soon retrieved her two younger children, she did not see Kasia for three months. By then, Glen had immersed Kasia in a sea of hatred and fear. He repeatedly told her that her mother was an alcoholic, and that her brother and sister were at risk in their mother's house. Glen's goal was to sever the attachment between Kasia and her mother, and he was well on the way to success.

Stacey applied in court for every remedy she could think of: contempt of court, a restraining order, the suspension of access, the immediate return of Kasia and her belongings, police

enforcement, forcing Glen to follow the parenting schedule, prohibiting Glen from saying demeaning things about Stacey or involving the children in the court proceedings (Glen had filed Kasia's handwritten statements in court), and to pre-pay and attend counselling.

Glen retaliated by seeking sole custody of all three children, a reduction of child support, and the appointment of a lawyer for the children ([S.H. v. G.H.](#), 2010 ONSC 5615 (CanLII), retrieved on 2013-02-02).

Stacey's case was heard by Madam Justice McGee of the Ontario Superior Court. She took immediate action, quoting another judge: "It is not sufficient for the court to overlook a first breach. Child custody and access Orders are not like a game of baseball, where it takes three strikes before you are "out" (Justice Greer in [Sickinger v. Sickinger](#), 2009 CanLII 28203 (ON SC), retrieved on 2013-02-02. In this case, the mother repeatedly breached a Consent Order and was found in contempt. She appealed the contempt finding and lost. She was ordered to pay her husband's costs of \$10,000.)

Justice McGee granted what is called a "multi-directional" order. She gave Stacey pretty much everything she asked for, but more importantly, she identified the case as high-conflict. She took control and ordered that all future proceedings must be before her.

From a lawyer's point of view, Stacey was fortunate. As a family law lawyer, I have seen far too many cases where the offending parent is not "out" after one strike – or two, or three, or even four. In fact, parents like Glen sabotage the court system time and time again, seemingly without penalty. The case escalates into a high-conflict all-out fight where one (or both) parent's goal is to alienate the child from the other parent. The case goes before a series of judges who don't know what to do. Stacey was fortunate to have a judge who was willing to take charge right from the first breach of the order.

But Stacey probably didn't feel so lucky. She had already withstood two years of accusations, spent thousands of dollars, and no doubt suffered an endless series of sleepless nights. Then it took her another three months and perhaps thousands of dollars more to get what she was already entitled to – Kasia's return. The police helped Glen when Stacey was the one who needed help. She was treated like a criminal and went to jail, and Glen later leveraged this by trying to bait her into breaching her bail conditions. She was prohibited from contacting Glen while the children were with him. She endured yet another smear campaign alleging alcohol abuse. She had to listen to Glen's lies.

Yet the highest price was paid by Kasia. Her father used her as a tool to meet his own needs – in short, he abused her, and for three long months there was nothing her mother could do to stop it.

It is perverse that one parent struggles to get a legally-binding order only to find that the other parent flouts it almost with impunity. It happens in all kinds of subtle ways. One parent keeps changing the pick-up schedule. The access parent doesn't show up and the custodial parent is left to

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explain it to a deeply-disappointed child. Someone won't answer the phone. A child is returned late, or not at all. There is a slow undermining of parental authority. Instead of doing their job, the police tell the parents to go back to court and sort it out.

The frustrated parent goes back to court to get ... another order. In the meantime, he still has to obey the old one. So, until someone does something meaningful, the offending parent remains in control. Everyone loses faith in the justice system. Desperate parents start helping themselves – and risk *Criminal Code* prosecution for parental abduction.

It is easier to collect support than to collect your child. Every province and territory has a satisfactory maintenance enforcement program. Nova Scotia's Judge Milner says we should have an equivalent program to enforce parenting orders.

### The move toward reform

Governments are passing laws to deal with breaches of access orders (Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, the Northwest Territories and Nunavut), but it is not yet clear how effective those laws are. Section 61 of British Columbia's new *Family Law Act*, in force March 18, 2013, empowers the court to:

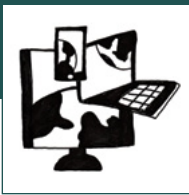
- make the parties see a counsellor or attend dispute resolution meetings;
- make the offender reimburse the other parent for her wasted access costs and give make-up parenting time;
- require that access transfers be supervised or make the offender report to the court;
- post security that will be lost if the offender continues denying parenting time;
- fine the offender up to \$5,000, or make him pay up to \$5,000 for the other parent's or the child's benefit.

Once a parent has an order, someone still has to enforce it. Alberta has now designated "enforcement officers." They include police officers, First Nations police officers, and peace officers under the *National Defence Act (Canada)*. There are enforcement guidelines and officers are required to write incident reports and give them to both parents.

It is easier to collect support than to collect your child. Every province and territory has a satisfactory maintenance enforcement program. Nova Scotia's Judge Milner says we should have an equivalent program to enforce parenting orders. He suggests we create a "Director of Access Enforcement." In theory, the director would oversee a squad of trained enforcement officers who understand the need to act quickly and decisively.

Judges do their best to make orders that benefit children. They are taking charge and case-managing high-conflict cases more often. The police are under pressure to treat breaches of parenting orders more seriously. After all, if the police who came to Glen's house had arrested Glen instead of Stacey, Kasia would have been spared the emotional trauma that nearly tore her in two.

Rosemarie Boll is Staff Counsel with the Family Law Office of Legal Aid Alberta, in Edmonton, Alberta.



# Online Resources for Dispute Resolution

*Margo Till-Rogers*

**M**aybe it's a dispute between neighbours. Or a conflict at work. Or a change to child custody arrangements. Tempers flare, things escalate and the next thing you know you're headed for court. Regardless of your legal problem, once you've entered the court system, things become much more complex and you may have much less control over the process.

Before you go to court, there are other options that should be considered. This column will look at some of the online resources available to help individuals interested in exploring alternative dispute resolution (ADR).

Public legal education portals such as [LawCentral Alberta](#), [Clicklaw](#), and [yourlegalrights.on.ca](#) are good starting points. Each portal has a separate section which links to resources that help people understand their legal problems and, ideally, resolve those problems outside the courts. Within the portals look under 'Alternatives to Court', 'Alternative Dispute Resolution' or 'Solve Problems'.

The [ADR Institute of Canada](#), also referred to as ADR Canada, is a key source of information on ADR. This nonprofit organization provides leadership, resources and support for both professionals working in dispute resolution as well as for the individuals and organizations who use their services. For those new to the subject, its list of [Frequently Asked Questions](#) outlines options for resolving conflicts outside the traditional litigation process, including mediation, arbitration and other non-adjudicative processes such as mini-trials and early neutral evaluation. Regional affiliates of ADR Canada span the country and links to these organizations are listed in the [Member Resources section](#).

Mediation is one of the most frequently accessed ADR options. Parties work together through a trained intermediary to try to work out their legal disputes and reach a satisfactory outcome through guided negotiation. Mediation is not a substitute for legal advice and the mediator will not decide the outcome of the dispute. Justice Canada's [Dispute Resolution Reference Guide – Mediation](#) gives an overview of what mediation is, how the process might be applied, and sets out some of its advantages and disadvantages.

'[Mediation – Building Solutions that Work](#)' is a short online video by the Alberta Courts that can help potential participants understand the mediation process and how it might work for them.

Neutral evaluation is another dispute resolution option that can be used on its own or in conjunction with other forms of ADR. An experienced third party (typically a lawyer or a trained dispute resolution practitioner) meets with the parties to hear the details of their cases. The evaluator will provide a non-binding evaluation of the merits of each party's case. See the [Neutral Evaluation](#) section within Justice Canada's Dispute Resolution Reference Guide for a detailed look at the process as well as a checklist and a sample neutral evaluation agreement.

A third, and more structured approach to alternative dispute resolution, is arbitration. Arbitration differs from other ADR processes in that it is, in most instances, binding on the parties and the decision of the arbitrator may be entered on the court record. The ADR Institute of Alberta has posted a [video](#) to explain what arbitration is and how it works. Arbitration is frequently used in disputes relating to the workplace, such as grievances between unions and employers and unfair dismissal cases. The [Federal Mediation and Conciliation Service](#) plays a role in resolving certain types of disputes governed by the *Canada Labour Code*.

ADR Canada members who practise mediation agree to abide by the [National Mediation Rules](#) and the [Code of Ethics](#). There are also [National Arbitration Rules](#). Both sets of Rules provide a Model Dispute Resolution Clause that can be used when setting the terms of a contract.

To find a private dispute resolution practitioner there is [ADR Connect](#). This bilingual database lists mediators, arbitrators, trainers and other ADR specialists across Canada. The [seven regional affiliates](#) listed on the ADR Canada website also maintain directories of registered practitioners and their areas of interest. [Family Mediation Canada](#) and its affiliate organizations provide contact details for professionals specializing in family matters.

Information about mediation and other dispute resolution services is set out on the respective provincial and territorial government websites, usually under the Justice or Attorney General portfolios. For family matters see the [Inventory of Government-based Family Justice Services](#) by Justice Canada – a listing of provincial and territorial government agencies that provide support for families going through separation and divorce.

A third, and more structured approach to alternative dispute resolution, is arbitration. Arbitration differs from other ADR processes in that it is, in most instances, binding on the parties.

There are many benefits to using alternative dispute resolution methods. ADR can save you time and money, offer you more control over the process, and help to preserve relationships. ADR will not be an option in all cases but by accessing some of the resources outlined here, and asking for help when you need it, you'll be in the best position to determine if it may be a tool to help you resolve your legal dispute.

Margo Till-Rogers is a librarian and the Associate Director of the Centre for Public Legal Education Alberta (CPLA) in Edmonton, Alberta.





# Anti-spam Law May Snare Charities

*Peter Broder*

*T*hose of us who work for charities are probably as accustomed as anyone to getting unsolicited emails asking for funding or other support. Even in the occasional cases where these requests are genuine, rather than scams or trickery, the sender often hasn't taken the time to even check if what's being sought is within the charity's purview (thus the email in most cases ends up in the recycle bin). And charities are as subject as everyone else to computer viruses, malignant software and malware.

So undoubtedly lots of people in the charitable sector – and many charities themselves – welcome federal government efforts to crack down on unwanted electronic messages.

The mechanism chosen by the government to deal with such messages and other troublesome computer communications is Bill 28 – also known as the anti-spam legislation – and the general thrust of its provisions is to prohibit commercial electronic contact with individuals or entities with which the sender does not have an existing relationship or prior consent.

The legislation, however, is problematic for charities and non-profit organizations. Specifically, it creates grey areas with respect to certain activities undertaken by charities and non-profit organizations. For those communications that it covers, it also imposes a higher obligation to gain consent to be contacted than was generally the norm under past privacy legislation. Engaging in or permitting breaches of the legislation can result in heavy sanctions.

Included in the provisions is the following definition of “commercial activity”:

‘commercial activity’ means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit....

Leaving aside a limited number of narrow exemptions that are spelled out in the statute and in regulations, the requirement that there need not be an expectation of profit potentially brings a host of activities undertaken by charities and/or non-profit organizations, particularly revenue-generating initiatives, within the ambit of the legislation. The extent to which it might also apply to activities not considered revenue-generating ones is unclear.

The legislation does carve out certain exceptions, one of which focuses on an existing membership, donor or volunteer relationship, as the basis for allowing communications. To trigger the exemption the membership, donor or volunteer relationship must have occurred within a two-year period immediately prior to the message being sent.

Unlike the *Personal Information Protection and Electronic Documents Act (PIPEDA)*, which draws a distinction between personal and business information, the new statute does not distinguish between personal and business contexts. There is, however, an exception for commercial electronic messages “sent to a person who is engaged in a commercial activity and consists solely of an inquiry or application related to that activity”.

This suggests that work-related communications are permissible, and depending on how “commercial” is interpreted could arguably cover contacts concerning the operational matters of a charity or non-profit organization. This potentially provides a safe harbour if the work a charity and/or non-profit organization undertakes is considered under the regulatory regime to be commercial.

Notwithstanding these carve outs, charities and non-profit organization face tremendous uncertainty as to what messages they send will be subject to scrutiny. That means that to avoid potential non-compliance, groups will have to seek consent for those communications.

Like *PIPEDA*, the regulatory regime makes use of the concepts of express or implied consent. But while in many cases under *PIPEDA*, reliance could be made on implied (passive) consent, the new law contemplates only limited use of implied consent and the expectation is that express (requiring a positive action by the consentee) consent will often need to be obtained if the communication is subject to the legislation. A transition period is provided and is intended to allow time for express consents to be collected.

Even where it is possible to obtain consent, charities’ administrative costs and the burden of doing so is likely to be significant. And it is particularly ironic to impose this additional obligation when many charities are moving toward electronic transactions as a way to reduce office supply and clerical costs.

... the requirement that there need not be an expectation of profit potentially brings a host of activities undertaken by charities and/or non-profit organizations, particularly revenue-generating initiatives, within the ambit of the legislation.

In cases of non-compliance, the legislation features measures that potentially make charities and non-profit organizations liable to significant monetary and other penalties if they engage in or are associated with illegal communications. Specifically, the provisions contemplate liability for those that “permit” as well as those that send false or misleading electronic messages or telemarketing. The contemplated sanctions are heavy, and non-compliant persons or entities could face penalties in the six- or seven-figure range.

Although the legislation does provide for due diligence and other common law defences, it is uncertain under what circumstances they will apply.

Given the severity of potential penalties under the legislation, risk management may lead some charities and non-profits to take steps – such as, implementing costly measures to obtain consent from those it is planning to send messages to, or eliminating some of their “cold call” communication vehicles – to reduce their possible exposure to sanctions. This is even though, owing to the vagueness of the provisions, they may be addressing behaviour that is not actually covered by the legislation.

It is possible under the legislation to exempt categories or types of messages. Section 6(5)(c) provides exceptions from aspects of the regulatory regime for any commercial electronic message “that is of a class, or is sent in circumstances, specified in the regulations” and Section 6(6)(g) provides a similar exception if the message “communicates for a purpose specified in the regulations”.

It should be noted, however, that a Section 6(5)(c) or 6(6)(g) exception through regulations could be taken as implicitly characterising the activity as commercial. Charities and/or non-profit organization may prefer to take the position that their messages are not commercial in nature.

The Regulatory Impact Analysis Statement released with the draft Regulations also suggests the possibility of the federal government “exploring the use of interpretational guidelines and other guidance material to provide clarity where appropriate”.

Though not binding at law, such guidelines could provide greater clarity as to what activities are within the scope of the legislation and thereby reduce the administrative burden on charities and non-profit organizations without the need for the sector to concede that these communications qualify as “commercial electronic messages”.

Whatever the outcome, let’s hope that a solution can be found that is less wasteful in time and money than the problems it is designed to eliminate.

Notwithstanding these carve outs, charities and non-profit organization face tremendous uncertainty as to what messages they send will be subject to scrutiny.

Peter Broder is Policy Analyst and General Counsel at The Muttart Foundation in Edmonton, Alberta. The views expressed do not necessarily reflect those of the Foundation.



# Casey Hill and the Church of Scientology

*Peter Bowal and Michelle Barron*

*Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual ... whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand ... the right of the public ... to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.*

Silkin v. Beaverbrook Newspapers Ltd., [1958] 1 W.L.R. 743, per Lord Diplock at pp. 745-46

## Introduction

It has never been easier for anyone to speak to the world than it is today. A single word can tear through the Internet and become publicly accessible. A slower, slightly less global world 30 years ago, however, was the setting for the 1995 case of Hill v. Church of Scientology.

### The Backstory

In 1983, the Ontario Provincial Police obtained a search warrant and searched premises occupied by Scientology. Approximately 250,000 documents in 900 boxes – over two million pages of material – were seized. Scientology promptly sought to invalidate the search warrant and secure the return of the seized documents. One and a half years later, a judge ordered 232 of the documents to remain sealed.

At about the same time, Scientology was challenging the Ontario government's denial of a licence to perform marriages to Scientology's president Earl Smith. A government official concluded that her decision would benefit by examining the seized documents. Hill was contacted and he advised her to apply to a judge through the Crown's office. Access to these sealed documents was granted without notice to Scientology.

Upon learning of this, Clayton Ruby, a lawyer for Scientology, wrote letters to the Ontario government and to Hill stating that what had happened was “disgraceful and shocking” and that it had made a “mockery of the courts.”

As it turned out, Scientology had Hill in its crosshairs long before 1983. The court found that:

Hill had become a target of Scientology's enmity. Over the years, he had been involved in a number of matters concerning Scientology's affairs. As a result, it kept a file on him. This was only discovered . . . during the course of this action. The file disclosed that from approximately 1977 until at least 1981, Scientology closely monitored and tracked Casey Hill and had labelled him an “Enemy Canada”. Casey Hill testified that from his experience, persons viewed by Scientology as its enemies were “subject to being neutralized”.

### The Defamatory Press Conference

Lawyer Morris Manning, represented the Church of Scientology, and recommended bringing contempt proceedings against Hill without gathering further information on the matter. On September 17, 1984, Manning, wearing his barrister's robes, addressed the press on the steps of the of the main Toronto court house to publicly denounce Crown prosecutor Casey Hill. To an audience of television stations and newspapers, Manning announced new criminal contempt litigation against Hill. He denounced Hill's misleading a judge and wrongfully participating in the “opening and inspection of documents which to his knowledge were sealed.”

### The Criminal Contempt Motion

Within two months of the courthouse press conference, Manning and Scientology prosecuted the motion to have Hill jailed or fined for his part in a government official obtaining access to the sealed documents. At this point both Manning and Scientology should have been well aware that no sealed documents had actually been breached.

All allegations against Hill were struck out as unfounded.

On September 17, 1984, Manning, wearing his barrister's robes, addressed the press on the steps of the of the main Toronto court house to publicly denounce Crown prosecutor Casey Hill.

### The Defamation Action

One week after the Scientology contempt motion was dismissed, Hill sued Manning and Scientology for defamation. It was seven years before the month-long jury trial took place. Hill testified:

I was sick. I was shocked. I understood from reading it that it related to access to the documents. The type of thing that Mr. Ruby and I had been dealing with over many months, and I was just incredulous.

...

I was horrified when I saw it. I had had a long history of dealing with counsel for the Church of Scientology. Small problems, medium-sized problems and very serious problems had been raised between us.

Every effort was made to answer those issues as they came up. When I saw the newscast, I realized that there was really nothing I could do to stop the information from getting out. I thought it was false. I thought it was a very dramatic representation. A well-known lawyer as Mr. Manning was – and he was gowned.

...

And he was standing before the High Court. The indication that I had been involved in opening sealed documents and giving permission was totally false. For me, in seeing it, it was equivalent to saying I was a cheat and that I had obstructed the course of justice. It was an attack on my professional reputation and I had no way of stopping it.

Manning and Scientology were found jointly liable for general damages of \$300,000. Scientology alone was judged liable further for aggravated damages of \$500,000 and punitive damages of \$800,000. The Ontario Court of Appeal affirmed this decision and amount of damages in 1993.

The two main issues at the Supreme Court of Canada two years later were whether the common law of defamation reconciled with the *Charter* freedom of expression and whether the jury's award of damages could stand. The Court answered both issues in the affirmative, thus bringing this 12-year ordeal to an end. At that time, it was the largest damages award for defamation in Canadian legal history. Almost 1000 judicial decisions have referred to the Supreme Court's *Scientology* decision since 1995.

### Aftermath

While Canadian courts have made it more difficult to win defamation cases since the *Scientology* case, the damages associated with successful actions have increased. This may be driven by wider publication through the Internet and information technology, and jury sympathy for

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individuals wronged at the hands of more powerful others. There have been larger jury awards for defamation since *Scientology* – for example, an Ottawa jury awarded a SkyService pilot \$3 million for a career-ending defamation by his employer in 2008.

Ironically, defamation may not actually damage one's reputation or career, at least not for long. The Supreme Court noted that "subsequent to the publication of the libel, Casey Hill received promotions, was elected a bencher [a governor of the Law Society of Upper Canada] and eventually appointed a trial judge in the General Division of the Court of Ontario" in Brampton.

Morris Manning continues to work as a lawyer in Toronto, as does Clayton Ruby. The Church of Scientology also continues to be in the news occasionally in connection with a variety of issues.

Peter Bowal is a Professor of Law at the Haskayne School of Business and Michelle Barron is a student in the Faculty of Arts at the University of Calgary in Calgary, Alberta.



## Getting Your Security Deposit Back

*Rochelle Johannsen*

You've moved all of your stuff out of the place you were renting, you handed your keys back to the landlord, and you completed the last inspection of the property. A few weeks go by, and you realize that you haven't received your security deposit back from your landlord. What should you do?

As a first step, you may want to simply contact the landlord or the property manager to find out what is going on. This is especially helpful if your landlord is new to being a landlord, or if you aren't sure that you provided your forwarding address to your landlord. If you call the landlord and do not hear back, or you hear back but don't like what you hear, then the next step is usually a demand letter.

A demand letter is a letter that you write to your landlord, demanding that your landlord do something. In this case, you would be demanding that your landlord return your security deposit to you. You can find step-by-step instructions to writing one by going to [this blog post](#).

Now that you know the steps involved in writing a demand letter, here's an example of what one for the return of the your security deposit could look like. Make sure that you include the details that are specific to your situation; don't just copy and paste the example. The [Canadian Mortgage and Housing Corporation](#) has some examples of demand letters for repairs and you can take a look at those letters [here](#).

December 14, 2012

John Landlord  
123, 4567 - 89 Street  
Edmonton, Alberta  
T1A 2B3

To John Landlord:

I am writing in regards to the security deposit that I paid under the lease of #11, 345 Renter Road. I paid a \$1,000.00 security deposit when I moved in on December 1, 2011. I lived in the property until November 30, 2012, and I had paid the rent in full. I completed the walk-out inspection report with you on November 30, 2012 and there was no damage marked down on the report, and the apartment was clean.

I have not received my \$1,000.00 security deposit from you. I have not received a statement of account, documenting the deductions from the security deposit, as required by the Residential Tenancies Act.

If I do not hear from you on or before December 28, 2012, I will file an application for return of my security deposit with the Residential Tenancy Dispute Resolution Service.

I look forward to receiving my security deposit, which you can send to my new address at 9876 Owner Way, Edmonton, Alberta, T1A 2B3.

Thank you.

*Jane Tenant*

Jane Tenant  
9876 Owners Way  
Edmonton, Alberta T1A 2B3

Rochelle Johannson is a staff lawyer with the Centre for Public Legal Education Alberta (CPLEA) in Edmonton, Alberta.



## Protection and Prosecution: Falling at Work

*Peter Bowal*

### Introduction

Just before Christmas 2009, Mr. Murgappa Naiker died instantly after falling 18.5 feet from an open bucket while de-icing an airplane at the Calgary airport. He was not wearing his safety harness. He had 17 years experience as a de-icing ramp agent and had completed updated safety training two months earlier.

His employer, Servisair, was charged with failing to ensure the health and safety of the employee, and failure to ensure use of personal protective equipment. The employer sought to defend by showing it had exercised due diligence to prevent this workplace fatality. This article describes this typical regulatory prosecution against an employer ([R. v. Servisair Inc.](#), 2012 ABPC 63 (March 09, 2012)).

### Facts

Servisair is a global provider of aviation ground services. It provides ramp services, passenger services, load control, de-icing and aircraft cleaning.

At 6 a.m. on December 21, 2009, Mr. Naiker was working as part of two Servisair de-icing teams from modular de-icer trucks in an open area on the tarmac. Soon after starting to de-ice the

airplane, Mr. Naiker fell from the bucket, which is surrounded by guard rails 43 inches high, and died from blunt head injury. He was 52 years old, 5 feet 9 inches tall and weighed 157 lbs. No alcohol or drugs were detected in his body. The bucket door was in an open, inward position. No one witnessed Mr. Naiker's fall.

Servisair had safety policies and procedures in place for de-icing operations. De-icing bucket operators are required to use safety equipment. When in an open bucket, the restraint must be worn and securely attached to the de-icing truck boom.

In de-icing training, Servisair emphasized proper use of harnesses and lanyards and the mandate that these fall restraint devices be used at all times while in the open bucket. The company also required drivers of de-icing trucks to ensure the de-icer in the bucket wore the fall protection equipment. Mr. Naiker had not been wearing his harness and lanyard, which were readily available, contrary to Servisair's safety procedures and his training. All four employees (two bucket operators and two truck operators) were in violation of company policy and training on the use of fall protection equipment.

The Crown must prove a wrongful, illegal act (*actus reus*) beyond a reasonable doubt before the burden shifts to Servisair to show on a balance of probabilities that it took reasonably steps (due diligence) to prevent the incident from occurring.

## The Charges

As airports are governed by federal legislation, in this case the [Canada Labour Code](#), Servisair was charged with the general section 124: "Every employer shall ensure that the health and safety at work of every person employed by the employer is protected." and also section 125(1)(w) which requires employers to ensure that workers are familiar with and uses all prescribed safety equipment. If the contravention of this duty causes the death or serious injury to an employee, the employer is guilty and may be sentenced to a fine up to \$1,000,000 and/or imprisonment for up to two years.

Section 148(4) states that the employer charged may successfully defend by proving it "exercised due care and diligence to avoid the contravention." The *Code* also lists various detailed legal duties of employees to use safety equipment and observe health and safety precautions.

## Actus Reus of the Offence

The Crown must prove a wrongful, illegal act (*actus reus*) beyond a reasonable doubt before the burden shifts to Servisair to show on a balance of probabilities that it took reasonably steps (due diligence) to prevent the incident from occurring. Some previous judicial decisions have held that a workplace death automatically leads to the conclusion that the employer failed to ensure the health and safety of the employee. Proof of the accident is essentially proof of the breach of this law.

The Crown had proven the *actus reus* in this case by showing beyond a reasonable doubt that Mr. Naiker was employed by Servisair and working when he fell to his death.

## The Due Diligence Defence

It was now up to Servisair to show how it exercised reasonable care in the circumstances to avoid the accident. To answer this question, the Provincial Court judge went through all the evidence of Servisair in great detail.

Overall, the judge concluded from the “overwhelming evidence” that Servisair “implemented a thorough and complete set of policies and training to ensure safe procedures [were] in place for employees required to de-ice aircraft” in a highly regulated industry on an ongoing basis. Servisair complied not only with its own safety standards, but those of Transport Canada and other agencies within the airline industry, as well as national and international safety procedures, including de-icing operations.

Servisair had established a Central De-Icing Facility in Toronto to develop de-icing safety procedures. There was extensive ongoing training of de-icing employees in place. Mr. Naiker was trained as a de-icer, and completed training prior to each winter season which emphasized the need to wear fall protection equipment when de-icing aircraft from the open bucket. He had completed this recurrent training two months before his death.

However, given that Mr. Naiker was dead because he had not followed safety procedures, and the other three co-workers with him that morning were also safety non-compliant, the critical employer due diligence issue became whether Servisair reasonably monitored, supervised and enforced its own safety practices and procedures. The other de-icer was not properly trained and qualified. Servisair did not systematically go out and observe de-icing operations. There was a smaller supervisory staff on duty in the 5:00 a.m. to 7:00 a.m. period – which is the time this fatality occurred – to monitor and a large territory to cover, especially for unscheduled planes de-iced farther away from the gates.

The evidence showed that Mr. Naiker and his colleagues had not used harnesses in the past and nothing was said or done about this. Only a few weeks before, Mr. Naiker had been observed *by an airline captain* without the safety harness, and reported. He was then verbally warned to use it, which he did on his next airplane. Policy called for this warning to be placed on his file, which was not done.

On the morning in question, the two de-icers were rushing to complete an unscheduled airplane. Mr. Naiker enlisted his untrained and unprepared colleague at the last minute because he felt he would do a favour for the employer. Since it was only one

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plane, he decided not to wear his safety equipment. Other de-icers testified that they did not always wear their harnesses.

Therefore, did Servisair reasonably enforce its own safety policies? The Court said “yes.”

The judge said (surprisingly): “the company was completely unaware that anyone had ever failed to wear fall protection equipment” and that no safety discipline records existed “because this issue had never been raised as a safety issue.” The judge continued “this company was unaware that any employee would violate the requirement to wear fall protection equipment, especially since the danger to the employee himself was so apparent and significant.”

This seems to be a curious conclusion given that all four workers that tragic morning were not in compliance with safety policies, the evidence was that the deceased worker occasionally did not harness up for the first de-icing, that the pair of de-icers deliberately did not report each other, and the one time that any supervisor admitted to having observed Mr. Naiker working without a harness, he only verbally warned him and did not take any further disciplinary action. Mr. Naiker’s de-icing partner, who would know best what usually happened, said he knew that morning that Mr. Naiker was not harnessed and he did not harness either. Surely the fact that all four workers violated their safety obligations that morning is compelling evidence about Servisair’s enforcement of its safety procedures.

## Conclusion

The judge said Servisair: “has satisfied the Court on a balance of probabilities that it took all reasonable steps to ensure the safety and health of its employee, Mr. Murgappa Naiker, and to ensure he wore his fall protection equipment. Perfection is not the expectation of the Court with regard to the test of due diligence ...”

Servisair was found not guilty of both charges and the Crown did not appeal the acquittal.

## Lessons Learned

Both employers and employees need to do their respective parts in workplace safety. Employers cannot guarantee that injury and death will not occur at work, since they also depend on employees to comply with safety policies. When safety standards change, it may take a redoubled effort to bring experienced employees around to consciously committing to them.

Enforcement of workplace safety obligations for employees is achieved by prosecution and by employer workplace discipline,

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which must be serious, consistent and documented for internal safety violations. Proof of the employer's *actus reus* of the offence is straightforward where a fatality occurs at work. At trial, it will then be up to the accused employer to show that it acted reasonably in the circumstances to prevent the fatality.

Employers must keep records, conduct their own investigations and be prepared to come to court to show in detail what they have done to prevent the incident. They must show that they have an effective system of safety policies and training and that the safety program is closely monitored and enforced by management. Mere declarations and platitudes on the importance of safety will not be enough – effective and ongoing action must be demonstrated.

These Servisair de-icers were very experienced, had long worked together and got along well. They took things for granted and cut corners. This case referred, inaccurately, to “one off” safety violations. The case is another example how serious injury or death can happen in mere seconds, especially where the workers are performing repetitive actions, feel rushed in a task, take safety for granted, and where no one – fellow workers, corporate management or regulators – are holding them accountable daily.

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