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Corporal Punishment

Lost and Found

Sniffer Dogs

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When It Hurts To Be Home

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Reflecting on Family Violence

I practise family law and often my clients have experienced, or are experiencing, family violence. It can be difficult to discuss "family violence" generally because there is no one experience of violence. A "yes" to a general question about whether or not a client has experienced family violence can mean a hundred different things; just as a "no" can be very misleading. One of my first tasks is to sort out what this means to a particular client.

There are stereotypes of those who allege family violence and often those stereotypes lie at the extremes. Some people automatically imagine horrible stories of daily torture. Others are automatically suspicious and imagine a parent who fabricates abuse in order to get the upper hand in custody. These extremes do exist, but most of the time the situation lies somewhere in between.

I must acknowledge my clients' experiences; that violence is a very important part of their stories about where they've come from, what they've come through, and where they think they can go in future. My clients need to be able to trust that I have heard and understood their stories. They don't want me to brush it off, push it aside, or minimize it. Sometimes, clients are just starting to realize what they have experienced is abuse and are trying to come to terms with their own histories. They are learning about what is acceptable and unacceptable in a relationship and how to stand up for themselves and their children. This can be a fragile time.

My clients need to be able to trust that I have heard and understood their stories.

But this does not mean I must blindly accept everything my client offers as truth. I also challenge the holes in a client's story. There are always two sides (*at least*) to every tale, and when relationships fall apart we all colour our histories in light of our present feelings. I suspect some of my clients downplay the violence while others certainly exaggerate. Rarely do I think this is intentional; it's simply a matter of perspective. But it makes determining "the facts" all that much harder: my own client may not even have a good grasp of what *really* happened.

Family court is not the place to find validation for one's experiences, it is not designed to find guilt, and it does not provide healing.

Family violence happens behind closed doors. Most people do not have hard proof that violence occurred so it's usually a s/he-said-s/he-said situation. I must sort out what a *judge* is likely to conclude, and then more importantly, how it is likely to affect the parties' ongoing parenting and financial obligations.

I say "more importantly" because family law is practical and it looks ahead. The history of a relationship is often not as relevant as my clients wish it to be and this can be hard to grasp. Family court is not the place to find validation for one's experiences; it is not designed to find guilt, and it does not provide healing. Rather, the outcomes from family court are orders only setting out financial obligations and parenting schedules.

Often, the very formative part of a client's story, the abuse, is completely irrelevant in law. Family violence is not a factor to be considered when dividing matrimonial property (See s. 8 of the Alberta *Matrimonial Property Act,* RSA 2000, c. M-8) and the "misconduct of a spouse" is specifically excluded as a consideration when awarding spousal support, unless there has been a clear financial consequence. (See s.15.2(5) of the Canada *Divorce Act*, RSC 1985, c 3 (2nd Supp) and s. 59 of the Alberta *Family Law Act,* SA 2003, c F-4.5)

Often, the very formative part of a client's story, the abuse, is completely irrelevant in law.

It can be hard to tell someone "I know you left everything behind to be with this person only to be broken down day after day, but the numbers just don't work out for you…" but sometimes that is the conversation that must be had.

What can be even more difficult to understand is how the court views family violence in relation to parenting. Family violence is relevant to determinations about what might be in a child's best interests (See s. 18(2)(vi) of the Alberta *Family Law Act,* SA 2003, c F-4.5) and the court generally accepts the social science that says exposure to violence harms children, but how it will affect the outcome of a specific case is rarely clear. An abusive partner is not automatically assumed to be an abusive or bad parent. This means that the relationship between the parents must continue, despite their past. We can take steps to limit contact or divide up decision-making responsibilities, but that connection will always be there.

Further, it can be risky to claim there has been family violence only to have a judge conclude that it did not happen. It can be interpreted as a tactic to alienate the other parent and can be held against the one who made the claim. In other words, such claims can backfire, so we have to tread carefully and focus on what is likely to be proven.

An abusive partner is not automatically assumed to be an abusive or bad parent.

Sometimes there is conflict between what I tell a client is a likely outcome on parenting matters and what their supporters (family, friends, social workers, etc.) say. Clients have a hard time reconciling the different messages they are receiving and my advice can be drowned out by the many other voices. Building trust with my clients is key to ensuring they take my advice seriously and make wise decisions on how to proceed.

Clients often tell me that they really just want their former partner to change; they want them get help for their anger, addictions, or mental health. But the law can only do so much. Counselling can be ordered, but it is expensive and may lose its effectiveness when the other party is unwilling to participate. Other orders, such as terms that parents not say disparaging remarks about each other, can be virtually unenforceable. And enforceable terms, such as limiting access to children, can feel like a punishment to the child.

Family violence is also a complicating factor when deciding how best to pursue a matter. Generally, it's best for parents to work matters out through mediation or negotiation, but when there is a power imbalance, these strategies may be inappropriate. It can be emotionally (and sometimes physically) dangerous to send a client into such a process. This might mean clients litigate more readily, leaving decisions to judges.

…when there is repeated family violence, I want to encourage clients to protect themselves and to get out of what is clearly an unhealthy and harmful relationship.

Further, victims of family violence may have a compromised ability to make wise choices. Such clients may want to give up on certain items (particularly spousal support or property) in order to avoid further conflict.

One of the most difficult aspects of working with victims of family violence is watching a client return to an abuser. I am generally supportive of partners attempting to work through their difficulties toward reconciliation. However, when there is repeated family violence, I want to encourage clients to protect themselves and to get out of what is clearly an unhealthy and harmful relationship. I can discuss my concerns with my clients, but it's ultimately their choice. I can only act on my clients' instructions which are informed by their values, histories, and perspectives, not mine. I have done my job when my clients understand their options, rights, and obligations. But, even in light of that knowledge, some people return to abuse. I cannot understand these decisions, but I have to respect them and be available if and when these clients need legal assistance again.

Working in family law can be emotionally draining and working with clients who experience family violence only exacerbates these feelings. However, assisting a client to come through and out of such situations comes with high rewards.

A Spotlight on Family Violence and Immigrant Women in Canada

Family violence remains a serious, on-going problem for many inhabitants of Canada. Justice Canada defines it as any form of abuse, mistreatment, or neglect that a child or adult experiences—physically, sexually, emotionally, financially, or otherwise—from a family member or from someone with whom they have an intimate relationship.

Statistics Canada's most recent profile on family violence indicates that there were at least 95,000 victims in 2011 according to police reporting, most of whom were women. (*Family violence in Canada: A statistical profile*). This is a drop from previous years, but it is widely recognized that the true number of victims in a given year is much greater than reported. The absence of more accurate numbers results from limitations in how family violence data is collected, from the types and phrasing of questions asked to the difficulty of securing a representative sample, particularly when many studies interview in English and/or French only. Low reporting rates are also at play, as many reasons exist for why individuals might be unwilling or unable to report their victimization.

Family violence and related involvement in the legal system is ultimately challenging for all parties involved, but these challenges are magnified for those immigrants unfamiliar with Canadian justice and social systems.

These and other issues limit collective understanding of family violence, especially around that occurring in some immigrant families in Canada. Tremendous diversity exists among these families, and yet relatively little data exists on how family violence plays out among those who have relocated to Canada. A recent resource by Justice Canada, *Abuse is Wrong in any Language*, recognizes that sometimes behaviours occur in immigrant families that are not always recognized as family violence or crimes. Nevertheless, the absence of detailed data in this respect slows the development of culturally meaningful initiatives to address the problem.

Inroads are being made, however. Studies and analyses of broader data are increasingly occurring with an eye to immigrant patterns, especially around the victimization and help-seeking behaviours of women. According to Statistics Canada's 2011 profile, immigrant women may be at a slightly lower risk of abuse than Canadian-born women, particularly outside of spousal relationships. (*Measuring violence against women: Statistical trends*) Tremendous diversity exists among these families, and yet relatively little data exists on how family violence plays out among those who have relocated to Canada. Their access to support, however, is complicated not only by obstacles shared with Canadian-born women, but also those unique to or heightened by the settlement process. Shared experiences

include feelings of fear, shame, and helplessness; hopes of the abuse ending; and a desire to secure the future of children. (*Nowhere to turn? Responding to partner violence against immigrant and visible minority women)* Additional obstacles include social isolation, language and cultural barriers, financial insecurity, fear or lack of understanding about their legal status, additional dependency on their partner, a lack of specialized services, as well as perceived and real discrimination and inaccessibility of services. (Hyman et al and Barrett et al)

Despite overall low-reporting rates around partner violence, recent immigrant women have been found to be among those most likely to come to the attention of law enforcement agencies, whether by self-reports (Hyman et al) or through reports made by others. (Barrett et al) Fear of the unknown, such as outcomes around custody and financial security, often renders legal intervention a frightening prospect for these women. But if it is deemed necessary, intervention presents a critical opportunity for addressing unhealthy family situations.

Outcomes when applying family and immigration law may differ tremendously according to each family's situation, because each case is unique. Nevertheless, there are basic procedures in place across the country addressing living arrangements and financial support, particularly around children. Some legislation is federal, some is provincial or territorial. By and large, though, they all speak to the same issues. Following reported violence, immigrant families residing in Alberta might undergo proceedings related to, for example, the Alberta *Child, Youth and Family Enhancement Act,* the Canada *Divorce Act* or Alberta *Family Law Act*, with some key points set out below:

Child, Youth and Family Enhancement Act

The mandate of Child and Family Services, as laid out by the *Child, Youth and Family Enhancement Act,* is to protect children from anyone that might injure their physical and emotional well-being. Exposure to family violence either as a target or a witness to the abuse of another family member is grounds for intervention. This can take the form of supervision, temporary guardianship, or in extreme cases, the permanent removal of children from the custody of their parents. With all three forms of intervention, parents have a right to either agree to the terms or to oppose them in court.

A supervision order (or family enhancement agreement) means that the children will remain in the home as long as the parents abide by the terms that they have agreed to follow as set out by Child and Family Services or those they have been ordered to follow by the court. Terms usually include the attendance of anger management and parenting courses by parents, as well as allowing a worker to visit their home on a regular basis to monitor the situation.

Temporary guardianship occurs when children are deemed to be at risk in the custody of their parents, and continues until the parents have completed agreed upon or court-ordered requirements. Typical requirements include the completion of parenting and domestic violence courses when family disharmony is noted. Once the conditions have been met and the concerns addressed, however, the children are returned to the parents.

Following reported violence, immigrant families residing in Alberta might undergo proceedings related to, for example, the Alberta*Child, Youth and Family Enhancement Act* , the Canada *Divorce Act* or Alberta *Family Law Act*

Finally, in severe cases where Child and Family Services determines there to be no foreseeable opportunity to return the children to a healthy environment with their parents, an application for permanent guardianship is brought forward. Refusal or an inability to complete the agreed upon terms, for example, may be viewed as a lack of foreseeable opportunity.

Divorce Act and *Family Law Act*

Whereas the *Divorce Act* is exclusively for those who are married and have filed for divorce, the *Family Law Act* applies to adult interdependent partners as well as to all married but separated spouses who have not yet applied for

divorce. These *Acts* apply to residents of Canada regardless of citizenship status.

All parents who are looking after their children 40% or more of the time have the right to request child support from the other parent. The Federal Child Support Guidelines stipulate how much base support is payable according to the gross income of the paying parent and the number of children in question. All parents have a responsibility to support their children, regardless of whether or not they are spending time with those children.

In some cases, spouses and adult interdependent partners are also eligible for spousal support, which is awarded on a discretionary basis by the court. The amount and duration are determined by a variety of factors, including but not limited to the duration of the relationship, the incomes of both households, on-going needs, past support patterns, any existing contractual agreements, and the duties performed by both parties while in the relationship.

Conclusion

Family violence and related involvement in the legal system is ultimately challenging for all parties involved, but these challenges are magnified for those immigrants unfamiliar with Canadian justice and social systems. All residents of Canada—irrespective of their immigration status—have the right to a family life free of violence. The law, in turn, strives to guarantee this right by engendering lifestyle changes and ensuring financial support as appropriate.

Still, guaranteeing that abused immigrant women are aware of this right, confident of its enforceability, and adequately supported through its procedures is a different matter. The path for accomplishing this, however, undoubtedly hinges in good part on paying closer attention to and acting upon community-specific needs around family violence.

Notes:

1. Hyman, I., Forte, T., Du Mont, J., Romans, S., & Cohen, M. (2006). Help-seeking rates for intimate partner violence (IPV) among Canadian immigrant women. *Health Care for Women International, 27*(8), 682-694.

2. Barrett, B., St. Pierre, M., & Vaillancourt, N. (2011). Police response to intimate partner violence in Canada: Do victim characteristics matter? *Women & Criminal Justice, 21*(1), 38-62.

Domestic Violence, Renting and the Law

Homelessness is often a result of domestic violence (DV). When someone is fleeing violence at home, he or she needs somewhere to live and often has few or limited resources. There are additional difficulties if the person is a renter and either wants to remain living in the property, or is trying to find somewhere new to rent. Renting law impacts the options that the person has, and different provinces have taken different legislative steps to help with this problem.

The relationship between domestic violence, residential tenancy law, and homelessness is interconnected. Several studies have identified a link between family violence and homelessness (including *An Environmental Scan of Strategies to Safely House Abused Women* and *Family Violence and Homelessness: A Review of the Literature*). The Edmonton based *A Case Study: Retrospective Analysis of Homeless Women in a Canadian City* focused on two inner-city women's shelters and found that "[h]aving abusive relationships and housing problems (62.3%) were the main reasons why women had come to the shelter" (p. 13). Included in the housing problems were issues associated with renting, including eviction.

There is a stigma attached to being a victim of domestic violence in the context of being seen as a desirable tenant in a residential tenancy situation.

Recent research by the Edmonton Social Planning Council and the Edmonton Coalition on Housing confirms that a bad rental history and lack of landlord references means that DV victims will have a difficult time finding stable housing. The *Understanding Tenancy Failures and Successes* final report also identified that discrimination occurs or the basis of source of income: "When landlords found out tenants were on government income support (e.g. AISH [Assured Income for the Severely Handicapped], Alberta Works), there was often greater reluctance to rent them a unit" (p. 20). The Alberta government provides income support to women fleeing domestic violence situations, and based on the study, this funding could also be a basis for discrimination against the domestic violence victim. The same study identified the need for education on rental housing rights and responsibilities for those who were vulnerably housed and/or homeless and for the staff (the service providers or intermediaries) who provide the support services.

There is a stigma attached to being a victim of domestic violence in the context of being seen as a desirable tenant in a residential tenancy situation. In July 2006, the Canadian Mortgage and Housing Corporation released *Housing*

Discrimination Against Victims of Domestic Violence. This research was undertaken to determine if landlords discriminate against battered women. The results of the study suggested that landlords do discriminate against battered women and that "a substantial number of landlords were surprisingly candid in their unwillingness to rent to a battered woman and some were even openly hostile towards battered women" (p. 3). A victim is most vulnerable immediately after leaving the abusive relationship and trying to find somewhere new to live, which is also the time that the victims are faced with landlord discrimination.

In Canada, some provinces have special legal provisions to help domestic violence victims and some provinces do not. Quebec, Manitoba and Nova Scotia have all amended their residential tenancy legislation to include provisions that relate to breaking the lease if there is domestic violence.

There are different legislative approaches to help deal with the intersection of DV and rental housing. In the United States, the *Violence Against Women Act* prohibits publicly funded landlords from denying victims admission into housing and requires that leases explicitly state that domestic violence is not a legal reason to evict the victim of that violence. Some states also have laws to help victims; including requirements that the landlord change the locks within a set period of time if the victim has a protection order, and provisions that allow a tenant to break the lease if DV occurs (see *Housing Rights of Domestic Violence Survivors: A State and Local Law Compendium*).

In Canada, some provinces have special legal provisions to help domestic violence victims and some provinces do not. Quebec, Manitoba and Nova Scotia have all amended their residential tenancy legislation to include provisions that relate to breaking the lease if there is domestic violence. Generally speaking, if there is a fixed term tenancy, then neither landlords nor tenants can end the tenancy early if they are both meeting their obligations under the agreement. The changes to Nova Scotia's *Residential Tenancies Act* and Manitoba's *Residential Tenancies Act* allow a fixed term tenant to break the lease and move out when the tenant receives a certificate from a designated victim services office.

In Alberta, the Centre for Public Legal Education Alberta has partnered with the Faculty of Extension at the University of Alberta to explore the legal context of female victims of domestic violence in relation to rental housing in Edmonton, Alberta. We are in the process of identifying:

- what residential tenancy problems are commonly faced by victims of DV;
- whether there are currently legal information resources available to help prevent or overcome those problems; and
- whether the law itself contributes to the problems victims face.

The end result will be a research report, with recommendations and suggestions for possible legal reforms.

The relationship between domestic violence, residential tenancy law, and homelessness is interconnected. Several studies have identified a link between family violence and homelessness.

We have interviewed key informants from the community, and held focus groups. We are in the last months of the research. The service providers that we have consulted have identified rental housing issues as a major problem that their clients face every day. Many of the women end up being penalized when they leave their rental property because they do not provide adequate notice. There is no mechanism to remove their name from the lease, so the victim ends up being responsible for rent that is unpaid, as well as physical damages done to the unit, after she leaves. Once tenants have broken a lease, they are usually considered to have a bad rental history, and have trouble finding new accommodation without references from previous landlords. There is also no mechanism that would allow the tenant to remain in the property and remove the abuser's name from the lease.

Many of the service providers also identified the policies of subsidized housing providers as being a barrier for their clients. If a victim leaves the property and then the abuser causes damage to the property or doesn't pay the rent, then the victim is held financially accountable for those breaches. Until the tenant clears the debt, they remain

ineligible for that organization's subsidized housing. One tenant was evicted because the abuser, whom she had a protection order against, showed up at the property and caused damage. She was evicted by the landlord because of the damage, and the eviction was upheld, even though the tenant herself had not caused the damage and had sought an order to keep the abuser out.

The final report will be submitted in February, and will be made available to the public. If you want to know more information about the research project, you can contact me at rochelle[at]cplea.ca. The research project is being funded through the Government of Canada's Homelessness Partnering Strategy through Homeward Trust Edmonton's Community Research Projects.

Corporal Punishment and Domestic Violence: The Case for "Anti-Spanking" Legislation

Recall conversations among parents deliberating the joys and perils of raising children – does the following sound familiar?

> *"I wouldn't normally spank my kid, but if he crosses the road without looking, you bet I'm gonna make my point! That'll be the last time he does that."*

While spanking is reportedly becoming an *a gauche* social practice in Canada, the Canadian Incidence Study of Reported Child Abuse and Neglect documented 18,688 substantiated cases of physical abuse occurring in Canada in 2008, of which just over half (54%) involved a child being hit with a hand, including slapping and spanking.

Corporal punishment is defined as "the use of physical force with the intention of causing a child to experience pain, but not injury, for purposes of correction or control of the child's behaviour" (Straus, 2001). Though a number of organizations and the research community have strongly opposed the use of corporal punishment, in Canada, parents, and other caregivers including schoolteachers, can use "reasonable" force to correct children's behaviour under Section 43 of the *Criminal Code*.

Clearly, spanking remains a common, yet divisive, practice in Canadian households.

Determining the prevalence of corporal punishment is challenging as estimates are usually based on parents self-reporting, which is subject to deliberate omissions and errors of recall. However, Canadian surveys over the last decade have shown rates as high as 50% (Durant & Enson, 2004).

A 2012 CBC poll of 6,417 readers echoes these findings. The poll asked readers what they thought about Canada's current legal provisions allowing spanking; about a third thought that the law was reasonable (36%) and some (9%) thought it was too constraining. About half (53%) were opposed to hitting a child. Clearly, spanking remains a common, yet divisive, practice in Canadian households.

Impacts on Kids: The Cycle of Domestic Violence

Despite the commonly held belief that corporal punishment used by loving parents is a good, or at least harmless, disciplining technique, an overwhelming body of research now shows that even mild and moderate corporal punishment has harmful side effects. Some studies have found that a majority of child abuse cases arise in situations where the abuser intended to discipline the child, and two-thirds of abusive parents admit that their abuse began as an attempt to discipline their child (Gershoff & Bitensky, 2007).

Documented negative effects of corporal punishment that reach into adulthood include mental health issues, criminal behaviours and aggression. Given that children learn relationship skills and social behaviours in the home, it is not surprising that those who witness or experience violent relationships go on to perpetuate these patterns in adulthood.

How does this happen? Experiences of violence in the home teach children that violence is an acceptable, even normal, part of parenting and intimate relationships (Bower-Russa, Knutson, & Winebarger, 2001). In fact, some research has found a direct relationship between the level of abuse experienced by mothers and the beliefs of elementary school-aged children about the intrinsic dominance of men (Graham-Bermann & Brescoll, 2000).

Given that children learn relationship skills and social behaviours in the home, it is not surprising that those who witness or experience violent relationships go on to perpetuate these patterns in adulthood.

Research also suggests that, by adolescence, children who have experienced or witnessed violence often have trouble trusting others and forming healthy intimate relationships with peers (Levendosky, Huth-Bocks, & Semel, 2002), leading some to question whether they would be able to control their aggression and become non-violent partners (Goldblatt, 2003).

Of course, not all children who experience or witness violence develop these propensities, but the risk is high. One of the largest and most compelling studies conducted to date found that the childhood experience of physical abuse, sexual abuse, or growing up with a battered mother doubled the risk of domestic violence victimization or perpetration in adulthood (Whitfield *et al*., 2003). Even mild to moderate corporal punishment that causes no physical harm is associated with increased aggression in adulthood (Gershoff, 2010).

Alternatives to Spanking: What Can Be Done?

Though Canada ratified the *Convention* in 1991, spanking remains legal and widely practised.

Growing public concern and strong research evidence supporting “anti-spanking” legislation have led 35 countries to ban corporal punishment in the past thirty years. Such legal bans are closely associated with large decreases in support for, and use of, corporal punishment as a child-discipline technique (Zolotor & Puzia, 2010).

The *United Nations Convention on the Rights of the Child* (1989) calls on signatory states to

> *take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (Article 19).*

Though Canada ratified the *Convention* in 1991, spanking remains legal and widely practised. Though only part of the solution, the Government of Canada should repeal Section 43 of the *Criminal Code, RSC 1985, c. C-46*, which currently allows the use of reasonable force by schoolteachers, parents and persons standing in the place of a parent to correct children’s behaviour. Once repealed, provinces and territories should develop policies for police and

prosecutors that outline the proper enforcement of the assault provisions of the *Criminal Code* in cases of corporal punishment. There is further need for public awareness messages to inform Canadians about the harmful effects of corporal punishment and the development of parenting education (Durant & Enson, 2004). Province-wide parenting strategies to build the capacity and skills to promote positive forms of discipline are critical to success.

> *"But if I can't spank him, what else have I got?"*

No one is saying parenting is easy, yet as parents and caregivers, it is incumbent on us to guide children's behaviour, while "respecting their rights to healthy development, protection from violence and participation in their learning" (Durrant, 2007). The use of "positive discipline," as described by Joan Durrant is founded on child rights principles and research on children's healthy development and effective parenting. The major characteristics of positive discipline are that it:

- is non-violent and respectful of the child as a learner;
- is about finding long-term solutions that develop children's own self-discipline;
- involves clear communication of parents' expectations, rules and limits;
- builds a mutually respectful relationship between parent and child;
- teaches children life-long skills;
- increases children's competence and confidence to handle challenging situations; and
- teaches courtesy, non-violence, empathy, self-respect, human rights and respect for others.

For more information on positive discipline, follow this link to Durrant's manual for parents and caregivers.

Ultimately, this is a call to ground parenting in non-violence, empathy, self-respect, human rights, and respect for others. It is about providing children with the same protection from physical assault as is given to Canadian adults. And it is about stopping the transmission of domestic violence.

Including Pets in Protective Orders

There is a growing awareness of the importance of pets to their owners, and especially to victims of domestic violence who rely on them for comfort and security at a time when they are most needed. Perpetrators of violence know this too – which is why they often threaten, harm, or even kill the pets of their victims as a way of controlling them.

As long ago as 1904, visionaries like Louise McKinney recognized the connection between animal cruelty and family violence.

Numerous studies have demonstrated this dynamic. The Alberta SPCA's study "Inside the Cruelty Connection: The Role of Animals in Decision-Making by Domestic Violence Victims in Rural Alberta" (2012) found that 59% of pet-owning women in emergency shelters delayed leaving the abusive environment out of concern for their pets. In 36% of the cases, animals were threatened by the abuser – and 85% of those threats were carried out. Interviews with victims show how difficult it can be for women with pets or livestock to leave a violent relationship, and how the animals suffer as an abuser controls the victims by threatening or harming the animals.

In addition, children often (85% of the time) witness the threat or harm to the animal – and in half of the situations it is the child's own pet. This undoubtedly causes emotional distress to all the victims in such situations, and the thought of escaping a violent home while leaving the animal behind becomes an impenetrable barrier to seeking help.

Not that this knowledge is new. As long ago as 1904, visionaries like Louise McKinney recognized the connection between animal cruelty and family violence. Louise petitioned her peers to form humane societies and promote humane education as ways to counteract violence. Other historical figures also connected the dots and saw the need for animal cruelty laws to help build a more compassionate society.

So, with the growing body of empirical evidence, is the law keeping up? Specifically, is there adequate legal protection for animals – not just for the animals' sake but for their human owners who won't, or can't, leave their beloved companions behind?

Protective orders cannot be written to protect pets for their own sake. However, pets can be included if doing so will

help protect the person for whom the order is written.

There are some legal devices available to those who need protection from a spouse or other family member. Known collectively as “protective orders,” these vary from province to province and may be known as emergency protection orders, restraining orders, peace bonds or other names. These may have various purposes – for example, they may allow the victim a certain time period to return home to collect valuables, or they may prohibit a spouse from being in proximity to the victim.

So where do pets fit into this puzzle?

In Canada, only the province of Newfoundland and Labrador directly specifies that animals may be included in such orders. In that province’s *Family Violence Protection Act* “property” means an interest, present or future, vested or contingent, in real or personal property, including companion animals…” This doesn’t mean, however, that animals may not be included in protective orders in other provinces.

Protective orders are made by a judge in court or by police to help protect one person from another. A protection order contains a condition that affords safety and security to a specified (named) person or persons. Protective orders cannot be written to protect pets for their own sake. However, pets can be included if doing so will help protect the person for whom the order is written. In other words, to get a pet included, the applicant claims that her concern for the animal is related to her own protection. The above-mentioned Alberta SPCA study or similar research findings may be submitted to strengthen the claim.

Wherever there are no specific provisions for pets or livestock in provincial protective order laws, the broad discretion of the court may allow for their consideration in most protection orders. Where the animal has actually been harmed or threatened, there is also the alternative of using provincial animal protection laws or the *Criminal Code* for direct protection of the animal. The primary concern in most cases will be whether creating a condition regarding the animal is necessary for protection of the applicant.

Wherever there are no specific provisions for pets or livestock in provincial protective order laws, the broad discretion of the court may allow for their consideration in most protection orders.

While some may bristle at the thought of pets being property, in fact, this is how they can be protected – as long as it is recognized that the pet’s safety is necessary to providing safety for the (human) victims. Many people consider pets to be family members, but under the law they are not. However, using the principles stated above can help to ensure their safety, and that of their vulnerable owners as well.

The Alberta SPCA has several resources on the connection between animal cruelty and domestic violence, including a pamphlet on animals in protective orders and a study on Court Protections for Domestic Violence Victims and their Pets conducted by Student Legal Services of Edmonton in 2012.

What to do if your pet is threatened in a domestic violence situation

- Make note of the dates and extent of the threats.
- If there is evidence of the threat (letter, email, text, recording), keep that evidence.
- Take pictures of any injuries.
- Keep evidence of veterinary bills and pet supplies for which you paid.
- If there are any ownership papers in your name, be sure to keep a copy and include it in your safety plan.
- If possible, keep your pet's vaccinations and licence up to date.
- Tell your lawyer about the threats and the evidence, and request that any protective order includes provisions for the safety of your pets or livestock.

Finders Keepers? A Historical Survey of Lost and Abandoned Property and the Law

Introduction

You are walking along a busy downtown street when a small object on the ground catches the corner of your eye. Intrigued, you bend down to find a small pouch which upon further examination contains a gold bracelet. There is neither attached identification nor any sign of the owner. To whom does this bracelet now belong? Does the well-known adage of "finders keepers," the law of the elementary school playground, apply in this case? Or are there actual formal laws at play that delineate specific rights of possession?

Beyond simple moral considerations, the legal principles of "lost and found" that govern this fictional scenario are ones which jurists have debated for centuries. This article provides a historical overview of these issues and briefly explores some of the complexities associated with this field of personal property law.

Foundations in Roman Law

The basic foundations of the law of lost and found are rooted in the legal codes of ancient Rome. In fact, the concept of finders keepers derived from the work of the second century jurist Gaius, who suggested that unowned property (*res nullius)* became "the property of the first taker." (Lueck) The Roman Emperor Justinian further proposed that property which was intentionally abandoned by its owner (*res derelicta)* turned into a *res nullius* and could thereafter be claimed by any individual who found it (known as *occupatio*.) (Metzger)

The basic foundations of the law of lost and found are rooted in the legal codes of ancient Rome.

But not all things seemingly left abandoned fell under this category. Objects could "drop out of moving vehicles without their owner's knowledge," Justinian surmised, or thrown off a ship in a storm out of necessity. (Metzger) In these cases, the original owner retained his or her right of ownership and to take the property would be constituted as theft. (Melville) Roman law thus began to flesh out some formative distinctions about property ownership which would subsequently form the basis of the modern Western legal tradition.

Developments in English Common Law

The seminal case in the law of lost and found is *Armory v. Delamirie* (1722), 1 Strange 505, 9 ER 664, a tort case tried in the Court of King's Bench, England, in 1722. The plaintiff, a chimney-sweep's boy, found a jewel during the course of his work and sent it to a goldsmith (the defendant) for valuation. The defendant's apprentice removed the jewel and offered three half-pence as compensation. Instead, the plaintiff sued to recover the original jewel.

Lord Chief Justice Pratt's ruling in this case established the key precept in the law of lost and found. He ruled that "the finder of a jewel, though he does not by such finding acquire an absolute property right of ownership … has such a property as will enable him to keep it against all but the rightful owner." In other words, the case established that a finder holds title to the property he or she finds against all other individuals, except from the true owner.

This ruling influenced subsequent interpretations in the law of lost and found. For example, in *Bridges v. Hawkesworth* (1851), 15 Jur. 1079, 21 LJQB 75, the plaintiff found some banknotes on the floor of a shop and handed them to Hawkesworth, the shopkeeper, asking him to return the money to the original owner. When, after three years the money remained unclaimed and Bridges sought to claim it as his own, Hawkesworth submitted to the courts that he had the better claim as the item was found on his property. Lord Patterson, however, dismissed this argument and upheld the principle established in *Armory v. Delamirie.*

A similar case occurred in *Parker v. British Airways Board,* [1982] QB 1004*,* whereby Parker discovered a bracelet on the floor of the British Airways executive lounge, submitted it to the B.A. authorities, and requested that he be contacted if the owner was not found. When British Airways instead sold the bracelet, Parker sued.

…if an object is found by an employee during the course of his or her employment, the common law has found that the employer has better right to the property

The courts reaffirmed that to establish possession, the owner's *aminus possidendi* (intention to possess a chattel) must be clear. In the *Parker* case, though the British Airways lounge was restricted to a certain class of passengers, there was no manifest intent by the airline to exercise its control over lost property found in the lounge. Evidently, the common law has leaned heavily on the side of the finders over other potential competitors.

Exceptions to the Rule

However, the courts have established some limitations to the general rule set out by *Armory v. Delamirie*. *Hibbert v. McKiernan* [1948] 2 KB 142, 1 All ER 860 demonstrated that the law does not look kindly on trespassers or wrongdoers. In this case, Hibbert trespassed on a fenced golf course and found a number of golden balls. Though the balls were abandoned, Hibbert's presence on the property was dishonest and taking the property constituted an act of larceny.

Furthermore, if an object is found by an employee during the course of his or her employment, the common law has found that the employer has better right to the property (as per *South Staffordshire Water Co. v. Sharman,* [1986] 2 QB 44; *City of London Corporation v. Appleyard,* [1963] 1 WLR 982, 2 All ER 834*)*.

Further Interpretations in Canadian Law

…the common law has leaned heavily on the side of the finders over other potential competitors.

Canadian law has largely adopted the same common law principles of finders' titles established by English precedent. However, a knotty question still remains unanswered: how is one to determine whether an object found was intentionally abandoned by its original owner or accidentally lost?

In the Saskatchewan Court of Queen's Bench, Justice Klebuc (*Stewart v. Gustafson*, 1998 CanLII 14001 (SK QB)) provided a set of useful criteria to consider when one encounters property that may be lost or abandoned:

1. ***The passage of time*** – the longer an object is left unattended, the more likely it is that the owner intended to abandon it;
2. ***The nature of the transaction*** – the nature of some transfers from one owner to another may suggest abandonment;
3. ***The owner's conduct*** – an owner who does not take reasonable actions to reclaim his or her property after receiving notice will likely be deemed to have abandoned it;
4. ***The nature of the property*** – the higher the value of the property, the less likely it is that the owner intended to abandon it.

Conclusion

As we can see, the scenario described at the beginning of this article is governed by a long history of law. We can use the lessons learned from legal history to determine how best to deal with this particular circumstance.

The bracelet is made of gold and is likely valuable, meaning it is unlikely that it was purposefully abandoned by its owner. Because it was found in a public area, the appropriate course of action would be to submit the object to the police or a nearby authority. One of the obligations of a finder, after all, is to take reasonable steps to return a lost object to its original owner (*Parker v. British Airways Board*). You may very well provide relief to a frantic owner looking for a beloved family heirloom. If not, then the common law stands on your side if the owner is not found and you may claim the bracelet as your own.

From this brief survey of the history of the law of lost and found, we can see that the concept of “finders keepers” does enjoy legitimacy in the law – albeit with some important qualifications.

Notes:

1. Dean Lueck, “First Possession as the Basis of Property,” in *Property Rights: Cooperation, Conflict, and Law,* eds. Terry L. Anderson and Fred S. McChesney (Princeton: Princeton University Press, 2003), 200.

2. Ernest Metzger, *A Companion to Justinian’s Institutes* (Ithaca: Cornell Univeristy Press, 1998), 59-60.

3. Robert Dundonald Melville, *A Manual of the Principles of Roman Law Relating to Persons, Property, and Obligations*, 3rd ed. (Edinburgh: Green & Son Ltd., 1921), 234.

All Is Not Lost: The Law of Lost and Found

> *"Property and law were born and die together"*
>
> *- Jeremy Bentham, English philosopher, The Theory of Legislation (1931)*

Introduction

We all know the feeling when we lose something. Cell phone? Car keys? Most of us also know what it feels like to find something, such as a wallet. Losing a thing is a sad occasion while finding tends to be a happy one. Like many things in life, there are legal consequences to losing and finding things. We will look at the law in this area.

The law of lost and found falls under the judge-made (common law) category of 'personal property' law. Judicial decisions are usually unique to their own facts. The legal principles laid down frequently seem inconsistent and outcomes are difficult to predict. Since the losers and finders are usually private parties, this is private law and there is often no government regulation on the subject.

What do You Think Should Happen Here?

We start with a famous Ontario case where a young boy found a tin can full of money under a nearby private house while he was playing outside. The boy took a portion of the money and handed the rest to his mother. The boy spent the money he took lavishly, which piqued attention of the local police. During the investigation, the mother handed the rest of the money in her possession to the police to be returned to its original owner.

Most finder disputes revolve around who found the thing and took its possession and whether someone else had possessory rights.

The question arising from the case was: to whom did this can of money belong? To the boy who found the money? To the mother who was in possession of the money? To the police? To the owner of the property where the money was found? Or, perhaps to someone else such as the person who owned the money and put the can containing it in that location?

We will let you know what the court decided, but first we set out some personal property law principles that relate to retaining and losing possession of chattels.

What is Property?

The two criteria for property possession are physical control and manifest intent to exclude others.

Property is not a "thing" itself as much as it is a collection of *rights and obligations* over things, enforceable against others (Macpherson). These include possession, management and control, taking income and capital, transferability,

and prevention of harm from the thing (Ziff).

Who owns Property?

If a thing is first discovered in nature, such as gold nugget or wild animal, the first finder becomes the owner of the rights when he or she manifests the intent to exclude others by, for instance, pocketing the nugget. The two criteria for property possession are physical control and manifest intent to exclude others. Exceptions to this rule include:

- when the state declares priority to the property such as strategic minerals or protected animals;
- when the thing is stolen or misappropriated from the prior possessor; and
- when there is an existing owner.

Things that are made, not discovered, follow the same pattern, where the maker is the first possessor and enjoys legal ownership until it is transferred, such as by sale, or lost through abandonment of the thing.

True Owner's Rights

Owners always have the highest priority rights. But proving the ownership can be tricky. There are only a few things for which ownership can be thoroughly traced and verified – a car is an example. Ownership is often challenged.

Prior Possessor's Rights

Owners always have the highest priority rights. But proving the ownership can be tricky.

Prior possessors have superior chattel rights to those of the finder unless those rights were acquired illegally, such as by stealing. Clark found pine logs and tried to move them down the creek. Some logs broke off and were found by Maloney who claimed them. The court ruled that the first finder's rights trump the latter finder's rights due to immediate prior possession, unless the real owner claims them (*Clark v Maloney* 3 Har 68 (Del 1840)).

Occupier's Rights

It matters where something is "found." If someone loses something on your property and then it is found by someone else, who has the right to the thing? Did you, as landowner acquire higher rights even if you did not know of the lost item?

South Staffordshire Water Co v Sharman, (1896) 2 QB44 (Eng) established that if the true owner is not known, the owner of the land on which it was found, even if he did not know about the lost thing, has a superior claim to it. The reasoning is that the landowner controls all the things found on his land.

…if the true owner is not known, the owner of the land on which it was found, even if he did not know about the lost thing, has a superior claim to it.

Occupiers of land may have a weaker claim as shown in *Parker v British Airways*, (1982) where Parker found a bracelet on the floor of the airline terminal. The original owner was never found. The bracelet was given to Parker on the basis that the occupier, British Airways, did not display intent to exercise control and Parker was an invitee, not a trespasser. Generally, for the finder to claim the found chattel, he or she needs permission to be on the land. Trespassers cannot claim found chattels, even if the chattel's existence is not known by the land occupier (*Corporation of London et al. v. Appleyard et al*., [1963] 2 All E.R. 834). If the item is found on public property (like an airport), the occupier generally has insufficient control to claim it.

Therefore, if we find a wallet in a hospital waiting room or a parcel on a bus seat, the common law defining the finder's rights may be subordinate to the owner, prior possessor, or owner or occupier of the land. We will turn now to how the finder's employer or the state can also have stronger claims to the thing found.

Finder's Employer Rights

Since employees are agents of their employers, the employee finder's right is transferred to the employer if the employee finds something in the course of employment. Some cases have allowed the employee to keep the find where it was incidental and collateral to the employment, or otherwise specified contractually. In most instances, the employee finds a valuable thing on the employer's land, which allows for the occupier's rule to be followed (*White v Alton-Lewis Ltd* 1975, (On CC)). If the find is not on the employer's premises, but instead in a public place, the employee find is incidental because anyone has the same access and opportunity to find the chattel (*Byrne v Hoare,* [1965] Qd R 135).

An off-duty police officer found a bag with money in a park, which is a public place, and turned it over to his employer. It was held later that the bag and contents belonged to the police officer because it was not found during the course of his employment (*Millas v. B.C.* 1999 (BC Prov. Ct.)).

The State

Lastly, the state can intervene and claim found things. Historically, the state would intervene in cases where gold or silver was buried in the ground, but not lying on the ground (treasure trove principle). If the state is the occupier, such as in national parks and coastal waters, the state holds the right to chattels found there. The state seldom claims this right unless the finding is of substantial value, such as an historic ship found in coastal waters. Even then, the state typically pays rewards.

Finder's Intent to Possess and Exclude Others

Finders' intent must be clearly broadcasted to notify others of the property claim. In *Keron v Cashman* 33 A 1055 (NJ 1896), a boy (Crawford) found a stocking while walking with his four friends. While all five boys played with the stocking, it split open and money was found inside. The court ruled that the money belonged to all five boys equally because Crawford failed to clearly show intent to exclude others.

Most finder disputes revolve around who found the thing and took its possession and whether someone else had possessory rights. In the 1722 case of *Armory v Delamirie* (1722), 1 Str 505, 93 ER 664 (Eng) a chimney sweep found a ring and took it to a goldsmith for appraisal. The rogue goldsmith removed the jewel from the setting and refused to return it to the chimney sweep. The case went to court on the issue of who was the legal owner of the jewel. The chimney sweep was the first to find it and thus had a higher right to ownership. The finder has the right to lost property over all others except the true owner of that property. Armory was awarded damages in the highest value amount for the jewel.

Obligations of Finders

The finder must try to locate the true owner and care for the chattel in the interim because one is liable for the chattel until returned to its owner or prior possessor. If the finder does not return the thing upon request of the owner, the finder may be liable in the tort of conversion and be ordered to pay damages. No reward is owed to the finder and the finder cannot retain possession of the thing awaiting reward or for reimbursement of expenses.

Unclaimed Personal and Vested Property Act

Enacted in 2008, the *Unclaimed Personal and Vested Property Act* assists the public to find lost personal property in Alberta. Unclaimed property is eventually deemed abandoned property where the apparent owner has not claimed the property. Depending on the category of property, the recovery must be within as little as one year and as long as fifteen years (See the Regulations to this *Act*). General personal property becomes abandoned five years after the date on which the owner's right to recover the property arises.

Conclusion

No reward is owed to the finder and the finder cannot retain possession of the thing awaiting reward or for reimbursement of expenses.

We have seen that the common law of lost and found protects the true owner. Finders should make honest attempts to locate the true owner, take good care of the thing found and will acquire possession rights only when physical control and intent to exclude others are manifested. Trespassing finders have limited legal rights. Moreover, finders' rights will be subordinated to the rights of occupiers, prior possessors, employers, and the state – all with applicable qualifications.

Returning to the Ontario "lost can of money" case we presented at the outset of this article: under the law, the can and its contents found by the boy would first be awarded to the original, true owner. Since that owner was never found, the land owner is second in the line because the boy trespassed on private property to find it. If the landowner does not make a claim, the can of money found belongs to the boy finder unless police can show the item or its ownership was illegal. Chief Justice McRuer, in *Bird v. Town of Fort Frances* (1949), OR 292 awarded the money in the can to the boy because the true owner was not found and the boy's trespassing had no criminal intent. Interestingly, the landowner did not claim it for fear of incurring costs should he lose.

"Lost and found" is such a well-known life experience that several aphorisms have sprung up around it. We now know, for example, that "possession is nine-tenths of the law" is more legally accurate than "finders keepers – losers weepers."

In a follow-up article, several interesting recent Canadian "lost and found" cases will be briefly profiled. Look for the article in early February, 2014.

Notes:

1. C.B. Macpherson, "*The Meaning of Property*" in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Univ. of Toronto Press, 1978), p. 2.

2. B. Ziff, Principles of Property Law, 2nd ed., 1996, Toronto, Carswell, p. 2.

Viewpoint 38-3: Bus Ads Target and Isolate Muslims

We would like to provide some context and background surrounding the “honour killing” ad campaign on Edmonton Transit buses sponsored by the America Freedom Defense Initiative (AFDI).

The term “honour killing” must stop being used. It needs to be called what it is: murder, femicide, wrong. Attaching the term “honour” to these crimes empowers the perpetrators, allowing them to justify their thinking and actions.

These ads ran on buses in late October and had the slogan “Muslim Girls Honor Killed by Their Families” and included the text: “Is your family threatening you? Is there a fatwa on your head?” The sponsors of the ads say their intent was to bring attention to the issue of honour killing. We are providing another point of view and key information regarding these ads.

The term “honour killing” must stop being used. It needs to be called what it is: murder, femicide, wrong. Attaching the term “honour” to these crimes empowers the perpetrators, allowing them to justify their thinking and actions. Religion, culture, ideology and chauvinism are no reasons to justify abuse and murder. Any actions of violence against women and girls must be identified as what they are: criminal acts.

No one is denying this happens. We welcome efforts by anyone to shed light on and help end the violence. However, by targeting Muslim girls only, the campaign singles out and separates a group of people based on their faith, thereby stigmatizing and isolating them. One result could be that victims might not seek help because they may feel compelled to defend their faith at the expense of their own well-being.

…the Canadian Council of Muslim Women has worked tirelessly to maintain equality, equity and empowerment for all Canadian Muslim women through education and advocacy. The Council has sought to promote an Islam that is humane, egalitarian and equality-driven.

Providing support, services and resources to women and girls who might be caught in these situations is important and necessary. If the ad sponsors are in fact concerned about the welfare of Edmonton women and girls, then working with and advertising the work of local organizations already addressing these concerns should have been their priority.

Organizations such as the Indo-Canadian Women’s Association and the Edmonton Women’s Shelter are examples of groups providing safe opportunities for confidential assistance. One such Muslim organization is the Islamic Family and Social Services Association, which is already taking actions on domestic violence including:

- providing family violence outreach and counselling services;
- participating in Walk for Your Life annual domestic violence public outreach campaign in partnership with Métis Child and Family Services;
- working with local mosques to provide information for Friday sermons focused on family violence awareness and children’s mental health;
- building partnerships and strong working relationships with local women’s shelters, family violence outreach centres and imams at mosques around the city; and
- creating an after-school teen violence prevention program aimed at educating visible minority girls to recognize the potential signs of a violent relationship and increasing self-esteem.

As well, the Canadian Council of Muslim Women has worked tirelessly to maintain equality, equity and empowerment for all Canadian Muslim women through education and advocacy. The Council has sought to promote an Islam that is humane, egalitarian and equality-driven. At the community level, the Council has developed projects, events, grassroots workshops, and research publications in women's leadership, family dynamics, gender equality, racism and discrimination, and civic engagement.

Violence is not unique to any one cultural or religious group. On Nov. 4, 2013 Edmonton City Council proclaimed November Family Violence Prevention Month. The statistics are grim. Information provided by the Canadian Women's Foundation states that, on average, every six days a woman in Canada is killed by her intimate partner. As well, half of all women in Canada have experienced at least one incident of physical or sexual violence since the age of 16. Recent studies show that Alberta has the fifth-highest rate of police-reported intimate-partner violence and the second-highest rate of self-reported spousal violence.

The focus of this year's campaign is to bring men into the conversation and address the positive roles men can play ir ending family violence as fathers, role models, allies and influencers. At the Nov. 4 proclamation, more than 150 men, including many prominent leaders from the diverse Muslim community in Edmonton, stood on the stairs of City Hall to show their commitment and support.

The Muslim community is part of the fabric of Edmonton, Alberta and Canada. Muslims want what we all want: happy, healthy families and communities. Let's all work together to achieve this.

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Domestic Violence: Useful Websites for Alberta

As librarians, we are often requested to select and evaluate information resources. In this short reference article, we would like to recommend a few reliable websites that offer high quality information on domestic violence. We have selected sites from reputable sources that present current information, as well as offer links to further help and research.

The Internet is often the starting point to information seeking, and websites dedicated to domestic violence are many and varied. Some serve as quick connectors to social and crisis resources in emergency times, others offer a comprehensive review of the problem and its solutions, and several focus on a particular aspect or population. We have divided our selections into comprehensive sites, connecting sites, research sites and specific issue sites.

Comprehensive sites

These pages include substantial information as well as links. They address many of the information needs of domestic violence victims and survivors, including information about moving out (abuse information, shelter information, police information, money matters); issues after moving out (benefits, concerns about children, relocation, jobs, education); and legal concerns (child custody, court procedures, criminal procedures).

The *Alberta Human Services Family Violence pages* offer succinct but comprehensive information. The Family Law Violence Info Line (with information in 170 languages) and the Child Abuse Hotline are displayed on the front page. Links on the left hand margin direct the user to different topics for further information. Under “Where to go for help” there are links to information about financial support for Albertans fleeing abuse, services for aboriginal people, and sexual assault centres. Other links on the main menu offer information on shelters, children, rights, and supports. The “Materials and Resources” section is an extensive collection of brochures and pamphlets, some of which are translated into eight different languages.

The Centre for Public Legal Education Alberta (CPLEA), formerly the Legal Resource Centre in Edmonton, in co-operation with the Alberta Council of Women Centres, put together a comprehensive website, *Violet: Law and Abused Women* which includes commentary and links. Under “Just the Facts” there is information about abuse, getting out, legal implications, involving the police, and using the law to keep the abuser away. A section on “Going to court” guides the victim through issues like testifying, tips for witnesses, preparation for trial and others. Other sections in Violet introduce real stories with legal commentary and “action mazes” where the user interactively responds to possible scenarios of violence. Some of the information on this site is getting a bit out of date.

Student Legal Services of Edmonton: *Domestic Abuse and Your Legal Rights* focuses on the legal process. The information, although not legal advice, is concise and useful. It includes basics on abuse, information about the possible trial process, and discussion of legal options, including explanations about protection orders, peace bonds and other court options. It also refers the reader to further resources and includes a list of fast referral numbers. One thing absent from this site is a “cover your tracks” information link for victims at risk of having their Internet searches discovered.

On the national level, the Department of Justice Canada’s *Family Violence* page is organized in clear and easy to navigate sections. “Learn more” includes information on forms and types of violence in concise bullet point paragraphs. “Get Help” offers information about different people and organizations that may be able to help, including a link to a directory of victim services all over Canada. There is also information about children, with sections on

custody, parenting orders, and abduction. “Link to family violence resources” presents a list of links to government publications on children and family violence, elder abuse, and others.

Connecting site

Inform Alberta is a provincial on-line directory of publicly funded and not-for-profit community, health, social, and government organizations and services. It offers lists of agencies and non-for-profit organizations in the province. This directory is particularly useful to find local agencies in smaller locations, as it filters by location or postal code. Enter the search “family violence” and a postal code to get a list of providers in a specific area.

Research sites

These are sites with broad background information, focused on research rather than crisis information.

The *Domestic Violence Handbook: for Police and Crown Prosecutors in Alberta* provides a wealth of information. It offers an excellent review of the factors, aspects, causes and results of family violence.

National Clearinghouse on Family Violence (Public Health Agency of Canada) provides access to many publications on behalf of the Family Violence Initiative, including overview papers, reports, discussion papers and handbooks on family violence issues. Click on “View Resources” to access some of its information.

Specific issues sites

Some sites are directed to specific populations or discuss particular aspects of domestic violence. Among the best:

- *Family Violence Youth Site* – A page for children, related to the Justice Canada Family Violence.
- *RoseNet* – Companion to VioletNet offers information to immigrant women.
- *Alberta Elder Abuse Awareness Network* – a network of Albertans dedicated to increasing awareness and supporting a community response to elder abuse; their site provides resources and links on this topic.
- *Family Violence Prevention Program* – First Nations information from Aboriginal Affairs and Northern Development Canada.
- *Safety Under the Rainbow* – Same-sex domestic violence.

Alberta Law Libraries can help

If you have questions about these or other sites, the Alberta Law Libraries can help you navigate the information on the Internet. We also have many in-house materials and databases to help you understand legal issues and processes and direct you to appropriate resources and agencies.

Long arm of U of A law looking to reach rural Alberta

At some point between birth and death, life calls for at least some legal services. But for rural Albertans, who, like their urban cousins grapple with everything from wills to business deals, vital access to a lawyer isn't a given.

Law student Brittany Doucet, with law dean Philip Bryden, is doing her part to help bring legal services to rural areas

That's why the University of Alberta Faculty of Law is teamed up in an ongoing collaboration with the Alberta Rural Development Network (ARDN), the University of Calgary law school and other partners including the Canadian Bar Association on the Alberta Regional and Rural Access to Justice Project. The project, started in 2011, is exploring the shortage of legal services for Albertans who live outside of the province's cities and towns—where most law firms are established.

Though bread and butter legal services may rank low in the public eye on the ladder of community must-haves, compared to something like health care, they are just as important when life events happen, says Philip Bryden, dean of the U of A Faculty of Law.

"People go without legal services, and when they go without, there are consequences,"

Bryden said. "Lawyers are often seen as people who take up time and make processes difficult, but in fact, what we do is make it easier for people to get what they are entitled to and get a fair resolution of their problems."

The U of A plays a vital role by drawing attention to careers in regional and rural Alberta, said Paul Watson, research director for ARDN. The group is currently researching the human costs of going without legal services, as well as the financial ones. Part of the solution is to attract newly-minted lawyers to rural areas, he said. "We want to build momentum in making sure students are aware there are opportunities out there. The U of A as an educator has been actively working to make students aware of rural practice."

"Though bread and butter legal services may rank low in the public eye on the ladder of community must-haves, compared to something like health care, they are just as important when life events happen"

Without new lawyers to replace rural Alberta's "graying bar", sustainability of smaller communities suffers, creating disincentives for people to live rurally, Watson said. "There are so many commonplace issues—family matters, divorces, wills, real estate and business dealings—that call for legal expertise."

That variety is one of the things that convinced U of A law student Brittany Doucet to head for rural Alberta, where she will article with a Medicine Hat firm.

"I will get to handle a diversity of issues, which makes for an interesting articling experience, and because there are fewer lawyers than at a big firm, I'll have to do a bit of everything."

Doucet grew up in Calgary but likes the idea of settling in a smaller community.

Heavily involved in activities ranging from playing rugby to presenting an annual play with her fellow law students, Doucet wants to feel connected to her community and colleagues, and feels rural Alberta is right for that. "It's easier to get to know people and to get involved in community service. And the legal community will be smaller, so I'll get to know my colleagues well."

“If all of our graduates are going to Edmonton or Calgary, what happens to the legal profession in other communities?”

Programs in the U of A Faculty of Law geared to rural opportunities are showing success, said Patricia Neil, career development officer.“Student interest in going to rural Alberta has steadily risen over the years. We have had students article this past year all over the province, in Sundre, Camrose, Red Deer, Lacombe, Lloydminster, Grande Prairie, Peace River and Lethbridge.”

Annual events include a one-day firm hop, which lets students visit up to five law firms in a community such as Red Deer, a small firm career day that brings firms from across Alberta to the U of A law school to meet students, and a seminar which features lawyers and alumni from rural areas as guest speakers who talk about what it’s like working and living in smaller communities. As well, students do a one-day job shadow with area firms, most recently in Fort Saskatchewan and Wetaskiwin.

Paired with the needs of rural clients is the concern for continuity of law firms outside the large cities, Bryden noted. Law practices are stewards of important enduring documents, so succession is important.

“If all of our graduates are going to Edmonton or Calgary, what happens to the legal profession in other communities?”

Law schools such as the U of A and the U of C will have to work together and with the law profession to remove barriers to accessibility in rural areas, Bryden added. “It is a complex situation—there are issues of geography, issues of cost. One of the challenges of the profession is how technology is evolving, and how are we using it to potentially serve more people?”

Business education may also be a way to help address the problem, by teaching law graduates how to run a sustainable rural practice while providing affordable service to clients. “We see that as a new challenge for how we think about the legal profession and how we prepare students for professional practice.”

This article and photograph were originally published on December 6, 2013 as a news article on the University of Alberta website. It is reprinted with permission.

Human Rights and Québec's Charter of Values

On Thursday, November 7, 2013, the Québec government tabled its *Charter of Values, Bill 60*. The Bill provides that public body personnel must maintain religious neutrality in the exercise of their functions. It also restricts personnel from wearing objects "such as headgear, clothing, jewelry or other adornments which, by their conspicuous nature, overtly indicate a religious affiliation" (section 5). Both personnel of public bodies and those receiving services from public bodies must ordinarily have their faces uncovered (section 6). It appears to ban headgear, such as turbans, kippahs, hijabs, niqabs and other such clothing, as they indicate a religious affiliation. Under the Bill, the National Assembly can decide whether the crucifix in the Legislative Assembly will remain as a reminder of the province's Roman Catholic heritage.

How does the proposed new legislation fit into existing Canadian human rights law? While Canadian governments are bound by the *Canadian Charter of Rights and Freedoms* ("*Charter*") each province has individual human rights laws that apply to selected activities of individuals and governments. Unlike the human rights laws in most other jurisdictions, which focus on discrimination, Québec's law, the *Charter of Human Rights and Freedoms*, RSQ, Chapter C-12("*Quebec Charter*"), covers a broad array of rights and freedoms (similar to the *Charter*). It even includes rights, such as property rights, that are not included in the *Charter*. Many rights cases arising in Québec rely on both the *Charter* and the *Quebec Charter.*

In addition to passing the headgear and clothing requirements set out above, Bill 60 seeks to amend the *Québec Charter* as follows:

> *41. Section 9.1 of the Charter is amended by adding the following sentence at the end of the first paragraph: 'In exercising those freedoms and rights, a person shall also maintain a proper regard for the values of equality between women and men and the primacy of the French language, as well as the separation of religions and State and the religious neutrality and secular nature of the State, while making allowance for the emblematic and toponymic elements of Québec's cultural heritage that testify to its history.'*

The idea behind this is that everyone, regardless of belief, has the right to participate fully in Québec society.

Both the *Québec Charter* and the *Charter* guarantee freedom of religion. The current minority government in Québec, the Parti Québécois, seeks to amend the *Québec Charter* and add other legislation to include the right to be free *from* religion, especially for all aspects of the government. In addition, some of the accommodations that currently exist in the *Québec Charter* for religion will be curtailed (Bill 60, section 42). Interestingly, current Canadian case law interpreting the *Charter* has indicated that freedom of religion includes freedom *from* religion (see: *R v Big M Drug Mart Ltd, [1985] 1 SCR 295*).

The Québec government's reasons for the initiative include:

- controlling unreasonable faith-based exceptions from societal and workplace rules;
- guaranteeing equality of the sexes in Québec; and
- reinforcing the neutrality of the state.

Others who support the initiative note that both the *Charter* and the *Québec Charter* allow for laws that make reasonable infringements on constitutional rights (e.g., *Charter,* section one). No right is absolute. Rights are subject to reasonable limits that are justifiable in a democracy. For example, public employees may have their freedom of expression curtailed by the nature of the job. A teacher cannot publicly support anti-Semitic or other discriminatory beliefs and can be fired if this creates a poisoned classroom environment. The position of the government seems to be that the proposed law is justifiable.

…the proposed law's commitment to a fully secular state is weakened by the government's retention of some conspicuous religious symbols, as it makes the law appear not to be even-handed.

The proposed law indicates that being identified as religious will somehow affect the person's ability to perform his or her job in a fair, impartial manner. In addition, some advocates of anti-oppression and equality for women believe that requiring no "obvious" religious garb is appropriate. Others indicate that multiculturalism is a failed initiative that does not apply in Québec, and thus a *laissez-faire* approach (such as that in the rest of Canada or in Great Britain) for Québec would be "disastrous". They advocate the approach taken in France (banning religious garb in public). Finally, some analysts say that if a defence under the *Charter* or the *Quebec Charter* fails, the Québec government could invoke the notwithstanding clause of the *Charter* (section 33), which would permit the law to operate notwithstanding any violation of a *Charter* right.

Opposition to the initiative is based on academic, political and legal reasoning. Academics and politicians note that the government should separate the secular state and institutions from the individuals themselves (see: Justin Trudeau, "I have Faith in Québec. So Should You" The *Globe and Mail*, 12 September 2013). Amnesty International has stated that the proposal would violate both Canadian and international law by infringing on freedom of expression and religion (see: Benjamin Shingler, CTV News "Amnesty International slams Québec charter for limiting 'fundamental rights'", 21 September 2013).

Some analysts express doubt that the proposed revisions would actually be saved by defences such as *Charter* section one. Law Professor Carissima Mathem argues that requiring the thousands of people who work for the state to shed their religious symbols "will have an enormous exclusionary impact on the public service and other state institutions." and states that such a severe effect would have to be justified. Since there is no evidence that religious people are less fit employees, the purpose of the policy would be purely symbolic, making it unlikely to justify infringing a *Charter* right. Preventing negative perceptions of the neutrality of the state as a whole would also not likely be a sufficient justification. Further, the proposed law's commitment to a fully secular state is weakened by the government's retention of some conspicuous religious symbols, as it makes the law appear not to be even-handed (see: Carissima Mathem, 'What You Should Know About Quebec's Proposed Law on Secularism " Huff Post Politics Canada (16 September 2013).

Others argue that all of this is a move to encourage separatism and a rift between Québec and the rest of Canada. What is clear is that Bill 60 does affect freedom of religion, and this is a human rights issue. It will be very interesting to see what happens if this Bill passes into legislation.

Some Nuances to Keep in Mind When Measuring Giving

We are all familiar with those who find themselves subject to public or media criticism responding with the old saw that what they did, or what they said, was "taken out of context." Sometimes there is merit to that complaint, sometimes not. Usually, we associate being taken out of context with an individual or situation. But it can apply in other circumstances – and the use of statistics is a prime example.

This brings me to a recent *Edmonton Journal* report on a Fraser Institute study on charitable giving in Canada. The report repeats the now familiar assertion that Canadians are less generous in their charitable giving than Americans, suggests they may be becoming more so, and laments a recent decline in the number of tax filers claiming donations on their returns. On their face these suppositions seem reasonable. However, explored further, they are less credible.

There is, and has been for some years, a legitimate basis for concern about the tax filer data on which the Fraser Institute study is based. During the last decade, the percentage of Canadians claiming tax credits on their returns has been stagnating. Overall donations have tended to grow, however, owing to changes in demographics and in the size of the average donation. The latest data indicate that may no longer be the case.

…the suggestion that the gap in generosity between Canadians and Americans may be widening is open to question.

But before concluding that, one must look at the context. In the early 2000s, a number of donation tax schemes emerged that purported to offer donors a substantially greater tax credit for their gift than actual out-of-pocket costs. This was accomplished by a number of different structures, but the effect of the schemes was typically that tax receipts were issued for amounts substantially more than the value of the gifts that went to charities or their beneficiaries. Hundreds of millions of dollars and perhaps more were claimed illicitly.

The Canada Revenue Agency (CRA) responded with an aggressive auditing program of the charities associated with the schemes. Promoters of the arrangements were targeted for audits and legal actions as well. As part of the initiative, the CRA also announced that taxpayers participating in the schemes could expect to have their tax returns audited. The CRA efforts resulted in the revocation of the registration of scores of charities and the re-assessment of countless taxpayers. The courts have generally upheld the regulator's approach.

The breadth and popularity of the schemes suggests that earlier figures on total donations were likely overstated, and that some percentage of tax filers reporting credits were motivated more by the generous tax treatment they believed they were receiving, rather than by an authentic giving intention. So, it is not surprising that the latest figures have softened.

In light of this, the suggestion that the gap in generosity between Canadians and Americans may be widening is open to question. As well, the different natures of the charitable sectors in the two countries – especially the discrepancy between the types of organizations eligible for support through tax credits or deductions – needs to be considered in comparing the jurisdictions.

Often, explanations of differences in Canadian and U.S. giving are framed as stemming from variations in tax rates and governments "crowding out" the charitable sector by undertaking work that could better be done by the voluntary sector.

Additionally, there are marked disparities in the Canadian and American regulatory treatment of foreign activities,

investment in social entrepreneurship and non-partisan political engagement. In general, it is easier for American donors than their Canadian counterparts to see their contributions channelled into these types of activities. The profile of the religious community and the structure of post-secondary education and medical care in the two countries undoubtedly influences giving patterns, and – certainly in the case of the second and third areas – may give rise to different perceptions of the appropriate role for government in supplying these services.

Consider post-secondary athletic activity. In both Canada and the U.S. participation in sports at the university or college level is considered charitable since it is seen as contributing to the development of a well-balanced student and a necessary complement of mental well-being. However, the scale of post-secondary sports in the U.S. is exponentially larger than that in Canada.

Often, explanations of differences in Canadian and U.S. giving are framed as stemming from variations in tax rates and governments "crowding out" the charitable sector by undertaking work that could better be done by the voluntary sector. The *Edmonton Journal* article notes that Canadians pay higher taxes than Americans, and that Americans receive greater charitable tax deductions. As well, the Fraser Institute spokesperson in the piece, Charles Lamman, suggests that the greater support to charities provided by the Canadian government can cause a "displacement effect", whereby charities fundraise less and taxpayers give less because they believe the government is taking care of charitable responsibilities.

Leaving aside the argument of what properly constitutes charitable versus government responsibilities, there is another contextual consideration. If this displacement effect indeed exists, it needs to be remembered that tax revenue is raised at a much lower cost than charitable fundraising dollars, and that it is the net, not the gross, charitable dollars that, in the end, are available to support charitable work.

When Mark Twain famously quoted Benjamin Disraeli on "lies, damned lies, and statistics" one would expect neither had ever turned their minds to the Canadian charity world in the early part of the 21st century – but perhaps they were on to something.

I've Been Good. Can My Landlord Make Me Move?

Can a landlord end a tenancy when the tenant has not done anything wrong? It depends. We're going to look at some different factors that come into answering this question. Just so we're all on the same page, today we're talking about periodic tenancies, which are the kinds of tenancies that continue on indefinitely until either the landlord or the tenant give notice to end. The most common form of periodic tenancy is a month-to-month tenancy. There are no end dates in periodic tenancies.

If a tenant receives a termination notice from the landlord, what should they do next? First, the tenant should look at the reason for the notice. Is the landlord giving the notice because the tenant has breached the agreement? For example, is the notice because the tenant hasn't paid the rent? If the landlord's reason is because the tenant has done something wrong, then it is an eviction notice. Our article *What should you do if you get an eviction notice?* provides for more information about this.

If the reason in the notice is not about the tenant having done something wrong, then the tenant should answer two different questions to find out if the termination is legal.

1. Does the law say that the landlord can end the tenancy for the reason stated in the notice?
2. If yes, then has the landlord provided enough notice?

Does the law say that the landlord can end the tenancy for the reason stated in the notice?

Each province has its own law which states the reasons that a landlord is allowed to terminate a periodic tenancy. Here's a chart that shows the reasons that are allowed in Alberta.

Landlord Ends the Lease
If you haven't done anything wrong, then your landlord can only give you notice to end a periodic tenancy if the property is…
Going to be completely renovated
Going to be turned into a condominium
Going to be lived in by the landlord, or a relative of the landlord
Sold and the purchaser, or a relative of the purchaser, is going to move in
Sold and the purchaser requests that the tenancy be ended, if the property is a detached or semi-detached dwelling or a condo unit
Going to be demolished
Going to be used for a non-residential purpose
Operated by an educational institution and the tenant will not be a student anymore on the termination date

The reason for termination is legal, but has the landlord provided enough notice?

There are requirements about how long the landlord has to provide the tenant to move out. The landlord must provide the full amount of notice. In Alberta, the amount of notice that a landlord must provide varies based on the reason that the landlord is terminating.

Landlord Ends the Lease

If you haven't done anything wrong, then your landlord can only give you notice to end a periodic tenancy if the property is…	The notice will give you this long to move out…	
	Weekly Periodic	Monthly Periodic
Going to be completely renovated	365 days	365 days
Going to be turned into a condominium	365 days	365 days
Going to be lived in by the landlord, or a relative of the landlord	1 tenancy week	3 tenancy months
Sold and the purchaser, or a relative of the purchaser, is going to move in	1 tenancy week	3 tenancy months
Sold and the purchaser requests that the tenancy be ended, if the property is a detached or semi-detached dwelling or a condo unit	1 tenancy week	3 tenancy months
Going to be demolished	1 tenancy week	3 tenancy months
Going to be used for a non-residential purpose	1 tenancy week	3 tenancy months
Operated by an educational institution and the tenant will not be a student anymore on the termination date	1 tenancy week	3 tenancy months

The notice seems to be legal. Does the tenant have to move?

Yes, usually the tenant will have to move. If the tenant needs more time to find somewhere to live, then the tenant should see if they can negotiate with the landlord. If the tenant doesn't get the landlord's consent to stay longer, and doesn't move out, then the landlord can bring an application to force the tenant to vacate. The landlord will usually be able to keep the security deposit, and also apply for financial compensation from the tenant, if the tenant doesn't move out on time.

The notice is not legal. What can the tenant do?

The tenant should respond to the faulty termination in writing, and tell the landlord they are not moving and the reasons why. The tenant should keep the notice that they got from the landlord, as well as a copy of the objection that they gave in response. The tenant should keep copies just in case they end up disputing the termination notice in court. If the tenant objects to the termination notice, but the landlord still wants the tenant to leave, then the landlord can either serve a new termination notice, or apply to terminate the tenancy in court.

Where can the tenant go for help?

Where can you go for landlord and tenant law help?

BC

Residential Tenancies Branch
www.rto.gov.bc.ca

TRAC Tenant Resource and Advisory Centre
www.tenants.bc.ca

AB

Service Alberta
www.servicealberta.ca/Landlords_Tenants.cfm

Centre for Public Legal Education Alberta
www.cplea.ca

SK

Office of Residential Tenancies (Rentalsman)
www.justice.gov.sk.ca/Information-for-Landlords-and-Tenants

Public Legal Education Association of Saskatchewan
www.plea.org

MB

Residential Tenancies Branch
www.gov.mb.ca/cca/rtb/

Community Legal Education Association (Manitoba)
www.communitylegal.mb.ca/resources/

ON

Landlord and Tenant Board
www.ltb.gov.on.ca

Your Legal Rights
www.yourlegalrights.on.ca

QC

Régie du logement (rental board)
www.rdl.gouv.qc.ca

Éducaloi
www.educaloi.qc.ca

NL

Service NL
www.servicenl.gov.nl.ca

Public Legal Information Association of NL
www.publiclegalinfo.com

YT

Consumer Services
www.community.gov.yk.ca/consumer/landtact.html

NT

Rental Office
www.justice.gov.nt.ca/RentalOffice/index.shtml

NU

Residential Tenancy Office
rentaloffice@gov.nu.ca

NB

Service New Brunswick (Office of the Rentalsman)
www.snb.ca/irent/default.asp

Public Legal Education and Information Service of New Brunswick
www.legal-info-legale.nb.ca

PE

Office of the Director of Residential Rental Property
www.irac.pe.ca/rental/

Community Legal Information Association of PEI
www.cliapei.ca

LAWNOW
www.lawnow.org

Alberta LAW FOUNDATION

www.landlordandtenant.org

ALBERTA REAL ESTATE FOUNDATION

NS

Access Nova Scotia
www.gov.ns.ca/snsmr/access/land/residential-tenancies.asp

Legal Information Society of Nova Scotia
www.legalinfo.org

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Criminal Defence Law in the North: Part One

It seems that almost every lawyer who has travelled from southern Canada to practice law "North of 60" ends up writing about his or her experiences at some point. Almost all of those who are drawn to this part of Canada are struck by the geographical and physical beauty of this land, and by the personal, cultural and social situations and histories of the peoples who have lived here for generations before us.

I confess I am no different. I first started coming to the Northwest Territories to travel on circuit with the Territorial Court in the spring of 2010 when I was still living and working in Edmonton. Over the following two years the place, the people, and the experiences, grew upon me to the extent that after more than 25 years of practicing law in Edmonton I decided to close my office there and to resettle in the north. At the end of June, 2012 I made my last court appearances in Alberta, packed my car, and drove north to begin a new chapter of my career and my life. For the last 18 months I have worked as criminal defence counsel in Yellowknife as a member of the legal aid organization (the Legal Services Board of the Northwest Territories) which provides representation for the indigent who find themselves in conflict with the law.

Canadian history includes some dark and terrible moments involving efforts by white European society to subjugate and destroy aboriginal communities and culture on a widespread basis.

In the next three columns I will try to describe some aspects of criminal defence practice in this part of Canada's north, from both a personal and professional perspective. In so many ways and on so many levels, this setting is one of stark contrasts: the land is at once beautiful and intimidating; and the climate varies from surprisingly hot and dry in the summer, to cold and dark in the winter. The communities where we work as defence counsel also reflect contrasts, as they are both afflicted by deep-rooted social problems and personal tragedies, and blessed with resilient individuals and aspirations which cannot be denied.

In general terms, the substantive law is the same here as it is in every other part of Canada. The *Criminal Code* applies across the country, of course, and it is enforced in the Northwest Territories (and the other territories as well) by the R.C.M.P. (there are no municipal or territorial police forces in Canada's north). Just as the police operate complicated undercover operations to detect drug trafficking, in the north they also investigate and charge those involved in bootlegging operations. As is the case everywhere, the charges laid and prosecuted in the courts here reflect different aspects of the realities of life in this part of the world. Sadly, the abuse of alcohol is a widespread problem in the Northwest Territories, and this is apparent from the overwhelming number of criminal files which involve the intoxication of one or more of the persons involved in the events in question. Sexual assaults are a disproportionately frequent occurrence, usually committed while one or both of the persons involved are extremely drunk. As well, the incidence of family violence is high, and again, is often fueled by the excessive consumption of alcohol usually, but not always, by the perpetrator.

As is the case with the trafficking of illegal narcotics in southern Canada, bootleggers are active in the north, with the result that even in remote, legally "dry" communities it sometimes seems to be very little problem for individuals to purchase bottles of liquor, the consumption of which leads to much personal, family and community-wide turmoil and distress. Just as the police operate complicated undercover operations to detect drug trafficking, in the north they also investigate and charge those involved in bootlegging operations. Shipments are sometimes intercepted as they are brought in to isolated communities by plane or boat, the contraband confiscated and destroyed, and charges laid under the Territorial liquor laws.

The differences of our northern setting are apparent in other situations too. For example, in many communities,

quads and snowmobiles are used as often as trucks and automobiles. Even in Yellowknife, with the exception of four blocks in the downtown core, snowmobiles are a legal and common means of transportation. This is often reflected in impaired driving cases: in some places there are as many impaired driving charges laid in relation to the operation of snowmobiles, for example, as cars or trucks. I should add, however, that impaired driving is as much frowned upon here as anywhere else in Canada. Members of the communities are increasingly reporting suspected intoxicated drivers to the police, who often have little difficulty in locating and arresting offenders. Most places are so small everyone, including the police, knows who everyone else is, and where they live. Persons who are convicted and who are then ordered not to drive again are specifically warned that the court's order includes the operation of snowmobiles and quads.

Even now, two or three generations removed from the era of the Residential Schools, the children of those who suffered abuse and mistreatment in those institutions often end up before the courts.

Over the last 10 or 15 years, Canadian courts have become more aware of the historic and systemic factors which have led so many aboriginal Canadians into conflict with the law. Canadian history includes some dark and terrible moments involving efforts by white European society to subjugate and destroy aboriginal communities and culture on a widespread basis. The Residential Schools are perhaps the most well-known manifestation of this history of colonialism, but there are other examples too, including the destruction of the traditional way of life for those who were historically a nomadic society. In 1999 and again in 2012, the Supreme Court of Canada specifically recognized and confirmed that these historical events continue to play a role which contributes to the well-known fact that, compared to their numbers in the general population, aboriginal citizens make up a disproportionately high percentage of prisoners and inmates in our correctional centres and institutions.

Every day in northern courts we see on a very personal level the sad results of these historical Canadian policies. Even now, two or three generations removed from the era of the Residential Schools, the children of those who suffered abuse and mistreatment in those institutions often end up before the courts. They have committed offences, usually while intoxicated, fueled by deep-rooted anger and resentment. These feelings can be traced back to the upheaval and despair in their earlier lives as their parents tried to cope with their own scars and wounds left by mistreatment at the hands of priests, nuns, teachers, and others into whose care they were forced. One has only to hear a single such personal history – of a poverty-stricken childhood plagued with parental drinking and violence as a father or mother (and sometimes, both) tried to come to terms with their own childhood demons – to realize that such tragedies really do have an inter-generational ripple effect. The events of many years ago continue to have a very real and direct impact on the lives of individuals to this day.

In my next column I will review and discuss some unique and special aspects of sentencing offenders in a northern setting.

Whatever Happened to … The Law of Sniffer Dog Searches

When does a sniff amount to an illegal search? The Supreme Court of Canada recently weighed in on this question and the decision changes the law in Canada from what it had previously been. What was the law prior to the recent decision?

Assume you are walking along the street or are on public transit. Perhaps you are at the Greyhound bus depot where the police believe illegal drugs are being brought in and moved. Normally not much privacy would be expected in such public places.

If a police dog walks alongside someone and indicates (usually by sitting down) that this person has illegal drugs in his pocket or bag, that is an illegal search in Canada. Any drugs found will not be admissible in evidence if drug possession charges are laid.

This ruling emerges from a 2008 case from the Supreme Court of Canada called *R. v. Kang*-Brown, [2008] 1 SCR 456. As we will see, it was out of step with our American, British and Australian cousins.

The Kang-Brown Facts

On the morning of January 25th, 2002, Mr. Gurmakh Kang-Brown disembarked from an all-night Greyhound bus trip from Vancouver at the Calgary bus terminal, a route that the Calgary police suspected of being frequented by drug couriers. Several plainclothes officers were present as part of the Calgary Police Service's *Operation Jetway*, to observe passengers for suspicious behaviour that might indicate illegal courier activity.

Alighting the bus with his bag slung over his shoulder, Kang-Brown made sustained eye contact with plain clothes officer Sergeant Macphee, who returned his stare. Walking through the terminal, Kang-Brown turned and looked again at officer Macphee several times. Just before Kang-Brown exited the building, Macphee walked up and introduced himself as a police officer, showing his badge. He told Kang-Brown that he was not in any trouble and that he was free to go at any time, but that he would like to ask him some questions. Kang-Brown responded that that was fine with him.

After more small talk, Macphee noticed that Kang-Brown was becoming increasingly nervous. Macphee asked if Kang-Brown was carrying any illegal drugs. Kang-Brown answered that he was not. Macphee requested to peek into Kang-Brown's bag.

Kang-Brown put the bag on the ground and began to open it. Macphee knelt down, with his hands about to touch the bag. He said, "just an officer safety thing here, do you mind?" Before Macphee could touch the bag, Kang-Brown jerked it away and exclaimed "what are you doing?"

At this point, Macphee signaled another officer to approach with Chevy, a dog trained to sit when it detected narcotics. Chevy sat next to Kang-Brown's bag. Macphee arrested Kang-Brown for the possession of narcotics. A search of the bag turned up a box containing approximately $90 000 worth of cocaine and a small amount of heroin.

An Unconstitutional Search?

It is challenging to unpack the four separate opinions from the nine judges, but all agreed that the dog's sniff at the bus depot was a search subject to "reasonable search and seizure" principles under section 8 of the Charter.

At trial, despite handler evidence that sniffer dog Chevy had historically enjoyed an accuracy rate of about 90% on detections (and was obviously accurate in this case), Kang-Brown's lawyer argued that the use of a sniffer dog was an unlawful search. Under the *Charter,* all the evidence obtained as a result would be inadmissible at trial. Without any admissible evidence, there could be no conviction for the drug possession charge.

The case went to the Supreme Court of Canada in 2008. It is challenging to unpack the four separate opinions from the nine judges, but all agreed that the dog's sniff at the bus depot was a search subject to "reasonable search and seizure" principles under section 8 of the *Charter*. A minority of four judges said Canadian police can, even in the absence of legislative authority (i.e. under the common law) search using drug sniffing dogs on a *reasonable suspicion*. Another judge said the standard was *generalized suspicion*, which would have covered the facts of this case. The other four judges said the standard was the same as it has always been: the higher standard of *reasonable and probable grounds*. One will recall that the only reason the police officer approached Kang-Brown in the bus depot was because of his suspicious eye contact and the dog was summoned later after he was reluctant to open his bag.

Six judges said this sniff search violated section 8 of the *Charter* and the evidence of all the illegal drugs found were inadmissible against Kang-Brown. The other three judges disagreed.

Impact

As a result of the Supreme Court decision in *Kang-Brown*, sniffer dog searches were permitted only after police had reasonable and probable grounds to believe someone was bearing illegal drugs. This rendered sweeps and general monitoring by canines essentially unconstitutional in Canada in public spaces such as bus depots and streets.

There was flexibility in the application of *Kang-Brown* based on the nature of the public venue in which the search was conducted. For example, there was a lower expectation of privacy in airports, where security is more pervasive and people are subject to repeated searches (*R v. Chehil,* 2009 NSCA 111 (CanLII)), or even on a public highway (*R v. MacKenzie,* 2013 SCC 50 (CanLII)). Posting signs indicating that people and their bags may be randomly searched (which was the case at the Calgary bus depot, but some of the evidence on that was equivocal) may also reduce general privacy expectations.

Different Jurisdictions – Different Breeds of Sniffer Dog Law

Sniffer dogs have had to pass constitutional muster in other jurisdictions as well. The United States Supreme Court has decided four cases related to sniffer dogs. Basically, they say that the use of dogs in a public place does *not* amount to a search, so the equivalent Fourth Amendment right of the *Constitution* is not offended (*United States v. Place* (1983), 462 U.S. 696). The U.S. Supreme Court has also concluded that dog sniffs during routine traffic stops are permissible and are not searches, provided the traffic stop itself is legal. However, the Court classifies a dog sniff as a search – requiring probable cause and a warrant – on private property (*Florida v. Jardines* (2013), 133 S.Ct. 1409).

Sniffer dogs have had to pass constitutional muster in other jurisdictions as well. The United States Supreme Court has decided four cases related to sniffer dogs.

British law also refuses to define a dog sniff in a public place as a search. Peace officers often rely on sniffer dog indications as their basis for reasonable suspicion required for a further physical search. No legislation specifically governs the use of sniffer dogs by law enforcement and the practice has never been challenged in the courts. ("*Sniffer Dogs*", Release Legal Emergency & Drugs Service (London) 2013)

A study by the Ombudsman of New South Wales in Australia reported that drugs were found in only 27% of searches conducted after a dog had given a positive indication of their presence. The study, coupled with sustained public

outcry led to the 2005 repeal of the *Drug Dogs Act*, the legislation that enabled warrantless dog sniffs. Besides legal legitimacy, any police investigation tactic should have functional legitimacy.

Conclusion

The law of sniffer dogs, as in most areas of the criminal law, strives to balance the duty of law enforcement to detect and investigate crimes with our *Charter* right to be "secure against unreasonable search or seizure." There was a long-standing threshold that police must possess *reasonable and probable grounds* in order to conduct any search and this largely consigned technology-free sniffer dogs to the kennel.

However, the legal landscape with regard to sniffer dogs changed significantly with the release of the September 27, 2013 Supreme Court of Canada decision in the case of *R. v. Chehil*. In that decision, which was unanimous, the judges examined in great detail the concept of "reasonable suspicion", which differs from "reasonable and probable grounds". We will examine that decision and its impact on the Canadian law on sniffer dogs in our next column.