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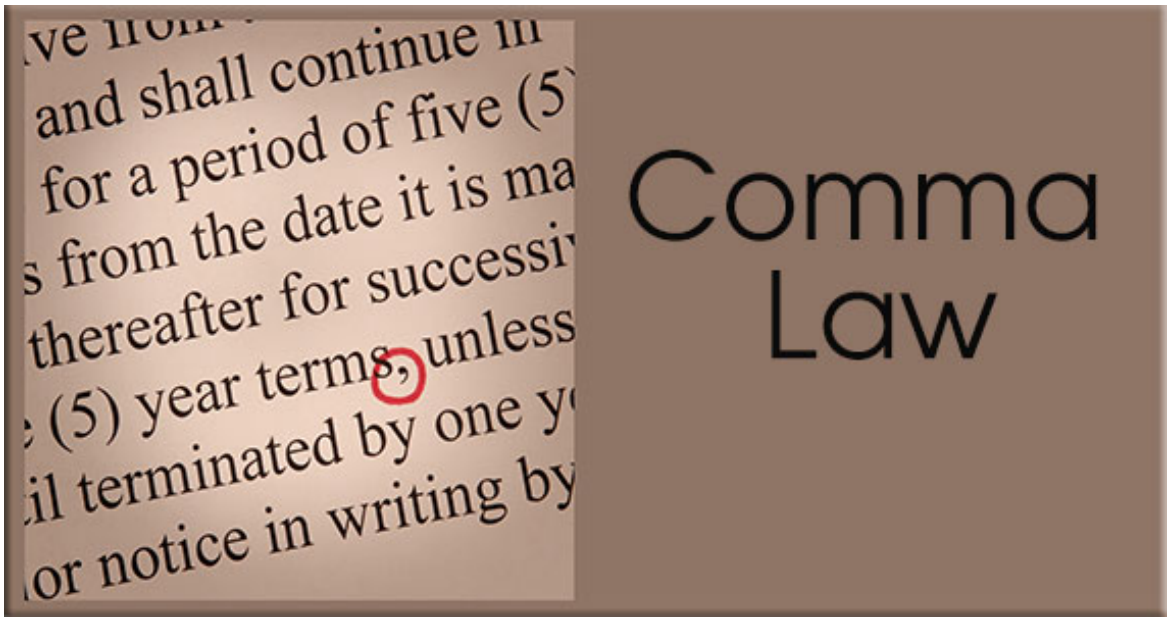
Comma Law



> *The writer who neglects punctuation, or mispunctuates, is liable to be misunderstood for the want of merely a comma . . .* – *Edgar Allan Poe*

Introduction

"Let's eat, Grandma" or "Let's eat Grandma." As the saying goes, "commas save lives."

This adage humorously demonstrates the significance of proper punctuation in determining meaning, and the potential cost for not heeding it. [1] Precision in punctuation has lost much ground in the last 30 years since the emergence of short, frequent, informal emails, texts and tweets replaced letters and reports as the preferred form of casual written communication between people and in companies. Meaning may be confused by punctuation in ordinary written communication, but the consequences are usually more serious in formal written communications such as contracts and other legal documents. The interpretations are adversarial and the stakes can be very high.

This article deals with the multi-million dollar comma involving Rogers Communications.

The Rogers Case

In 2002 Rogers Communications entered into a support structure agreement (SSA) with Bell Aliant, which granted Rogers access to transmission poles at the rate of $9.60 each per year. Rogers' access to these poles permitted connections of its telephone and cable services to homes throughout Canada. Bell Aliant was an agent of NB Power and did not own the poles itself. The five-year agreement was set to expire in May 2007.

However, in 2004 NB Power wanted to regain control of the poles and to raise the rates offered to companies like Rogers to $18.91, with a subsequent increase each year. Bell Aliant notified Rogers that its SSA was cancelled and that the rate increase would be effective at the beginning of 2006. Rogers Communications calculated that the SSA termination would cost it an additional $2.13 million to the original five-year deal. [2]

Defending the cancellation, Bell Aliant relied on a single clause in the SSA:

[This Agreement] shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

The devil is in the details, specifically in the last comma. Since Bell Aliant wanted to sharply increase the pole rate and wanted the contractual flexibility to do that, it interpreted this clause as the right to terminate the agreement *at any time*, with one year's notice. Rogers, on the other hand, wanted to retain the current rate as long as possible. It took the position that this clause meant the agreement could only be cancelled *at the end* of the current five-year term, as long as either party gave one year's notice before the five-year term ended.

The dispute reached the federal Canadian Radio-television and Telecommunications Commission (CRTC). The CRTC agreed with Bell Aliant citing "rules of punctuation." The placement of a single comma may seem like boring, picayune stuff, but you never know when ignoring the precise punctuation details will make a huge difference in legal outcomes. Placing the comma before the word "unless" meant that both antecedent phrases preceding the comma were modified by the phrase following the comma. A comma, placed here, closed the clause and dictated that what followed served to qualify the entire preceding section. Had the comma not been before the word "unless", the phrase "unless and until terminated by one year prior notice in writing by either party" would have only applied to the immediately preceding clause, "thereafter for successive five (5) year terms," and not any other clause before it. If the meaning was to limit the right to terminate the agreement at the end of the five-year term, the clause would have not included a comma placed before the word "unless" and there would have been a clear indication of the date whereby the right could be granted. Accordingly, the CRTC found this clause "clear and unambiguous." Applying the "plain and ordinary" meaning, Bell Aliant was permitted to legally terminate the 2002 SSA without cause at any time (Telecom Decision CRTC 2006-45).

The CRTC agreed with Bell Aliant citing "rules of punctuation."

Ken Adams explained the decision in this way: "The CRTC's analysis seems pedantic, in that it would be unreasonable to assume that drafters grasp the implications of every comma. But as a way of resolving a dispute, consulting a few books on punctuation is certainly quicker than delving into the intent of the parties." Adams said this clause could have been more clearly stated by separating it into two sentences, as follows: [3]

The initial term of this agreement ends at midnight at the beginning of the fifth anniversary of the date of this agreement. The term of this agreement (consisting of the initial term and any extensions in accordance with this section 12) will automatically be extended by consecutive five-year terms unless no later than one year before the beginning of any such extension either party notifies the other in writing that it does not wish to extend this agreement.

The Law of Punctuation

Mo-Tires

There is scant common law on how such interpretive disputes are to be resolved in Canada. The case of *Mo-Tires Ltd. v. Canada (National Revenue)* provides some direction regarding interpretation of clauses, but it fails to establish a framework for interpreting using commas, semi-colons, and periods in legal documents.

In *Mo-Tires*, the issue was whether a semi-colon (or a period in the French version) at the end of the paragraph created two separate independent clauses, or whether the semi-colon merely constituted a pause in a single clause. If the semi-colon created two separate antecedent clauses, Mo-Tires would have to pay taxes on the re-treading service *and* the original casing. Conversely, if the semi-colon only created a pause in a single phrase, Mo-tires would

only pay taxes on the re-treading service.

The tribunal concluded that the semi-colon created two separate antecedent clauses and Mo-Tires had to pay taxes to Revenue Canada on both its re-treading service and the original casings. *Mo-Tires* was one of the very few cases that provide guidance for the Rogers comma case.

Duality and Equality of Languages

Section 16 of the *Charter of Rights* entrenches the equality of both official languages, French and English:

English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Federal legislation [4] confirms that French and English versions of legislation are equally valid.

Appeal

In early 2007, Rogers Communications applied for a review of this ruling to the CRTC (Telecom Decision CRTC 2007-75), arguing that the French version of this clause had also been accepted by Bell Aliant and it was not ambiguous:

Sous réserve des dispositions relatives à la résiliation du présent contrat, ce dernier prend effet à la date de signature. Il demeure en vigueur pour une periode de cinq (5) ans, à partir de la date de la signature et il est subséquemment renouvelé pour des périodes successives de cinq (5) années, à moins d'un préavis écrit de résiliation à l'autre partie un an avant l'expiration du contrat.

The English and French versions of this contract were written as the result of a single process to develop a uniform and standardized agreement. In support, Rogers cited a 2006 CRTC decision that emphasized the value of uniformity in SSAs between two other Canadian telecommunications companies, Sogetel Inc. and Téléphone Milot Inc. (Telecom Order CRTC 2006 223). Rogers argued that the first ruling violated this uniformity principle. Although two interpretations were possible with respect to the English version of the SSA, the French version provided clear evidence that each party intended to restrict termination without cause to the end of the five-year term. Rogers also noted that the Commission's first ruling rendered the parties' agreement to a five-year term meaningless because either party could terminate the agreement at any point without cause.

The CRTC agreed and reversed its previous decision and ordered Bell Aliant to fulfill its contractual obligations until mid 2007.

Rogers Communications proved that its intended meaning in the subject contract clause was affirmed when the French version of the agreement was invoked. However, while it won that battle, Rogers ultimately lost the war and had to pay the price increase and hefty legal fees.

In the end, further technicalities removed the effect of this win for Rogers. The CRTC, whose authority derives from the *Telecommunications Act*, found it did not have jurisdiction to enforce any obligations between Rogers and Bell Aliant with respect to poles owned by provincially regulated power companies. Therefore, while the contract was binding on Bell Aliant for 5 years, the CRTC could not prevent a NB Power price increase (Telecom Decision CRTC 2008-62). When this decision was revisited in 2008, the CRTC decided that since NB Power controlled the transmission poles, Bell Aliant was not required to fulfill its contractual obligations after 2004 with respect to providing access to NB Power-owned transmission polls. The CRTC found Bell Aliant free of its contractual obligations after 2004 and it had no power to control NB Power's prices.

In 2009, Rogers submitted an application to review and vary the 2008 decision and sought damages for the increase

in fees for the poles from Bell Aliant but the CRTC refused to reverse its decision or award damages, stating it does not have the authority to award damages (Telecom Decision CRTC 2009-187). Rogers did not appeal this decision t the Federal Court of Appeal.

Rogers Communications proved that its intended meaning in the subject contract clause was affirmed when the French version of the agreement was invoked. However, while it won that battle, Rogers ultimately lost the war and had to pay the price increase and hefty legal fees.

Conclusion

Both of these large companies, and many others watching this dispute learned the lesson that punctuation matters, especially in legal documents. In Mo-Tires, the issue was whether a semi-colon (or a period in the French version) at the end of the paragraph created two separate independent clauses, or whether the semi-colon merely constituted a pause in a single clause The placement of a single comma may seem like boring, picayune stuff, but you never know when ignoring the precise punctuation details will make a huge difference in legal outcomes.

The failure to punctuate a single clause correctly may open the door to an entirely different – indeed contrary – meaning which inexorably will lead to risky, expensive, and prolonged litigation.

As the T-shirt says: “I love cooking my family and my dog. Use commas. They save lives.”

And a lot of money.

Notes:

1. A story is told about a telegram, the meaning of which fell victim to a slightly misplaced period. This is what was sent: “Not getting any better. Come at once.” This is what was received: “Not getting any. Better come at once.” See: Lynne Truss, *Eats, Shoots and Leaves*, (2003), Gotham Books, Canada, pp. 9, 11

2. Grant Robertson, Comma quirk irks Rogers, *Globe and Mail,* (August 6, 2006); and Barbara Shecter, Rogers wins ‘comma’ contract dispute, *The National Post.*

3. Kenneth A. Adams, “ Behind the Scenes of the Comma Dispute”, *Globe and Mail*, Aug. 28, 2007, p. 2; See also, Ken Adams, *Costly Drafting Errors, Part 1—Rogers Communications and Alian t.* (August 7, 2006).

4. *Official Languages Act, RSC 1985, c 31 (4th Supp); and Interpretation Act, RSC 1985, c I-21.*

You Can't Do or Say That: Constraining individual conduct in a public and commercial world

Greek triple-jumper, Voula Papachristou, was expelled from the 2012 London Olympic Games because of a disparaging and racist tweet she broadcast days before the Games. European soccer players making negative comments about officials on or off the field now face suspension. An 18-year-old Canadian junior water polo athlete received a two-year suspension from the national sport organization for his role in the 2011 Stanley Cup riots in Vancouver. According to Water Polo Canada, "The message [of the suspension] is, you're an athlete and you're representing Canada all the time, whether you're on the field of play or you're out at a restaurant or in the general public." (Canadian water polo player suspended two years for role in Stanley Cup riot, Sep.27, 2011) These examples reflect a seeming increase in measures aimed at censoring the conduct of athletes, on the field and off. Indeed, this trend affects not just athletes, and other celebrities, but can be seen increasingly in employment relationships. A number of factors can be identified as influencing this pattern, but perhaps most important is the exponential growth o social media and its instantaneous communication and global reach.

Public focus on morality clauses is a relatively recent phenomenon, even though they have been in use for some time.

Control over peoples' conduct is typically done through the use of what are referred to as morals, or morality clauses – a contractual provision prohibiting a person's immoral, illegal or otherwise disparaging conduct. These clauses commonly appear in endorsement-type contracts of athletes, performers, and other famous personalities, but actually go beyond this sphere. Companies and organizations typically insist on morality clauses to protect their reputation and interests from being affected by the improvident conduct of people with whom they have contracted.

First, a little history

Public focus on morality clauses is a relatively recent phenomenon, even though they have been in use for some time. They had their origin in the movie industry of the 1920s as a response to the scandalous and often excessive behavior of some of the most famous movie stars of the time. At about the same time, Major League Baseball went through the aftermath of the Black Sox scandal. Eight White Sox players were accused of intentionally losing games

in exchange for money from gamblers when the Chicago White Sox lost the 1919 World Series to the Cincinnati Reds. All were subsequently banned for life from organized baseball.

The use of morality clauses spread beyond the sports and movie industries when companies discovered the concept of “branding”.

Both groups were faced with having to stem increasing public criticism of seemingly lascivious and scandalous behaviour and threats by the U.S. Congress of censorship and greater regulatory control over their activities. Inserting strongly worded morality clauses into contracts, with the ability to terminate the contracts if the clauses were breached, was a way for these industries to start to control the conduct of these personalities.

Morality clauses again came to public attention in the movie industry in the late 1940s during the so-called McCarthy era. The U.S. Congress was holding hearings into “un-American activities”, generating huge public outcry and front-page editorials exclaiming a communist “infestation” of the movie industry. Studios once again used morality clauses, by then a mainstay in talent agreements, to terminate and disassociate themselves from scandalized actors, producers and other ‘undesirables’ within the industry.

The use of morality clauses spread beyond the sports and movie industries when companies discovered the concept of “branding”. Proctor & Gambling (P&G), with its Ivory Soap product, first pioneered this concept promoting the idea that there were differences in similar products produced by different companies. They also quickly learned that using a celebrity to promote their brand could be a double-edged sword. In the early 1970s, P&G hired model Marilyn Briggs to be the “Ivory Soap girl” on boxes of Ivory soap, posing as a mother holding a baby under the tag line “99 & 44/100% pure”. Millions of boxes of the soap with her picture on them hit store shelves the same week her X-rated film was released. The effect was catastrophic for P&G. Ivory’s association with ‘purity’ and ‘home values’ was disastrously undermined.

Morality clauses saw a third public resurgence in the early 2000s, when social networking really exploded. Indiscreet or disparaging comments could be broadcast to millions of recipients by the tap of a finger and a tweet or video could go viral in a flashThe primary concern for both parties drafting a morality clause is in describing the language around unacceptable conduct; that is, conduct that could lead to the termination of a contract.. At the same time, the value of endorsement deals skyrocketed and the exposure of companies and organizations in terms of reputation and brand value increased exponentially. For example, it is estimated Tiger Woods’ marital scandal cost the three sports-related companies (Tiger Woods PGA Tour Golf, Gatorade, and Nike) a 4.3-percent drop in stock value, equivalent to about $6 billion (Tiger Woods Scandal Cost Shareholders up to $12 Billion, Dec. 29, 2009). Companies and organizations responded by seeking greater protection from such unintended exposure. Indeed, the drafting of morality clauses has now become an important and increasingly sticky part of contract negotiations.

Issues facing morality clauses

The primary concern for both parties drafting a morality clause is in describing the language around unacceptable conduct; that is, conduct that could lead to the termination of a contract. The company or organization wants to have the greatest flexibility to determine inappropriate conduct so as to deal with even a whiff of a scandal. The endorsee (i.e., the athlete, personality or employee), on the other hand, wants to have as strict and narrow a definition of (mis) conduct as possible. The company or organization would favour language in the clause making it the sole judge of whether conduct violates the language of the morality clause. For example, the company or organization would be more likely to use language allowing it (but not necessarily requiring it) to take action should the endorsee bring him o herself into public disrepute, contempt, scandal or ridicule, or bring the company or organization into disrepute. The endorsee, however, would argue for wording requiring a much more serious degree of misconduct, such as a criminal conviction (as opposed to simply being charged with a criminal offence), before any action could be taken to terminate the agreement. He or she would also argue for more objective (and interpretable) language. What constitutes ‘disrepute’ or a ‘disparaging’ comment? This is definitely a debatable circumstance.

The bargaining strength, or leverage, of each party significantly influences the balance of the clause. The greater the apparent leverage of the endorsee, the more weak or lenient the morality clause. For example, Lance Armstrong, in spite of his past liabilities stemming from repeated allegations of doping, commanded a powerful position until his self-admission of doping in 2013, because of his ability to sell products through his image. For example, sales of Trek road bikes rose 143% from 2000 to 2005 largely, if not almost exclusively, due to the performance of Lance Armstrong, a key endorsee (Albergotti, R. & O'Connell, V.; *Wheelmen*, Gotham Books, 2013).

The wording of the morality clause raises a related issue: who decides, for example, when a comment is disparaging and when it is not? What is the test, if there is one? Would political comments be considered offside? What about comments or commentary directed at the business or organization itself, or its sponsors? The company or organization would favour language in the clause making it the sole judge of whether conduct violates the language of the morality clause. This certainly would disadvantage the endorsee, increasing with the vagueness of the language (i.e., what constitutes public disrepute?). The endorsee would likely attempt to negotiate an arbitration clause whereby an independent third party would interpret the conduct in question in light of the language of the morality clause.

Variations in morality clauses

The wording of the morality clause raises a related issue: who decides, for example, when a comment is disparaging and when it is not?

Some morality clauses are drafted specifically to the individual. The Callaway Golf Company included a clause in an endorsement agreement with John Daly, a professional golfer, allowing it to terminate their agreement if he engaged in any gambling or drinking activities. This was no doubt done in light of Daly's previous public conduct. In fact, Calloway did subsequently terminate its contract with Daly, relying on that particular clause.

Since the 1980s, it has become fairly commonplace to see reciprocal, or two-way, morality clauses, which allow the endorsee to terminate an endorsement agreement if the company or organization engages in fraud or some other criminal activity. Indeed, corporate malfeasance has meant endorsees have had to increasingly protect their own reputations and brands. For example, in 2008, the Houston Astros had no reverse morals clause in its endorsement agreement with the corrupt and bankrupt energy and financial trading company Enron Corp., which, at that time, was the seventh largest corporation in the United States. The Astros, faced with a huge public relations backlash, was forced to pay $2.1 million to the company's creditors in order to sever its relations with the company.

Following alleged bribery and other improprieties by members of the International Olympic Committee (IOC) in 1999, a number of sponsors threatened to pull major sponsorship commitments for the 2002, and subsequent Games, unless the IOC agreed to include detailed reverse morality clauses in their sponsorship contracts.

Similar stories can be found with individual, as opposed to corporate, endorsees. Professional golfers, Vijay Singh, Camilo Villegas, David Toms and Morgan Pressel all wore the logo of the Stanford Financial Group on their clothing. In 2009, Stanford Financial Group and its principle, Allen Stanford, were alleged to have led a $7 billion fraud scheme. Without a reverse morality clause, none of the golfers could have removed the logo from their clothing and disassociated themselves from the disreputable company. Most endorsement agreements now contain some form of reverse morality clause, albeit not necessarily a mirror image clause, which would depend upon the leverage, or negotiating power, of each party.

Conduct policies as an alternative

… professional and Olympic athletes' conduct, and other employees' conduct, can be narrowly controlled through conduct policies using language similar to that found in morality clauses…

So far, we have focused on morality clauses in endorsement contracts. Morality clauses are also found in

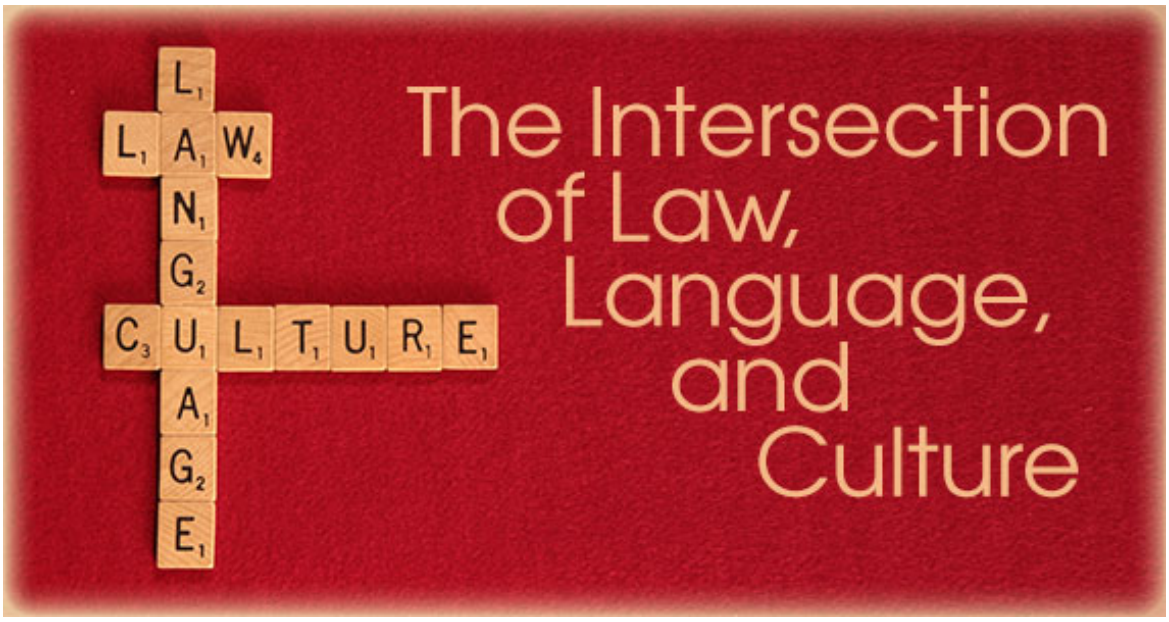
employment contracts and other types of contracts such as, athlete agreements used by Olympic, and other sport organizations, and contracts for other professional services. But more particularly and typically, conduct in employment situations is regulated by way of a conduct policy. In such circumstances the company or organization has significant authority over the content of the policy. Note, however, that the British Olympic Committee was forced to retract a provision in its athletes' agreement prohibiting athletes from commenting on human rights matters leading up to and during the Beijing 2008 Summer Olympic Games in the face of a ferocious athlete and public outcry. Nonetheless, professional and Olympic athletes' conduct, and other employees' conduct, can be narrowly controlled through conduct policies using language similar to that found in morality clauses not to bring the company or organization into disrepute (which is often vague and ill-defined and thus weak from a legal perspective).

Apart from athlete agreements and organizations' conduct policies, the speech of Olympic athletes is further curtailed by way of Rule 50 of the *Olympic Charter*, which states, "No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas." This rule could well be used to stop any athlete from supporting LGBT Russians at the 2014 Sochi Winter Olympic Games or speaking out against Russian anti-gay legislation at the Games.

Conclusions

The face of businesses and organizations is often portrayed by others hired to do the job, whether athlete, celebrity or employee. Their conduct can reflect upon the company or organization – and vice versa. It is understandable that parties would want to protect their reputation and brands. However, restrictions on conduct and freedom of speech can be onerous and overly controlling where they impinge on issues of ethical and social belief. Determining the bounds of control is a matter of negotiating leverage and reasonable accommodation, but must also be informed by principles of individual belief and human rights.

The Intersection of Law, Language and Culture



Introduction

When we think of the intersection of law and language, most of us reflect on the linguistic sides of the issue, such as: questions about why law-makers use certain words as opposed to others, queries about 'legalese', and problems of misunderstanding, interpretation and translation. Rarely do we spend much time considering the possibility that the language we speak might itself form the basis for the granting – or denial – of certain legal rights and responsibilities.

However, in Canada, this question of 'language rights' is a very important part of the legal landscape. Whether we are born in Canada or move here later in life, we learn that this is a bilingual country. We also learn that minority official language speakers (the French language minority outside of Québec, and the English language minority inside Québec [1]) have language "rights" and that these rights are sometimes protected by Canada's constitutional framework (including the *Canadian Charter of Rights and Freedoms*). But what exactly are these rights? Why do we have them, and when can we use them? And are these rights always constitutionally protected?

The Larger Framework

The structure of our bilingualism, and more specifically of our constitutionally-protected minority language rights, stems from our history. Canadian law recognizes that both the English and the French communities, and therefore, languages, played an important role in the founding of the federation now known as Canada. It recognizes that language is a fundamental aspect of individual identity and an expression of community and culture. Canada's bilingual character is also a fundamental aspect of Canadian national identity. It is a reference for national pride and patriotism. Like the flag and the national anthem, our bilingual composition portrays the national personality. Minority language protections ensure that all of these aspects of Canadian identity will be preserved.

It is these governmental commitments to the importance and equality of the English and French languages that have led to the bilingualism we know and enjoy today. Unlike some other countries, Canadian bilingualism is not one wherein most people in the country speak both languages fluently. Like the flag and the national anthem, our bilingual composition portrays the national personality Instead, Canadian bilingualism reflects the reality that there are a large

number of people who speak one language, and a large number of people who speak another (in Québec alone, there are almost 8 million French-speakers). This bilingualism is then echoed in the language-related rules and programs that are in place. The result: Canada has two official languages and numerous legal protections for minority official language rights (the French language minority outside of Québec, and the English language minority inside Québec).

The rules around our constitutionally-protected minority language rights, including who gets to decide what, are complicated, and equally steeped in history. To understand the greater picture, we must step back for a moment.

The basic rules that dictate which level of government can make laws in a particular sector are set out in sections 91 (federal) and 92 (provincial) of the *Constitution Act, 1867* ("*CA 1867*", formerly known as the *British North America Act* or "*BNA Act*"). Under the *CA 1867*, the word "language" itself does not appear in any of the lists in either s.91 or s.92. Instead, the authority to make laws about language is tied to each particular non-language subject matter. As a result, there is no single and complete power to make laws that are only about language, and powers over language are divided between federal and the provincial/territorial governments. Alongside the *Charter* and other constitutional protections, the federal government has passed additional laws about language rights. One example is the *Official Languages Act*. Again, however, this kind of legislation applies only to the federal government. Furthermore, the federal government has transferred some of its powers to the territorial governments in Nunavut, the Northwest Territories and Yukon.

The result is a set of federal language laws, and a set of language laws (or no language law) for each province/ territory.

It is important to understand what kind of language rights there are. In a nutshell, language rights appear in various kinds of law, and the kind of rights or protections that they give depends on the nature of the law.

Overarching Legislation / the Constitutional Framework

The most permanent commitment to bilingualism comes from the language rights that are enshrined in the *Canadian Charter of Rights and Freedoms* (the *Charter*), section 133 of *CA 1867* and section 23 of the *Manitoba Act, 1870*. These rights guarantee, under certain conditions, the use, protection and development of minority languages in certain sectors: education, governmental communications and services, legislation and publications, and judicial rights. These rights are essentially permanent; as they are difficult to alter (there is high standard for changes to the *Charter* and to other constitutional documents). However, although they affect people across Canada, and except in matters of minority language education rights, these rights are limited to the federal government, and the governments of Québec, Manitoba, and New Brunswick (the only officially bilingual province).

Federal Laws

Alongside the *Charter* and other constitutional protections, the federal government has passed additional laws about language rights. One example is the *Official Languages Act*. Again, however, this kind of legislation applies only to the federal government. Another example is section 530 of the *Criminal Code of Canada*, which outlines the minority official language rights of an accused in criminal proceedings before a court. These laws can be seen as one way the federal parliament puts constitutional minority language rights into action.

Provincial Laws

Due to its bilingual status, the government of New Brunswick has also passed additional language laws that work alongside the *Charter*. The laws of other provinces/territories contain some language rights, but they are generally

less extensive. The exact nature of these “rights” varies. Some provinces/territories have created laws that grant rights and protections. For example, in Manitoba and Ontario, a person can complain to a court if those laws are not respected. Other provinces, however, have not created such language laws. Instead, they have merely directed some government departments and service providers to communicate and offer services in the minority official language. In such instances, official minority language communication and services provided by provincial or private organizations are a matter of policy, not of right.

The Constitutionally-Protected Rights

As noted, the clearest and most permanent language rights are those enshrined in the documents of Canada’s constitutional framework. These rights can be divided into the following four general categories.

1. Minority Official Language Education Rights

Under section 23 of the *Charter*, Canadian citizens who are in an official language minority in their province/territory have the right for their children to be educated in the minority language. However, the *Charter* adds some criteria. For example, in all provinces/territories except Québec, the eligibility criteria are: that the first language of the parent is French and that he or she still understands French, or that the parent had his/her primary education in Canada in French. In addition, once one child is enrolled in French school, all the other children in that family may access French-language education. However, there can still be variations from place to place, in exactly how this right is fulfilled. Sometimes, a sufficient number of minority language children may result in a French-language school being built in a particular area. Other times it may only result in French- language instruction within a larger English-language school, or in a right for the children to be transported by bus to a French-language school in another area.

2. Government Services and Communications

Section 20 of the *Charter* states that, under certain conditions, any member of the public in Canada has the right to communicate in either official language with an office or institution of the federal government. It also states that any member of the public in Canada has the right to communicate in either official language with an office or institution of the government of New Brunswick (there are no conditions for this right). It is important to note, however, the limitations contained within the exact wording of these rights.

- Minority language speakers do not have a constitutional right to *any and all* governmental services and communications in their language: only the federal government and the government of New Brunswick. Minority official languages services and communications may still be available to them (for example, because a provincial/territorial law or policy allows for it), but it is not a matter of “right” protected by the Constitution.
- There are conditions. For example, in English-speaking provinces/territories, French services must be made available: where there is “significant demand”, or where the “nature of the office” makes it “reasonable” to offer the service in French. If neither of these conditions is met, even federal government services may not be available in French. Both of these conditions are matters that are continually under evolution and reassessment.

3. Legislation and other Governmental Publications

All federal laws (and regulations) exist in both languages. So, too, do the laws of New Brunswick, Manitoba, Nunavut

and the Northwest Territories. Furthermore, for some of these jurisdictions, even the journals, order papers, notice and minutes, and Hansard records are kept in both official languages.

Again, however, this is not necessarily true of all other provinces and territories. Some jurisdictions have chosen – either as a matter of provincial/territorial law or a matter of policy – to publish some or all of their laws in both languages (such as Newfoundland and Nova Scotia). All federal laws (and regulations) exist in both languages. So, too, do the laws of New Brunswick, Manitoba, Nunavut and the Northwest Territories. Furthermore, for some of these jurisdictions, even the journals, order papers, notice and minutes, and Hansard records are kept in both official languages. In others, for example, British Columbia, laws are only available in English.

The publication of court decisions also follows a similar pattern. The federal courts and the Supreme Court of Canada publish all decisions in both official languages. On the other hand, not all criminal trials result in decisions being issued in both languages. In fact, most don't. It depends on the language of the proceedings and/or the importance of, or general public interest about, the issue (sometimes, such as when the trial was in French, the decision may be published only in French). Similarly, decisions resulting from non-criminal provincial/territorial proceedings may or may not be available in both official languages, depending on the language laws of the province/territory.

4. Judicial Rights

Judicial language rights pertain to the possibility for an individual to use either French or English in the judicial system especially court processes. Section 133 of the *CA 1867* guarantees these language rights in any court established by Parliament (the federal government) and the courts of Québec. Section 23 of the *Manitoba Act 1870* and section 19 of the *Canadian Charter of Rights and Freedoms* guarantees similar language rights in Manitoba and New Brunswick. Rarely do we spend much time considering the possibility that the language we speak might itself form the basis for the granting – or denial – of certain legal rights and responsibilities. The courts of the other provinces/territories are not bound by any such constitutional provision, except where the *Criminal Code*, which is federal legislation, says differently.

Criminal law is in the jurisdiction of the federal government. Therefore, there is the possibility of having a criminal trial (including the preliminary inquiry) in French. French-speaking judges are available. You can choose to have your criminal trial in French, no matter what your mother tongue, and even if you understand English. In addition, every accused must be informed of the possibility of having his/her trial in French. If a French trial is chosen, the Crown prosecutor assigned to the case must speak French, the accused has the possibility of obtaining a translation of the information and indictment (the documents that list the charges against the accused person) upon request, and a jury, if there is one, can be formed of French-speakers. Lastly, the decision may be granted in French even if not all of the proceedings were conducted in French (however, a substantial amount must have been in French).

Conclusion

Constitutionally-protected minority official-language rights are multi-tiered and quite complex. And they are still developing: throughout the country there are cases before the courts asking for further clarification of these rights. As with all aspects of our constitutional framework, these rights are living, breathing entities. Despite their complexity, however, it is important that citizens understand these rights, especially if they are trying to assert them. More detailed information about these rights is available at: Canadian Legal FAQs – Constitutional Language Rights

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Notes:

1. This article pertains to constitutionally-protected French language minority rights outside of Québec. The issue of English language minority rights inside Québec will not be addressed in any detail.

Quebec's Need for Cultural and Linguistic Protection, the Notwithstanding Clause, and the Demise of the Meech Lake Accord

For careful observers of Canadian culture and politics, there was an obvious irony attached to the House of Commons motion that was approved in November of 2006, recognizing Quebec's special place in Confederation. The motion garnered 265 yeas and a mere 16 nays and stated:

> *"Que cette Chambre reconnaisse que les Quebecoises et les Quebecois forment une nation au sein d'un Canada uni."*
>
> *"That this House recognize that the Quebecois form a nation within a united Canada."*

Many of us will recall the highly polarized debate surrounding the 1987 Meech Lake Accord, signed by Prime Minister Mulroney and all of Canada's premiers. It generated a great deal of confident talk about how the province of Quebec, whose government had not signed on to the *Constitution Act, 1982,* had now been brought into the constitutional fold with "honour and enthusiasm." Seasoned Canada watchers would have known at that point to cue the scary movie music, and indeed a veritable firestorm occurred over the next few years, leaving the Prime Minister, Premier Bourassa and a great many other political figures to contemplate the ashes and rubble of Meech Lake with despair. This agreement recognizing that Quebec constitutes a distinct society within Canada and that our *Constitution s*hould be interpreted with that in mind, attracted vehement denunciation and scathing criticism from a number of quarters.The three years between the signing of the Meech Lake Accord and its demise were a momentous time for Canada, arguably involving the development of fault lines that split Canada and led to a gradual reconfiguration of our land. A painful odyssey took place over the next three years until the time limits expired with two provinces having failed to enact the required resolutions and constitutional shouting matches becoming the favorite blood sport in Canada.

The House of Commons Resolution of 2006 represents a shift in the willingness of political representatives from

English-speaking Canada, or Canada Beyond Quebec, to recognize the distinctiveness of Quebec as a predominantly French-speaking province, with its own unique culture, within our nation-state. This inevitably leads one to ask whether or not the furore over the Meech Lake Accord might have been a lot of sound and fury signifying, perhaps, a failure of imagination and tolerance.

The three years between the signing of the Meech Lake Accord and its demise were a momentous time for Canada, arguably involving the development of fault lines that split Canada and led to a gradual reconfiguration of our land. To better understand its significance in our historical development, we need to focus on the heated topic of language and cultural protection policy engaged in by the Quebec government and how these were perceived by citizens and the courts. In particular, I would maintain that the *Ford* and *Devine* decisions of the Supreme Court of Canada in 1988 and the reaction to them by Premier Bourassa and the National Assembly of Quebec continue to reverberate to this day.

The government of Quebec spends more on various cultural initiatives by a considerable margin than does any other province. At the heart of its culture is undeniably the French language itself.

As someone who has been fortunate enough to visit Quebec a number of times, I can say with conviction that I consider the province to be an indispensable part of my Canada. I mean not just the idea of Quebec but its lived reality, with all its messy contradictions. Along with our Aboriginal culture, Quebecois culture may well be what best defines the unique quality of Canada as a nation. Visits to Montreal, Quebec City and the Gatineau are a large part of what makes me enthusiastic to live and act as a Canadian. Engaging with the reality of what makes Quebec unique means coming to some level of acceptance of the need for a language and culture policy that protects French usage and its creative expression in artistic endeavours that place Quebec in a leading position in the world.

One of Canada's greatest movies*, Mon Oncle Antoine* (1971), directed by Claude Jutra, contains an unforgettable scene early in its depiction of the tough and impoverished lives of the inhabitants of a Duplessis-era asbestos mining town. The Anglophone mine owner, displaying a grim and angry demeanour, tosses Christmas stockings at the drab homes of his employees, failing to conceal the contempt he feels for these vulnerable French-Canadians. Anyone doubting the need for the Quiet Revolution that began in the 1960s to end the economic domination of the majority francophone population needs to view and reflect on Jutra's unsparing masterpiece. One way successive Quebec governments have chosen to do this is to enact language laws designed to ensure the predominant role of the French language in workplaces and public institutions.

As a general comment on Quebec's language laws – the sign laws, the laws mandating that French be the basic language in many workplaces, etc., I would emphasize that they operate in tandem with laws designed to protect Quebecoise culture. Language is more than a mere means of communication; it is part and parcel of the identity and culture of the people speaking it. It is a means by which individuals understand themselves and the world around them. Therefore, they can be best understood within the framework of the need in vulnerable societies to protect and promote language and culture. If we stop to consider the culture of Canada Beyond Quebec for a moment, and the huge difficulty we have in creating a space for our own made-in-Canada culture to survive and flourish, then consider the need for Quebec to protect both its majority language and its culture, we might perceive genuine connections between our parallel albeit different situations. Culture, in fact, includes all the ways members of a society live together, to cite UNESCO, including the arts, but also knowledge, belief, law, morals and customs. Culture must surely be agreed to be a public good and only through wise cultural policies in our highly globalized world can we preserve or invigorate our cultural identity.

While Canada Beyond Quebec has a similarly vulnerable culture to that of Quebec's, we have chosen a dramatically different path with our cultural policy. English-speaking Canada could accordingly be seen to be rather poorly placed to understand the approach taken by Quebec policy makers to matters of language and culture. The government of Quebec spends more on various cultural initiatives by a considerable margin than does any other province. At the heart of its culture is undeniably the French language itself.

One way successive Quebec governments have chosen to do this is to enact language laws designed to ensure the predominant role of the French language in workplaces and public institutions.

The connection between language and culture has been identified by the Supreme Court of Canada on several occasions as it interprets the *Constitution.* For instance, in the 1990 decision of *Mahe,* Justice Dickson described the importance of the need to protect and promote both official languages in the context of a case examining s. 23 of the *Charter of Rights*. He states at p. 362:

My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication; it is part and parcel of the identity and culture of the people speaking it. It is a means by which individuals understand themselves and the world around them.

Let's look at the Supreme Court's review of the Quebec language policy in the area of business sign laws, in the 1988 case of *Ford v. Quebec*, and how this played a dynamic role in the unfolding drama that was the Meech Lake affair, leading to the use of the notwithstanding clause by Premier Bourassa of Quebec. The curtain comes up on a stage with 11 men announcing to the Canadian populace that they have been meeting for days at a hitherto unknown Meech Lake cottage, which had been converted into a government conference centre in the Gatineau Hills. The Accord had been prepared for in a series of meetings between governments as the federal government of Brian Mulroney endeavoured to address major Quebec demands for an amendment to the Canadian *Constitution* in order that it might provide its assent and acceptance of the *Constitution Act, 1982*, which came into force without the province's agreement. The Accord can be briefly summarized as possessing five main modifications to our *Constitution*, as follows:

1. An interpretive clause for the *Constitution,* involving recognition of Quebec as a distinct society;
2. A veto power for future amendments for all provinces;
3. The granting of greater powers to the provinces in the field of immigration;
4. An opt out clause relating to any future federal programs that would extend into provincial areas, allowing any province to opt out and yet retaining the right to reasonable financial compensation; and
5. Involvement of all of the provinces in the future appointment of Supreme Court justices and of Senators.

Seasoned Canada watchers would have known at that point to cue the scary movie music, and indeed a veritable firestorm occurred over the next few years, leaving the Prime Minister, Premier Bourassa and a great many other political figures to contemplate the ashes and rubble of Meech Lake with despair.

This major constitutional breakthrough was touted as a vital means of addressing legitimate concerns of the province of Quebec and was described by the Prime Minister as the necessary "Quebec round" in our constitutional odyssey. I want to focus on the most prominent aspect of the Accord – the "distinct society" clause. This would be a means of recognizing in our most fundamental law that Quebec existed in our country as a distinctive part of it with unique needs in such matters as language and culture and that courts would need to take the existence of this "distinct society" into account when analyzing provisions under constitutional challenge.

The distinct society clause (and indeed the whole of the agreement) was, however, attacked by former Prime Minister Trudeau in a truly savage critique that extended to attacks on the persons and the motivations of the various political actors. In short he saw the distinct society clause and the rest as amounting to a "total bungle" that would render the Canadian state "totally impotent," leading us all to be "governed by eunuchs." Many others weighed in, emboldened no doubt by the firm convictions of the chief orchestrator of our new *Constitution a*nd its *Charter of Rights* and his undoubted knowledge of constitutional politics and law.

In the midst of the growing maelstrom, Premier Bourassa and his advisers huddled together and developed a new sign law that took into account many of the significant aspects of the Supreme Court's ruling.

With the Meech Lake Accord needing to be ratified in every legislature in the country within three years and with two governments being defeated and replaced by a new leadership, yet another ticking time bomb exploded in December, 1988. This was the Supreme Court's two rulings on the aforesaid sign laws earlier enacted by the Quebec National Assembly to protect the French language and ensure its primacy.

In *Ford v. Quebec*, Chief Justice Dickson and a unanimous court ruled that the sign laws contravened s 2(b) of the *Charter of Rights*, as well as s. 3 of the *Quebec Charter of Human Rights* and *Freedom*s and could not be justified as a "reasonable limit" under s. 1 of the *Charter* and could not likewise be justified as an acceptable restriction on freedom of expression under the *Quebec Charter.*

In the midst of the growing maelstrom, Premier Bourassa and his advisers huddled together and developed a new sign law that took into account many of the significant aspects of the Supreme Court's ruling. The Court had examinec and relied on studies about the need to provide protection for the French language given the North American context in which the Quebecois operated, saying that the laws at issue met a substantial and pressing need. The aim of the language policy was stated to be a legitimate one. However, the Court said that the requirement that commercial signs must be exclusively French was unnecessary and overly broad, given the need to respect freedom of expression by various participants in the Quebec economy. The Court stated that an alternative which would be acceptable would be to require that French be given a position of dominance and have greater visibility than that accorded other languages.

The new legislative package was drawn with rights under the Canadian and Quebec Charters, as considered by the Supreme Court of Canada, in mind. Premier Bourassa made a controversial decision to invoke the notwithstanding clause to ensure that the new legislation could not be reviewed and possibly struck down, in whole or in part, by the Court. Most observers saw that this draconian decision would be fatal to the prospects for convincing wavering or recalcitrant premiers from moving forward to ratify the Accord in their legislatures. Indeed, in two provinces – Manitoba and Newfoundland, the time limits for ratification came and went without the necessary ratification. Meech was dead in the water.

While the use of the notwithstanding clause is something that I and many other students of the Constitution are opposed to, with the belief that, at most, it should only be used in extraordinary circumstances where a compelling case can be made that some emergency requires its temporary usage, I also recognize that Bourassa was under great pressure to use all means at his disposal to protect his language package. A highly controversial decision was made by Premier Bourassa to invoke the notwithstanding clause to ensure that the new legislation could not be reviewed and possibly struck down, in whole or in part, by the Court.On balance we can look back at Bourassa's decision to invoke s. 33 – the notwithstanding clause – as constituting a serious blunder on both legal and political grounds. The moderating of the legislation so that English and other minority languages could be displayed, with French being placed in a dominant position, could have been justified under s. 1 of the *Charter* had a new challenge proceeded. Hence, use of the notwithstanding clause was unnecessary. Further, if indeed the "Quebec round" of constitutional amendments was vital to Quebec as well as to Canada as a whole, weathering the storm of criticism by certain French-language zealots would have been a wiser course than angering and rendering suspicious wide swaths of the citizenry in Canada Beyond Quebec.

Perhaps future governments, sensing a citizenry wishing to create a more unified country than what we are experiencing in the current era, will dust off elements of the Meech Lake Accord and examine whether the distinct society clause, together with other vital imperatives, might not warrant careful consideration. In the meantime, Quebec will assiduously continue with its unique language and culture policies.

Multicultural Family Law Facilitators Project

Project Description

This article briefly describes the Multicultural Family Law (MFL) Facilitators project developed by United Cultures of Canada Association, Family Law Office (Legal Aid Alberta) and ASSIST Community Services Centre with financial assistance provided by the City of Edmonton – Community Services. In the first phase of the project, a training program was developed. *Ad hoc* interpreters often fail to show up, or interpret so poorly that the evidence is lost. Many do not understand their professional obligations or legal liability. The first group of Multicultural Family Law Facilitators received training to provide legal interpreting at court and non-court legal events and cultural education in relation to family law in the following languages: Arabic; Cantonese; Dinka; French; Hindi; Lingala; Malayalam; Mandarin; Punjabi; Spanish; Swahili; Tami; Tagalog; Tshiluba and Urdu. A second group is currently undergoing training to offer services in Persian, Russian, Ukrainian, Italian, Polish and German. These services are available free of charge until the end of June 2014. The training of the Facilitators is based on the guidelines provided by the National Standard Guide for Community Interpreting Services, published by Healthcare Interpretation Network in 2007 to "promote the highest quality of interpreting when adopted for assessment, training, hiring, performance monitoring and possible future professional recognition."

Introduction

Following the economic boom in 2007, Edmonton recorded a population growth rate of approximately 12%. The article "*Edmonton Indicators 2006 – 2011 Census Population: Edmonton Population Growth Accelerates"* indicates that, in this period, Alberta was the "fastest growing province" led by Calgary, Edmonton, and Wood Buffalo. The report, "*The Way We Live: Edmonton's People Plan 2010*" notes that the city has welcomed 135,000 people in the past decade and is now home to "over 50 international cultures and 70 unique ethnic groups."

The *Canadian Charter of Rights and Freedoms* (s. 14) grants every citizen the right to the services of an interpreter during court proceedings.

The article *"Misinterpretation: Crisis in Canadian Court Interpreting"* discusses an important aspect of changing

demographics: “As Canada becomes more multicultural, a shortage of skilled interpreters is creating major problems with the administration of justice in courtrooms across Canada.” Further, “[w]hen 3.4 million Canadians speak neither English nor French at home, and 521,000 are unable to speak either official language, concern is rising that language barriers could be denying them access to the justice system.”

In Canada, political rights of individuals include the right to a fair trial. The *Canadian Charter of Rights and Freedoms* (s. 14) grants every citizen the right to the services of an interpreter during court proceedings. [1] While a communication handicap can restrict a person’s access to justice and ability to exercise legal rights, inaccurate interpretations can put the handicapped person at a risk of failing to receive justice. The unavailability of interpreters can affect and impede the administration of justice, but lack of professionally trained interpreters can impact the outcome of legal proceedings and result in mistrials. As reported in the article *“Misinterpretation: Crisis in Canadian Court Interpreting”*:

Mistrials have been declared because inadequate interpretations breach s. 14 of the *Charter.* The Supreme Court ordered a new trial in *R. v. Tran* [1994] S.C.J. No. 16 because an interpreter was only summarizing evidence rather than giving a full translation.

Further,

In one noted Ontario case, *R. v. Sidhu*, [2005] O.J. No. 4881, where Avtar Sidhu was charged with assault causing bodily harm, Justice C. Hill ruled that the *Charter* rights of the accused had been violated because of inaccurate interpretation. [1]

A more recent article *“Court interpreter shortage nears crisis”* presents the problem in the following words:

A judge in Scarborough throws out a drunk-driving case due to delays in finding a Tamil interpreter.

“As Canada becomes more multicultural, a shortage of skilled interpreters is creating major problems with the administration of justice in courtrooms across Canada.”

An assault conviction is tossed aside in Brampton because of incompetent Punjabi translation.

A judge in downtown Toronto declares a murder mistrial for lack of an interpreter in Oromo, an African language.

Last November, Ontario Superior Justice Casey Hill was reported to complain that judges are competing for interpreters in almost cutthroat fashion.

Sidhu has launched a $35 million class action lawsuit against the ministry on behalf of people who have suffered due to poor interpretation.

One City’s Response

In Edmonton, Dawn L. Nelson, Team Lead, Emergency Protection Order Program, Family Law Office (Legal Aid Alberta) shares the same concern in a different context:

Approximately five years ago, I began to notice an increase in clients coming from what are often referred to as “immigrant” or “ethnic” communities. Crimes in ethnic communities are sometimes perpetrated under the guise of cultural norms. Perpetrators of such crimes often try to convince their victims and the intervening authorities that their criminal behaviour is, in fact, a cultural practice. Many of these clients had been subjected to years of physical, sexual, financial, and emotional abuse, but had not been able to reach out for help. Language was often cited as a major barrier… In addition, their abusers would use cultural practices or threats to send their victims “back” to whatever country they had come from as a method of continuing the abusive power and control cycle.

I began to speak about these situations to my colleagues in family law as well as my contacts at the courts and in the Crown Prosecutors' office. It became apparent that we were all facing similar challenges, in that not only did we have to explain the law to a client, but we had to do so through interpreters who did not adequately understand the law themselves.

Ad hoc interpreters often fail to show up, or interpret so poorly that the evidence is lost. Many do not understand their professional obligations or legal liability. Regrettably, no agency in Edmonton is currently offering professional interpretation services, while available translation services are prohibitively expensive to someone in a crisis situation.

Another critical factor that Dawn Nelson draws attention to is cultural challenge: "At the same time, our clients had to explain their unique situations, including religious and cultural "norms" that were being manipulated to perpetuate and exacerbate the abuse, and we had to quickly formulate an understanding of their precarious immigration status or ingrained distrust of authority." She also mentions frustrations of her colleagues when their clients withdraw their applications for protection orders or recant their testimony in criminal assault trials.

In immigrant families, the perpetrator sometimes is also the sponsor of the victim. If a sponsorship application for the victim is still in the process, the abusive sponsor may threaten to cancel it. Domestic crimes in immigrant families sometimes transcend international boundaries. Examples of such crimes include international child abduction, notorious transcontinental *ex-parte* divorces where one spouse is a foreign national, and fake, fraudulent, or forced international marriages that share many characteristics with human trafficking. Many ethnic groups that migrate to Canada come from countries that follow different systems of family law. All these issues add new variables to family violence situations in immigrant communities.

Crimes in ethnic communities are sometimes perpetrated under the guise of cultural norms. Perpetrators of such crimes often try to convince their victims and the intervening authorities that their criminal behaviour is, in fact, a cultural practice. Victims are confused about the way in which Canadian laws would apply to such situations. While victims fear that they may not receive culturally effective responses from the mainstream service providers, the service providers sometimes hesitate to intervene for fear of offending the victims' cultural sensibilities. The Shafia sisters' trial two years ago is a sad reminder of the necessity of understanding the often confused boundaries betweer crimes and cultures.

Service providers need reliable cultural information as cultural traditions and values are strongly embedded in social issues that fall under the scope of family law; mistrials can result from misinformation about cultural practices just as they can result from inaccurate interpretations. However, the popular thoughts in legal interpreting strongly recommend that interpreters maintain neutrality and refrain from cultural advocacy or brokerage. This made it important for us to develop an interpreter job profile that included cultural education as one of the job responsibilities but without violating the code of ethics for interpreters or causing a role conflict.

The profile of Multicultural Family Law (MFL) Facilitators that we have developed combines two roles.

1. As legal interpreters, our MFL Facilitators are trained to adhere to the ethical principles and behavioural standards for professional interpreters.
2. As information specialists, they are prepared to provide support services including reliable cultural information to service providers when requested and relevant information about systems and procedures to their clients in their native language when required.

In order to keep their two roles distinct from each other, the MFL Facilitators are instructed to fulfill only one role at a time. For example, they will not provide cultural or system-related information in conjunction with an interpreting session and will not discuss a client's case during support services. They will not offer information, explanations, opinions or advice on any matter related to the legal case for which they have provided an interpreting service. Finally the cultural information that they provide to service providers will not constitute part of their interpreting assignment.

If you wish to obtain further information about the project or provide your feedback, please contact Nayanika Kumar at 780 756 3979 or ucca@shaw.ca. For a service request, contact Amber Khan at 780 919 9720 or requestlegalinterpreting@aol.com.

Notes:

1. The provision of interpreter services is a basic right of anyone who is a party or witness in court proceedings under s. 14 of the *Charter*, which guarantees the right of an accused to understand the proceedings. The Ontario Court of Appeal noted in *R. v. Petrovic*, [1984] O.J. No. 3265, that when an accused person requests an interpreter, an interpreter should be provided without question, and that the accused not be subject to a detailed inquiry into their ability to understand or speak the language of the proceedings. – *Misinterpretation: Crisis in Canadian Court Interpreting*

A Progress Report of Disability Rights since the Charter

In 1982, the *Charter of Rights and Freedoms* formally enshrined equality rights into the Canadian constitution. Section 15 of the *Charter* reads:

> *"every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."*

For advocates of persons with disabilities, the final wording of this clause was the culmination of an extensive lobbying effort, as earlier drafts omitted to explicitly mention disability. With equality rights achieving greater constitutional status, the courts have faced the challenge of interpreting the provision to meet the modern concerns of disabled persons throughout the country.

For advocates of persons with disabilities, the final wording of this clause was the culmination of an extensive lobbying effort, as earlier drafts omitted to explicitly mention disability.

Although the courts have shown to be receptive to the goal of achieving substantive equality since the advent of the *Charter* in Canadian law, it is argued that the progress of disability rights in s. 15 jurisprudence has been more tempered in recent years, for reasons we shall see below. The issue warrants further attention and will require the conjoint efforts of both the courts and the legislature to improve the legal state of disabled persons in Canada.

Early Litigation: Building Progress

The first decision of the Supreme Court on s. 15 grounds, *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143, established a foundation upon which later decisions eventually built. The court refused to follow the formal equality approach (through the 'similarly situated-similarly treated test') that had pervaded much of the earlier case law and instead adopted a purposive approach to s. 15. In so doing, the Court placed an emphasis on substantive equality under the *Charter*, where "consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application" (*per* McIntyre J). This judgment provided a conceptual legal framework necessary for future discussions on equality in subsequent years.

Overall, the early case law on disability rights shows a move away from the inherently less accommodating approach of the pre-*Charter* towards a social model embracing substantive equality.

But in *Eaton v Brant County Board of Education,* [1997] 1 SCR 241, where a twelve-year-old girl with cerebral palsy was placed by the school board into a segregated classroom, the Supreme Court allowed the school board's appeal. It held that there was no starting presumption of integration. Despite the disappointing decision, the Court's reasoning elucidated an appreciation for the need for the state to provide persons with disabilities reasonable accommodation. The case reflected changing perspectives on the nature of disability rights at the highest level, albeit at a slow pace.

Human rights and disability advocates had much more to celebrate with the landmark and unanimous decision

reached by the Supreme Court in *Eldridge v British Columbia,* [1997] 3 SCR 624. The case concerned deaf individuals who could not communicate with medical professionals because of the lack of interpreters. They succeeded in showing the Court that the governing legislation created adverse effects which amounted to discrimination. Overall, the early case law on disability rights shows a move away from the inherently less accommodating approach of the pre-*Charter* towards a social model embracing substantive equality.

The Difficulties with s. 15 Jurisprudence

The year 1999 was particularly important for s. 15 jurisprudence and its effects on disability rights. In *British Columbia (Public Service Employee Relations Committee) v BCGSEU (British Columbia Government Service Employees' Union),* [1999] 3 SCR 3, better known as the *Meiorin* case, the Supreme Court of Canada tackled a major conceptual problem with discrimination. The law, in effect, offered different remedies for direct *prima facie* discrimination and adverse effect discrimination. This bifurcation was eliminated in *Meiorin*. Justice McLachlin (as she then was) emphasized that to uphold this distinction was to "[shield] systemic discrimination from scrutiny" and thus to undermine substantive equality.

The law, in effect, offered different remedies for direct *prima facie* discrimination and adverse effect discrimination. This bifurcation was eliminated in *Meiorin*.

At the same time, however, new s. 15 criteria arose in *Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497.* In *Law,* the focus was placed on whether a claimant has faced a "loss of dignity". The *Law* criteria were strictly applied in *Granovsky v Canada (Minister of Employment and Immigration)* [2000] 1 SCR 703, where the appeal was dismissed because the legislation could not be said to demean the dignity of the individual facing a temporary disability. One commentator said that the approach in Law "leaves much to be desired and marks a retreat from the early promise of substantive equality," (Malhotra p. 274) and by another as "confusing, unpredictable, overly burdensome and excessively formalistic." (Ryder, p. 517) Despite the progress seen in the case law, it seems that the s. 15 jurisprudence lacks clarity and puts the robust protection of the rights of disabled persons on uncertain ground.

Conclusions: A Move Towards the Future

… the Supreme Court has been reluctant to accept leave to appeal in s. 15 cases. This trend is troubling and is a cause for concern.

The present record of disability rights is one of cautious optimism. On the one hand, there has been enormous progress in the Supreme Court's attitude towards Canadians with disabilities. This new social understanding should be lauded and provides strong encouragement for *Charter* litigation on disability rights in the future.

On the other hand, disability law has evidently faced difficulties since the *Law* decision. A 2010 study by Ryder and Hashmani of Osgoode Hall published in the Supreme Court Law Review indicates that the Supreme Court has been reluctant to accept leave to appeal in s. 15 cases. (Ryder, p. 518-19) This trend is troubling and is a cause for concern. Open and regular access to the courts is fundamental for Canadians with disabilities, without which the value and protection of the *Charter's* equality and non-discrimination provisions substantially diminishes.

Nonetheless, there are some tentative positive signs on the horizon. Ontario was the first Canadian province to establish a legislative regime governing disabled persons with the *Ontarians with Disabilities Act, 2001, SO 2001, c 32* (current version: *Accessibility for Ontarians With Disabilities Act, 2005, SO 2005, c 11*). This mirrors the activity by other jurisdictions, like the United States' *Americans with Disabilities Act (1990)*, or the United Kingdom's *Disability Discrimination Act (1995)* (now known as the *Equality Act (2010)*). Similar legislative efforts country-wide should be encouraged.

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Ontarians with Disabilities Act, 2001, SO 2001, c 32

Moreover, in 2010, Canada ratified the United Nations *Convention on the Rights of Persons with Disabilities*. This is a positive step that aligns Canada with the international community in recognizing the importance of accommodation and the protection of persons with disabilities. But Canada's First Report on the *Convention*, which the Department of Canadian Heritage indicated was expected in 2012, has yet to be published.

In conclusion, the protection and support for disabled persons does not exist in a legal vacuum. A robust rights regime is certainly one crucial part of the full picture; the challenge lies not only in the provincial human rights tribunals and the courtrooms, but in legislatures and communities. Canada needs good policy that will address social problems which predominantly affect those with disabilities, including poverty, inequality, and inadequate education and health care. In this respect, Canada can and should do more to meet its domestic and international obligations towards persons with disabilities, both in law and public policy terms. Further progress is surely yet to come.

Notes:

1. Ravi Malhotra, "Has the Charter Made a Difference for People with Disabilities? Reflections and Strategies for the 21st Century," 2012 Supreme Court Law Review 58

2. Bruce Ryder and Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010," 2010 Supreme Court Law Review 51

"Meaningful Access": Students with learning disabilities strive to be included

Jeffrey Moore attended public school, at School District No. 44 (the "District"), from kindergarten to grade three, beginning in 1991. Jeffrey had access to an aide and attended a Learning Assistance Centre; his parents hired a private tutor. By January 1994, in grade 2, Jeffrey had serious headaches; he was under "significant stress", was making slow progress in school and was behaving immaturely. He underwent a full psycho-educational assessment and was diagnosed with a severe learning disability. A District psychologist referred Jeffrey to the District's Diagnostic Centre, however funding cuts intervened and the Diagnostic Centre was closed down. The District had no other program to refer Jeffrey to, and therefore, it recommended that he attend a private school that specialized in learning disabilities. The private school was not available until grade 4 and so Jeffrey had to stay at his existing school as he struggled to read and his self-esteem dropped. Jeffrey's dad, Frederick Moore filed a complaint against the Ministry of Education and the Board of Education in School District No. 44 for failing to provide the learning supports that Jeffrey required. *Moore v British Columbia (Education), 2012 SCC 61* ("*Moore*")

This case is informative about a school board's responsibility to accommodate students with learning disabilities. A District psychologist referred Jeffrey to the District's Diagnostic Centre, however funding cuts intervened and the Diagnostic Centre was closed down. In British Columbia it is estimated that three percent of students have a learning disability (*Supporting Students with Learning Disabilities: A Guide for Teachers, Sept 2011, BC Ministry of Education*). The Learning Disabilities Association of Ontario notes that estimates of children who have a learning disability range from 2% to 10% (*Learning Disabilities Statistics*). This range is affected by the definition of "learning disability". There is no definition that is widely accepted and so there is no agreement as to whether certain conditions are included in the category of "learning disability". Regardless of the numbers, *Moore* notes that, "adequate special education … is not a dispensable luxury." [para 5] In fact, Abella, J. says that it is a "ramp" into the legislated commitment to educate all children. [para 5]

Moore was heard under section 8 of the British Columbia *Human Right's Code*. The case considered whether the "service" that Jeffrey had been denied was "special education" or "general education". The Supreme Court of Canada agreed with the dissent in the Court of Appeal by Rowles, J.A., who said that the service that had been denied was "general education" available to the public. Jeffery had been denied "meaningful access" to that general education which was mandated by legislation. The *School Act* preamble in British Columbia says that:

> *The purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy.*

This statement is aimed at all learners and not just learners who do not have a learning disability. In the Moore case, the cuts in the District were made disproportionately to special needs programs. Jeffrey had not received sufficient education at an early stage to address his severe learning disability. He had been given some access to support such as an aide and extra tutoring. However, he had not received adequate support given his challenges and the District's

recommendations. The District had recommended that Jeffrey be placed in the Diagnostic Centre for a more intensive program. However, the closure of the program, coupled by no backup plan or assessment as to the effect of the closure, resulted in discrimination.

The Court noted that the stress Jeffrey was experiencing would have improved with assistance for his learning disability. Getting support can bolster a child's self-confidence and decrease incidents of behavioural problems. In a 2007 study by the Learning Disabilities Association of Canada, Putting a Face on Learning Disabilities (PACFOLD) ("2007 Study"), it was found that 14.7% of parents who had children with a learning disability reported that their child had been diagnosed with emotional, psychological or nervous problems. This is in comparison with a reported 1% of parents of children who do not have a disability. Therefore, almost 15 times the amount of children with learning disabilities experience psychological difficulties in school. The frustration of not doing well causes psychological stress that can be addressed through remedial help. The 2007 study reported that 25% of Canadians with a learning disability (aged 22 to 29) did not have a high school certificate. The result of an untreated learning disability has a potentially long-term effect.

In the *Moore* case, the cuts in the District were made disproportionately to special needs programs. For instance, there was an Outdoor School that was not cut even though it cost the District a similar amount. The Supreme Court of Canada affirmed the Tribunal's finding that there had been discrimination by the District, based on Jeffrey's learning disability.

The Court noted that the stress Jeffrey was experiencing would have improved with assistance for his learning disability. Getting support can bolster a child's self-confidence and decrease incidents of behavioural problems.

A panel for the Edmonton Regional Learning Consortium (the "Panel") suggested the following to assist students with learning disabilities and to provide them with "meaningful access" to general education:

1. early identification of students with special needs;
2. appropriate assessment of what those needs might be; and
3. the identification and inclusion of supports necessary to provide a "meaningful" education to a student with special needs.

The Panel noted that schools must focus on having a mechanism to identify students and a process to review requests and to ensure that the school does not dismiss a parent's request without further investigation. (*Moore v. British Columbia (Education)*: what does it mean for inclusive education in Alberta? Mar 21, 2013 12:13, Webinar)

Jeffrey completed his program at the private school in grade 7 and was reading at a grade 5 level, with math at a grade 7 level. He later completed high school at another private school for children with learning disabilities. Clearly he was able to learn with the right program and supports. Frederick Moore was awarded $10,000 for injury to dignity and the money to pay for Jeffrey's private school tuition from Grade 4 to 12.

You can learn more about the findings in *Moore* from *The Supreme Court Changes Direction: Disability and Discrimination* by Linda McKay-Panos, Law Now January 1, 2013.

Tax Assistance for Persons with Disabilities

According to a 2012 Statistics Canada survey, an estimated 3.8 million adults in Canada are living with a disability. Of those in the survey aged 75 or greater, 42.5% suffered from one or more disabilities that limited their daily activities.

Fortunately, Canada has several tools to assist us in dealing with these challenges from a financial perspective. For many, reductions in tax payable for either the person with the disability or a caregiver are available. In addition, there are several benefits, grants and other support mechanisms offered. This article will provide an overview discussion of the more common opportunities available through the income tax system as well as the Registered Disability Savings Plan (RDSP). For many, reductions in tax payable for either the person with the disability or a caregiver are available. In addition, there are several benefits, grants and other support mechanisms offered The availability of these opportunities is primarily based on the level of disability and the income of the individual, the caregiver and their respective families. We will discuss these aspects using rates, thresholds, and values for an Alberta resident in the 2014 calendar year.

Opportunities by level of disability

Category 1 – An impairment of physical or mental function that is severe and lasts at least 12 months

The individual must either be markedly restricted in the ability to perform a basic activity of daily living (or significantly restricted in enough activities to be considered markedly restricted in the whole), or would be restricted but for life-sustaining therapy. In order to prove this level of disability, Form T2201 – Disability Tax Credit Certificate, must be completed (indicating these conditions have been met) and signed by a “Qualified Practitioner” (which generally means a doctor qualified to opine on the applicable disability).

To meet the **markedly restricted** test, it must take the individual an inordinate amount of time (which the Canada Revenue Agency (CRA) suggests to usually be three times the normal amount of time), or he/she must be unable to perform one of the activities of daily living all or substantially all of the time (at least 90% of the time). The activities of daily living include: speaking, hearing, walking, elimination, feeding, dressing, and mental functions necessary for everyday life.

To be **significantly restricted**, a person’s vision or ability to perform a basic activity of daily living must be substantially restricted all or substantially all of the time (at least 90% of the time). To meet the Disability Tax Credit (DTC) test, he or she must be significantly restricted in at least two activities of daily living, or, significantly restricted in vision plus one activity of daily living, to the point where they would be considered markedly restricted in at least one activity of daily living.

The CPP Disability Benefit is a monthly payment available to people who have contributed to the CPP and who are not able to work regularly at any job because of a disability.

Opportunities available and respective maximum dollar values include:

- Disability Tax Credit ($2,537/year),
- Disability Supplement Tax Credit for minors ($1,710/year),
- Child Disability Benefit ($2,650 per year)
- Registered Disability Savings Plan (RDSP) (tax on earnings is deferred until payout)
    - Canada Disability Savings Grant ($3,500/year up to $70,000 lifetime)
    - Canada Disability Savings Bond ($1,000/year up to $20,000 lifetime)
- Canada Pension Plan (CPP) Disability Benefit ($1,236/month)

Of special note, the Disability Tax Credit (DCT) may be transferred to the person on which the individual with the disability is dependent. Certain medical expense claims, such as nursing home costs, can prevent the claim of the DTC.

Most of these items may have their value reduced based on a number of factors. For example, the Disability Supplement Tax Credit is reduced if child care expenses are claimed in respect of the minor, while the Child Disability Benefit, a supplement to the Canada Child Tax Benefit, is reduced by 4% of adjusted family net income exceeding $43,953, assuming one child with a disability in the family.

Access to payments related to an RDSP is phased out based on family income. A deceased person's RRSP or RRIF may be transferred into an RDSP for a financially dependent child or grandchild. For a minor with a disability, this is the parents' income as computed for the Canada Child Tax Benefit. Beginning in the year in which the individual with the disability turns 19, access is based on family income of the individual and their spouse. The Canada Disability Savings Bond (BOND) is completely phased out when family income reaches $43,953.

For the Canada Disability Savings Grant (GRANT), the crucial family income number is $87,907. Where the income is less than or equal to this amount, the Government will provide up to $3,500 if at least $1,500 is contributed by others. Where the income is higher, $1,000 will be provided if at least $1,000 is contributed by others. BONDs and GRANTs are available in any year before the year of the beneficiary's 50^{th} birthday, subject to the lifetime limit.

To participate as the beneficiary of an RDSP, you must be eligible for the DTC. Contributions to the RDSP are not tax deductible and can be made until the end of the year in which the beneficiary turns 59. Once the RDSP is opened, the GRANT and the BOND can be accumulated within it. The GRANT, the BOND, and the investment income earned in the account are taxable once they are paid out of the plan. A deceased person's RRSP or RRIF may be transferred into an RDSP for a financially dependent child or grandchild. Likewise, a Registered Education Savings Plan may be transferred to an RDSP if certain conditions are met.

The CPP Disability Benefit is a monthly payment available to people who have contributed to the CPP and who are not able to work regularly at any job because of a disability. To qualify, the disability must be severe and prolonged, CPP contribution requirements must have been met, and the individual must be under the age of 65.

Category 2 – Dependent on someone due to an impairment in physical or mental function

In order to be eligible for these items, the test is not whether the impairment is severe but rather whether there actually is an impairment and whether the individual is dependent on someone. Dependency is determined on a case by case basis but requires the need for regular and consistent provision of the basic necessities of life such as food, shelter and clothing.

The Caregiver Amount and the Family Caregiver Amount are claimed by individuals that have an impaired dependent. The Caregiver Amount is available for certain related individuals who reside in the same household.

Opportunities available and respective potential dollar values include:

- Caregiver Amount ($1,710),
- Amount for an Infirm Dependent 18 or Older ($1,710)
- Family Caregiver Amount ($302)
- Disability Supports Deduction (Can deduct all applicable expenditures)

The Caregiver Amount and the Family Caregiver Amount are claimed by individuals that have an impaired dependent. The Caregiver Amount is available for certain related individuals who reside in the same household. The amount for an infirm dependent is available for a broader group of dependents, regardless of where they reside. Both are income-tested, with the Caregiver credit allowing claims for a higher income dependent. The Family Caregiver Amount is basically a top-up credit for those who are claiming another credit for the dependent. Many of these credits were discussed in Law Now issue 37-1 "Credit where Credit is Due". The Disability Supports Deduction is for expenditures that allow an individual to go to school or earn certain income.

Category 3 – Medical Expenditures

What constitutes a medical expenditure is complex and encompasses several specific inclusions under the *Income Tax Act*. The more commonly included expenditures are: non-cosmetic services provided by an authorized medical practitioner, travel costs to receive medical services, prescribed drugs, attendant care, nursing home fees, medical assistance devices such as glasses, and home renovation to allow greater mobility, function or access (for those with severe and prolonged mobility impairments).

In general, only expenditures over and above base amounts (base amount varies depending on income level) will be multiplied by 15% (Federal) plus 10% (Alberta) to determine the total tax credit.

A claim may be made with respect to payments made for the individual or on behalf of a spouse, a minor child, a spouse's minor child, or another prescribed relative who is also considered a dependent.

Some claims require either impairment or eligibility for the disability tax credit and some require making a choice between the claiming the medical credit and the DTC.

In addition to the medical credit itself, the Refundable Medical Expense Supplement, based on the same expenses, can be worth up to $1,152 when family income is between $3,363 and $25,506.

Other Credits and Benefits affected by Disability or Impairment

Where an individual has a disability, and in some cases simply an impairment, several non-disability focused credits and deductions can be affected. For example, with regard to the Child Care Expense Deduction, an individual with a dependent child eligible for the Disability Tax Credit may be afforded an additional $3,000 to $6,000 in potential deductions. Some other items that may be affected include: the Education Amount, the Home Buyer's Program, the Working Income Tax Benefit, the Child Fitness Tax Credit and the Child Arts Tax Credit.

Conclusion

This is a list of only a few of the financial supports available. Where an individual has a disability, and in some cases simply an impairment, several non-disability focused credits and deductions can be affected. Several of these

opportunities can be used simultaneously; however, one benefit or claim may affect the value of another. The individual's province of residence may also have benefits available, such as Assured Income for the Severely Handicapped in Alberta. As such, a professional should be consulted to determine which combinations of benefits and claims will be most beneficial and whether more complicated planning such as the use of Trusts would be appropriate.

Persons with Disabilities and the Law – Resources for Research

Persons with disabilities come from all walks of life, age groups, cultures, and geographic areas of Canada. An estimated 3.8 million adult Canadians reported being limited in their daily activities due to a disability in 2012; this represents 13.7% of the adult population. [1] Persons with disabilities may face challenges and social barriers that prevent them from participating fully in the community. For example, they may encounter barriers to enjoyment of their equality rights; they may have difficulty securing accommodations at work; or they may experience challenges in accessing the justice system.

If you are interested in learning more about how the justice system is responding to the needs of people with disabilities, Alberta Law Libraries would be an excellent starting point for your research. Persons with disabilities may experience barriers to full and equal access to justice. Law librarians are experts at finding legal information. We can introduce you to the most relevant and trustworthy sources, both on the Internet and in the libraries' own collections. This article provides examples of some information that can help with research regarding three aspects of the topic: Raising Awareness; Human/Equality Rights; and Access to Justice.

Raising awareness

Two sites aimed at raising awareness of disabilities within the Justice system are FASD and The Justice System and Mental Health and the Law.

Fetal Alcohol Spectrum Disorder (FASD) is a non-hereditary, permanent and often non-visible disability that affects adults and children around the world. As a resource for legal professionals and others who want to understand FASD, the FASD Justice Committee developed the FASD and The Justice System website. With case law, background information, and practical tips and strategies for dealing with the unique problems presented by participants in the justice system with FASD, this site is a valuable resource.

Recognizing that the law impacts the lives of persons with mental or psychiatric illnesses, the Mental Health Commission of Canada (MHCC) has published information on Mental Health and the Law. The information includes reports produced by and for the MHCC, and related documents, all of which address the experiences of persons with mental illnesses in the court system, with the police, and in other legal situations.

Human rights and equality rights

Human and equality rights are important subjects for research regarding people with disabilities and the law. The right to equality and the duty to accommodate are guaranteed by law in Canada. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees equal benefit and protection before and under the law. It makes it illegal for governments in Canada to discriminate against people with disabilities in their laws and programs. The *Canadian Human Rights Act* and the *Alberta Human Rights Act* prohibit discrimination on the grounds of physical or mental disability. Librarians can show you books, websites, and pamphlets that provide general background in this area of law.

To learn more about human and equality rights as they relate to persons with disabilities, a librarian might suggest a visit to the website of the Council of Canadians with Disabilities (CCD). It is a national human rights organization of people with disabilities working for an inclusive and accessible Canada. The *Canadian Human Rights Act* and the

Alberta Human Rights Act prohibit discrimination on the grounds of physical or mental disability. Librarians can show you books, websites, and pamphlets that provide general background in this area of law.The CCD has intervened in many test cases, and the website links to not only the cases but also to related court documents such as affidavits and written arguments. Similarly, the Arch Disability Law Centre, a not-for-profit organization that works with individuals with disabilities and the disability community has represented individuals and groups in significant disability-related cases, many at the Supreme Court of Canada.

For more information on human rights in Alberta, you can visit the website of the Alberta Human Rights Commission (AHRC). It offers useful Information Sheets, including one on Mental or Physical Disabilities and Discrimination. AHRC decisions are available on CanLII and can be searched or browsed.

Under the *Canadian Human Rights Act* and the *Alberta Human Rights Act* , employers have a legal duty to take reasonable steps to accommodate an employee's individual needs. To read about persons with mental or psychiatric disabilities and accommodation in employment, librarians might point you to the website Mental Health Works, published by the Canadian Mental Health Association, Ontario.

Access to Justice

Persons with disabilities may experience barriers to full and equal access to justice. Law librarians can show you online resources created by organizations that work to educate lawyers, judges, and others participants in the legal system of how they can accommodate and include people with disabilities. Reach Canada and the ARCH Disability Law Centre are two such organizations.

Reach Canada has published a Handbook on Disabilities for Law Professionals. Aimed at lawyers, judges and others in the legal industry, the handbook is intended to help them execute their duty to accommodate. This resource covers criminal law, contract law, informed consent to medical treatment, administrative law, self-representation, and much more.

ARCH Disability Law Centre has published the Disability Law Primer, a resource intended to increase the legal profession's capacity to serve people with disabilities. The Primer consists of 10 articles, available in both French and English, on topics such as providing legal services for persons with disabilities, human rights and disability law, capacity to instruct counsel, and more. ARCH offers numerous publications in addition to the Primer.

Alberta Law Libraries can help

If you are interested in learning more about how the justice system is responding to the needs of people with disabilities, Alberta Law Libraries would be an excellent starting point

This article demonstrates some of the online information available with respect to how the justice system is responding to the needs of people with disabilities. Librarians can help you find resources in the libraries' collections; authoritative books on human rights, the *Charter*, employment law, criminal law, and more can be located using Alberta Law Libraries' online catalogue. The library also provides databases for case law and articles searches. The Library offers a number of ways you can get help; contact us for assistance with your research.

Notes:

1. Statistics Canada. Disability in Canada: Initial Findings from the Canadian Survey on Disability (Canadian Survey on Disability, 2012).

Viewpoint 38-4: Mothering with Disabilities

In 2012, child welfare authorities sought to remove a new-born baby immediately after birth from a couple who both had cerebral palsy. Authorities identified that the parents would need support in caring for their child, but instead of the state providing that support, they were willing to spend significant dollars to remove the child from the home. The mother told CBC, “We know that we need help, but we know that we are the best thing for our boy right now. We both wanted to be parents and now we are, and we don’t want to give anyone control of our family.”

That is just one example of the stigma against parents with disabilities. That stigma—that parents with disabilities are less able to parent—shows up in the way that law and policy are designed and implemented. Since we know that women disproportionately carry the burden of child care and single mothers head up the vast majority of lone parent households, this stigma against parents with disabilities is particularly borne by women.

Moms with disabilities face unique challenges in the intersection between gender and disability. Mothers may lose their children through custody disputes or child protection proceedings because of perceptions about their abilities, rather than the best interests of their children. Women seeking to be mothers also face greater difficulties than nondisabled women in exercising their reproductive rights or accessing reproductive technology.

“We know that we need help, but we know that we are the best thing for our boy right now …”

A recent U.S. study showed that the American legal system discriminates against disabled parents and their children. Statistics show that child-removal rates from parents with psychiatric disabilities are as high as 70 to 80 percent. From parents with intellectual disabilities, the rates range between 40 and 80 percent. No similar research exists on the Canadian legal system.

In response, West Coast LEAF is currently working on a project called “Mothering with Disabilities.” We are exploring the answers to three questions.

1. What are the legal issues facing mothers with disabilities?
2. What are the legal rights of mothers with disabilities and how do existing laws and policies impact these women’s rights as parents?
3. And finally, how should these laws and policies be reformed to ensure greater respect for the rights of mothers with disabilities?

Our work in this area is informed by a number of key principles, including that the voices of mothers with disabilities must form the basis for all law reform recommendations and that, while decisions concerning child custody and care must always be made in the child’s best interests, very often the outcomes for children will be better when the rights of their mothers are respected.

The project has been undertaken with the hope that the research will not only shed light on the kind and extent of discrimination faced by disabled mothers, it will also help trigger a change in the way their capabilities as parents are viewed. We expect our final report to be published later next year. We are grateful for the support of the Notary Foundation of B.C. on this project.

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Freedom of Association and Collective Bargaining: Are There Justifiable Limits?

For several years, public service employees have been restricted in their right to strike, in order to preserve their "essential" services. However, some argue that recent changes to Alberta's public service labour legislation unjustifiably interfere with several rights under the *Canadian Charter of Rights and Freedoms* ("*Charter*")— particularly freedom of association.

Alberta's *Public Service Employee Relations Act RSA 2000 c P-43* (*PSERA*) and its *Labour Relations Code, RSA 2000 c L-1* (*Code*), provide limits on striking by public service employees. Section 70 of the PSERA prohibits employees or unions to whom the Act applies from striking or causing a strike. Section 96 of the *Code* prohibits some employees and trade unions from engaging in a strike, causing a strike or threatening to cause a strike. The *PSERA* provides for compulsory interest arbitration to settle any disputes about terms or conditions of employment; the *Code* provides for compulsory interest arbitration to resolve bargaining disputes in trade unions to whom the *Code* applies.

Both the *Code* and the *PSERA* provide for fines for people, trade unions and their officers or representatives who cause, consent to, or engage in a strike that is prohibited by the legislation. They both provide that if a prohibited strike commences, the Board may impose a suspension of the deduction and remittance of union dues by the employer (Alberta Government) for between one to six months.

Bill 45, the *Public Sector Services Continuation Act*, received Royal Assent on December 11, 2013 and is awaiting proclamation. Bill 45 substantially increases the fines and penalties that are imposed on unions, members and employees in relation to strikes that are already prohibited by the *PSERA* and *Code.* Additionally, there is an expansion on the type and range of conduct related to strikes in which these fines and penalties will apply.

The following are examples of proposed changes:

- Employees, trade unions and their officers and representatives are prohibited from threatening to strike (section 4(2) and 4(3));
- A "strike threat" includes calling a strike, threatening to call or authorize a strike, setting a poll or vote of employees to see if they want to strike and any other act that could "reasonably be perceived as preparation for an employees' strike" (section 1(1)(k)(i)–(v));
- A three-month suspension of the deduction and remittance of union dues is automatic upon any finding that a strike threat or strike has occurred. The suspension is increased by a month for each additional day or partial day upon which the strike threat or strike continues (section 6(1) to (2));
- Trade unions can avoid dues suspension in the case of any strike or strike threat if they prove all of the following to the Labour Relations Board:
    - The strike or strike threat occurred against the express instructions of the trade union, which instructions must have been given prior to the strike threat or strike;
    - All of the actions of the trade union and its officers have been consistent with the instructions; and
    - The trade union and its officers or representatives have never previously contravened section 4 (section 6(3)(c)).

- Upon application to court by an employer, if the court finds that a strike threat or strike has occurred, the court must require the trade union to pay $1,000,000 into court for each day or partial day on which the strike threat or strike occurs or continues. Money required to be paid into this fund will be held for a period of at least two years to satisfy any possible judgments relating to losses resulting from the strike or strike threat (sections 9 to 12);
- The trade union can avoid payment into court of the amount referred to above if it proves all of the following to the court:
    - The strike or strike threat occurred against the express instructions of the trade union, which instructions must have been given prior to the strike threat or strike;
    - All of the actions of the trade union and its officers have been consistent with the instructions ;and
    - The trade union and its officers or representatives have never contravened section 4.
- A trade union will not be found liable for losses resulting from a strike or strike threat if it proves all of the following to the court:
    - The strike or strike threat occurred against the express instructions of the trade union, which instructions must have been given prior to the strike threat or strikes;
    - All of the actions of the trade union and its officers have been consistent with the instructions; and
    - The trade union and its officers or representatives have never contravened section 4.
- Employees found to have contravened sections 4(1), (2) or (4) are subject to the imposition by the employer of a penalty of up to one day's pay for each day or partial day of the breach;
- Substantial fines (e.g., $250,000 plus $50 per employee who belongs to the union that day) are payable by a union for each day or partial day a strike, strike threat or other breach of the legislation occurs;
- Any person who 'counsels' another person to contravene section 4(1) or 4(2) is subject to a fine of $500 for each day or partial day on which the offence is found to occur or continue.

The Alberta Union of Provincial Employees ("AUPE"), which represents Alberta Government employees, recently applied to the Alberta Court of Queen's Bench for a declaration that the *Public Sector Services Continuation Act* breaches the *Charter* and is not saved by *Charter* section 1. The Court will determine whether the objective of preserving public services and saving taxpayer money is pressing and substantial, whether the provisions in Bill 45 are rationally connected to this objective, and whether these provisions minimally impair the rights and freedoms in question (including freedom of association). Of particular interest is the allegation that the new legislation violates *Charter* section 2(d) freedom of association.

Section 2(d) of the *Charter* guarantees individuals the freedom of association. Freedom of association includes the right to establish an independent employee association and to exercise in association, the lawful rights of its members (*Delisle v Canada (Deputy Attorney General),* [1999] 2 SCR 989). Originally, the Supreme Court of Canada held that freedom of association does not include, in the case of a trade union, the right to bargain collectively or the right to strike. Nevertheless, the SCC later held that freedom to associate becomes meaningless if the state does not take positive steps to ensure that this right is not a hollow one.

In the case of Bill 45, AUPE argues that the government employees have the right to organize, to engage in a meaningful process of good faith collective bargaining in an attempt to achieve workplace-related goals, and to seek to negotiate important terms and conditions of employment into a collective agreement. They assert that freedom of association also includes the right of unions and their members to engage in partial or complete withdrawal of their labour as part of the collective bargaining process. The AUPE argues that section 4 of Bill 45 breaches the right to freedom of association by prohibiting all unions and employees from threatening to withdraw or from actually

withdrawing their labour as part of the collective bargaining process or for any other purpose. They argue that the same is true for Section 70 of the *PSERA* and section 96 of the *Code.* In addition, they assert that the penalties, fines and the abatement fund provided under Bill 45 have the effect of "financially crippling" trade unions.

If the AUPE is successful in any of its *Charter* arguments, the Alberta Government will have the opportunity to defend its proposed and existing legislation under *Charter* section 1, which provides:

> ***1.*** *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

To justify Bill 45's limits on *Charter* rights, the Alberta Government will likely argue that the purpose of the legislation is to "protect the Alberta taxpayer from an illegal strike," and establish a "more comprehensive and responsive system to respond to the threat of illegal strikes or strikes themselves." Further, the threat of a strike requires significant mobilization of resources to avert harm in the event that a strike happens. The Government will assert that Bill 45 is an effective deterrent to illegal behavior, and thus will help ensure that Albertans receive essential services. This Bill also addresses the workers who feel pressured not to cross an illegal picket line by punishing unions who call an illegal strike.

The Court will determine whether the objective of preserving public services and saving taxpayer money is pressing and substantial, whether the provisions in Bill 45 are rationally connected to this objective, and whether these provisions minimally impair the rights and freedoms in question (including freedom of association).

This lawsuit demonstrates the importance of freedom of association in the labour relations context, while illustrating how the Government will have to justify any limitation of those rights. It also illustrates the importance of consultation with stakeholders when proposing a new law or a significant amendment to a law. One of the major complaints in this lawsuit is that the people who will be most directly affected by the Bill were not adequately consulted before it was proposed and passed.

Organization Launched to Foster Canadian Charity Law

One could do worse than to study charity law to understand some of the key elements in the Canadian legal system. There are the constitutional questions raised by overlapping federal and provincial jurisdiction with respect to the subject matter. There is the use of the common law – progressive development by judges of a legal framework through reliance on precedent and a commitment to treat like situations alike – to determine what is a charity. The power of superior courts to supervise charity matters is a notable example of the doctrine of inherent jurisdiction.

As well, there are a host of statutory and common law issues, arising from core concepts in other areas such as trusts, tax, corporate, and property law, which may come into play.

It might be expected that this mix would lead to lots of interesting Canadian jurisprudence and a fertile legal environment. But that has not proved to be the case. Instead, the field is marked by countless narrow rulings, often taking their tenor from foreign and archaic cases, and numerous situations where a compelling legal question has yet to be joined. Moreover, various factors – the high cost of litigation; limited resources of many charities and groups seeking to qualify as charities; and, heavy reliance on volunteers in running and advising organizations – contribute to litigation at the appeals level being a rarity.

The Federal Court of Appeal has, by statute, jurisdiction over registration and revocation of status as a charity under the federal *Income Tax Act* (*I.T.A.*). … the pace of change in the scope of the meaning of charity in Canada has been glacial.. The Federal Tax Court deals with all other *I.T.A.* charity matters. Superior provincial courts have inherent jurisdiction over charities, and deal with such things as *cy pres* applications (In certain circumstances if a charitable purpose becomes impossible to fulfill, the *cy-près* doctrine allows a court to alter the purpose to one as close as possible to the original intention.)

The courts have provided little guidance on the intersection of the *I.T.A.* provisions governing registered charities and provincial constitutional authority, set out in section 92(7) of the *Constitution Act, 1867* (UK), over the "Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province". As well, notwithstanding the imperative set out in the leading case *Scottish Burial Reform and Cremation Society Ltd. v Glasgow Corporation* "to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied", the pace of change in the scope of the meaning of charity in Canada has been glacial.

The application of the law of trusts to charities is inconsistent from province to province – something that is problematic for organizations with assets in multiple jurisdictions. In another important area, liability of charity board members, there is a scant case law, leaving directors uncertain about their obligations and the conduct expected of them.

A new organization, The Pemsel Case Foundation (Pemsel), was recently created to foster better understanding and clarification of Canadian law of, and related to, charities. [Note: the author of this article serves as Pemsel's Executive director.] Named after the seminal 1891 House of Lords case *Commissioners for Special Purposes of the Income Tax v. Pemsel* that established the four principal heads of charity in the current legal classification, Pemsel will undertake research, education and possibly interventions in existing litigation to further its mandate.

In its approach to litigation, Pemsel hopes to build on the previous interventions by the Canadian Centre for Philanthropy, and its successor organization, Imagine Canada in Supreme Court of Canada cases dealing with charity law. Those interventions were less concerned with arguing for particular outcomes in the case at hand, and

focused instead on the appropriate legal test that should be used by the Court to make its determination.

One particularly intractable problem in charity law is what is “political” and how engagement by charities in that realm should be treated. The common law criteria for charity include rules that constrain or preclude charities’ political engagement based on their purposes. The *I.T.A.* features another set of rules that constrain or preclude charities’ political engagement based on their activities. There is very little case law on reconciling these two sets of rules, and the case law that does exist does not provide adequate clarity on what is and what is not permitted. In practice, this means that charities often do not engage in political work even though doing so might efficaciously advance their mandate.

The Pemsel Case Foundation asked Maurice Cullity, a retired Justice of the Ontario Superior Court of Justice and a former Osgoode Hall law professor, to try to sort through the complexities of this problem. His analysis of the issue, *Charity and Politics in Canada – A Legal Analysis*, is the first of a series of occasional papers to be published by Pemsel.

Pemsel hopes that Justice Cullity’s piece will be the first of many contributions the Foundation can make to a clearer and more dynamic understanding of Canadian charity law. By doing so, we hope that, as well as more fully exploring the many-faceted aspects of the law in this area, we will help facilitate the work of Canadian charities and other voluntary sector groups.

An extended version of this article can be found in The Philanthropist, Vol 25, Issue 4.

Insubordination and Dismissal

> *It is . . . generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.*
>
> *- Laws v. London Chronicle Ltd. [1]*

Introduction

Much has changed in the last half-century in employment, including the purge of words like "master" and "servant" from our workplace vocabulary. One thing that has not changed is the foundation of employment that employers control the employees' work. It is not up to employees to "consider the wisdom" of employer instructions as long as they are legal, safe and within the compass of one's job. (*Stein v. British Columbia Housing Management Commission* (1992), CanLII 4032 (BC CA)) Even experts who think they are better qualified than their bosses must submit.

Even a single act of disobedience that is not otherwise of a grave and serious nature, if it is clear and wilful, may be sufficient to justify firing if it can be seen as an employee repudiation of the employment relationship. Nevertheless, the real world is characterized by more tinges of gray than laser blacks and whites. Insubordination – the failure to submit to the authority of the employer – the state of disobedience, rebellion and mutiny - is not always easy to identify to a point where one would feel legally secure in firing the employee. Judges today are inclined to grant employees second and third chances (on the basis that everyone is entitled to a bad day once in a while) and expect employers to progressively discipline recalcitrant employees.

In this article, we set out a few judicial decisions that come down on both sides of the insubordination issue.

Amos v. Alberta – the Employer Wins

Even a single act of disobedience that is not otherwise of a grave and serious nature, if it is clear and wilful, may be sufficient to justify firing if it can be seen as an employee repudiation of the employment relationship.

Steve Amos, a computer systems analyst working for the government of Alberta, "entered the room and, in a belligerent tone and loud timbre, told Varma (his supervisor) that he should not be taking shit from users, but that he should be giving shit to them." (para 12) He had, on "many earlier occasions" told his supervisor how to do his job. This time, Varma gave Amos a verbal warning. Amos mentioned that verbal warning every day and asked for time at work to write up how this affected his feelings. He was denied and so complained up the ladder. Six months later he refused to perform a simple task. He wrote Varma he refused because he had "lost trust in [Varma's] ethical standing as my Supervisor." Amos was fired for insubordination.

In the ensuing wrongful dismissal lawsuit, the judge said:

- the disobedience must be grave, wilful, and deliberate;
- must go against workplace rules that were consistently and clearly enforced;
- the order disobeyed must be reasonable, lawful and within the employee's normal duties;
- the employee must be aware that discipline would be handed out for disobedience; and
- the employee must have no reasonable excuse for disobeying the order.

Henry v. Foxco - the Employee Wins

Judges today are inclined to grant employees second and third chances (on the basis that everyone is entitled to a bad day once in a while.)

Gerald Henry, an employee at an automobile dealership operated by Foxco, was to remove decals from two vehicles. When his supervisor thought he was taking too much time to do that, he approached Henry and told him to work faster. Henry then became loud and abusive toward his supervisor, swearing at him and provoking him to fire him if he was not satisfied with the work being performed. The supervisor obliged and summarily dismissed Henry on the spot. This is Henry's account of what happened:

> *Graham — That better be your second one [van].*
> *Henry — No, it's the first.*
> *Graham — J… C…, you've been on it all afternoon.*
> *Henry — No, I've been out back.*
> *Graham – It would only take me 20 minutes. Do the one outside.*
> *Henry — What's your problem?*
> *Graham — If you don't like it – quit.*
> *Henry — I'm not going to quit. You'll have to fire me.*
> *Graham — Alright, you're fired.*

While the trial judge found Henry's insubordination significant enough to justify firing, a majority of the New Brunswick Court of Appeal said that such insubordination was not cause for firing under the Supreme Court of Canada's *McKinley* test. (*McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 SCR 161) The *McKinley* test says that, in order to constitute just cause for firing, an action (for example, insubordination, or in that case, lying to the employer) must be so grave that it violates the obligations of an employment relationship to the extent that such a relationship could no longer exist.

The majority judges ruled that Henry's actions came at a time of great stress and in the "heat of the moment," and did not rise to the level of a firing offence.

Conclusion

Every case of employee insubordination will be judged "as a matter of fact" according to the perceptions of the trial judge. It is hard to lay down hard and fast rules or a catalogue of disobedience that will lead to justifiable firing. The test generally will be whether the disobedience is a clear and intentional rejection of a legal, safe and reasonable work request that, overall, can be characterized as the employee repudiating the job. The test generally will be whether the disobedience is a clear and intentional rejection of a legal, safe and reasonable work request that, overall, can be characterized as the employee repudiating the job. Aggravating factors include where the refusal is accompanied by a bad attitude, public embarrassment, recurring performance refusals or problems, or extra costs or losses to the employer.

On the other hand, after *McKinley,* employers are expected to cut employees more slack, not take all insubordination personally, and try to continue to work with the employee who might be stressed or upset. Firings impair workplace morale and the employer's reputation. Instead of firing the worker, the employer might start with a lesser form of discipline or serve reasonable notice of termination or pay in lieu. Firing should be an option only where the employer has the strongest evidentiary case that the worker has manifestly repudiated that job by the insubordination.

Notes:

1. [1959] 1 W.L.R. 698 (C.A.), per Lord Evershed M.R., at p. 700

A Brief Primer on Child Support: Part One

Child support is money paid by a parent toward the living expenses of his or her child. Other people can be required to pay child support, including guardians and stepparents.

The duty to pay child support is based on a parent's obligation, under the old common law, to provide his or her child with the "necessities of life." This duty, which continues to be a part of the *Criminal Code*, is now expressed and fleshed out in two laws, the federal *Divorce Act* and the provincial *Family Law Act*. Although these laws have a lot in common, they also have some significant differences.

The *Divorce Act* only applies to people who are or used to be married to each other, and, for reasons that I'll explain in another column, is only available in the Court of Queen's Bench. The *Family Law Act* applies to everyone, including married spouses, adult interdependent partners (common-law spouses), and people who had a child together and are neither spouses nor partners. Both the Court of Queen's Bench and the Provincial Court can make orders under the *Family Law Act*.

The obligation to pay child support is generally triggered when parents separate. Of course, they each have the duty to support their child during their relationship, and that's covered by the *Criminal Code* and the law on child protection. When and how much gets paid can be decided by a court order or the parents' written or oral agreement. Child support is usually payable until a child turns 18, it is usually paid monthly, and the amount payable is almost always determined using the Child Support Guidelines.

> ***Myth: You don't have to pay child support if you give up your rights as a parent.*** *In fact, a parent has to pay child support whether he or she is present or absent from the child's life. Because the right to benefit from the payment of child support belongs to the child, not the parents, parents cannot agree to waive child support in return for waiving the entitlement of one of them to be involved in their child's life.*

Those are the general rules, but there are exceptions. Lots of them.

Who Can Ask for Support

Under the *Divorce Act*, only a spouse can ask another spouse to pay support. Under the *Family Law Act*, a parent or guardian can ask a parent to pay support, as can anyone who has "care and control" of the child and the child him- or herself.

Who Has to Pay Support

The basic rule is that the person who has the child for the least amount of time pays support to the person who has th child for the most amount of time. The recipient supports the child as well, but through the love, care and attention he or she provides rather than a cash payment.

Under the *Divorce Act*, spouses must support their own children. A stepparent spouse may have to support a child brought into the marriage if he or she "stands in the place of a parent" to that child. Whether someone stands in the place of a parent depends on the nature of his or her relationship to the child; the court would look at factors such as

whether the spouse provides for the child, disciplines the child as a parent and represents him- or herself as being responsible for the child. A 1999 case from the Supreme Court of Canada, *Chartier v Chartier*, talks about this issue in a lot more detail.

Under the *Family Law Act*, parents must support their children. “Parent” includes spouses and partners who stand in the place of a parent to a child brought into the relationship, as long as they have demonstrated a “settled intention” to treat the child as their own. The *Family Law Act* provides a list of factors for the court to consider, which include the length of the child’s relationship with the person, the nature of their relationship and the person’s support of the child.

> ***Myth: You don’t have to pay child support if access is withheld.*** *In fact, a parent has to pay child support regardless of whether the other parent is denying access, even if the denial is a breach of an order or an agreement. Child support and access are entirely separate issues.*

Our discussion of child support will continue in the next issue of LawNow.

Criminal Defence Law in the North: Part Two

In my last column I briefly sketched out some aspects of substantive criminal law as it is enforced and applied in the Northwest Territories. I want in this contribution to comment upon some underlying factors which, at least sometimes, lead to criminal conduct, as well as aspects of sentencing.

At the end of my last piece I noted that the courts now recognize and accept that Canadian historical efforts to subjugate aboriginal citizens and communities have led to the present situation, where the incidence of poverty, family violence, substance abuse and other social challenges are higher among First Nations Canadians than others.

Problems which frequently play a role in criminal misconduct are not addressed as quickly or easily in the North as would be the case in a southern location. Social services, family support, mental health and similar programs are far more difficult to access in the Northwest Territories compared to the situation in a southern province. Of course, nothing in what I have written in this or my earlier column should lead to the conclusion that all northerners are alcoholics or criminals or wounded and lost individuals. It is well-known that the incidence of suicide is higher among aboriginal Canadians than other groups, and the problem is even more acute in the North. Individuals who have lost loved ones to suicide or through other tragedies, such as drownings or hunting mishaps (I have acted for persons who have lost two or three family members who sometimes simply never returned from hunting trips out on the Arctic ice) are often left to grieve without counseling or support programs and this too sometimes leads to anger and criminal misconduct as the individual attempts to find outlets for pent up emotions and feelings of tremendous loss.

Unfortunately, economics being what they are, treatment options for northern Canadians are very limited. In 2013, the only residential treatment facility for substance addictions in the Northwest Territories (located at Hay River) was closed by the government in favour, it said, of treatment programs which would be more locally based in communities. The government says it will focus on treatment regimes which are closer to traditional ways, and which will include components such as going on the land and engaging in other cultural practices in order to address and heal addictions and their underlying causes. In the meantime, citizens of the Northwest Territories now have to go to southern Canada if they are in need of intensive substance abuse treatment and counseling, even though this means further removal from family and other support systems, and from more appropriate cultural settings.

In other ways, as well, the impact of punishment can be different in the North, compared to other, more populous parts of Canada. Some efforts are made to accommodate cultural needs and practices within the correctional institutions in the Northwest Territories, but there can be no doubting or downplaying the dislocation and isolation felt by an offender from a small Inuit community such as Sachs Harbour (located on Banks Island, in the Arctic Ocean) who is brought south to Yellowknife to serve time in an institution here. Unemployment is high in many communities so the payment of fines can be a challenge, and some smaller settlements do not have the infrastructure necessary to establish and operate a fine-options program (the “community service work” option which allows offenders to perform work in the community in order to satisfy the payment of a fine).

Economics also adds to the severity of a sentence of imprisonment in the North. The main correctional centres for male offenders are in Yellowknife and Hay River. A smaller, lower security establishment is in Fort Smith, where the Territories’ only female custodial institution is also located. In one or two of the larger RCMP detachments (in places like Inuvik) it is sometimes possible for offenders to serve short sentences on weekends, but in most situations where imprisonment is ordered, the individual must be transported to one of the jails, which usually means separation by hundreds or thousands of kilometers from family, friends and community support. And unlike the situations in the South, where almost everywhere is connected by road to everywhere else, in the North most communities rely upon

air travel as their connection to the outside world. However, the cost of travelling by air is usually prohibitively expensive, with the result that inmates of a correctional facility simply do not see their family members for the duration of their sentences. Some efforts are made to accommodate cultural needs and practices within the correctional institutions in the Northwest Territories, but there can be no doubting or downplaying the dislocation and isolation felt by an offender from a small Inuit community such as Sachs Harbour (located on Banks Island, in the Arctic Ocean) who is brought south to Yellowknife to serve time in an institution here. And any person ordered imprisoned for more than two years may find him or herself sent to a federal penitentiary in southern Canada, where the effects of removal from family and community are magnified exponentially.

A unique aspect of practice in the North is that the courts (and even Crown prosecutors) appreciate that such traditional practices as “going on the land” have rehabilitative value for individuals who have come into conflict with the criminal law. Almost without exception, most offences are committed when the accused are living in a community where there is access to alcohol. The very same persons, when travelling or living in the bush or on the tundra – and away from the lure and effects of liquor – almost always are valued members of their community, who are able to assist others by hunting, trapping and fishing to supply their family and others with food and supplies. More than once I have read letters of support from persons who express the highest respect, and who highly value, the skills of a client when he is “on the land” and able to provide for and assist others, including children and elders, who are not able to provide for themselves. All too often, the same person – my client – has committed terrible acts of violence when back in town, drinking, and acting out unresolved issues of anger and loss. Because of the healing and rehabilitative effects of allowing individuals to spend time on the land, living in ways which are closer to their traditional and cultural roots, judges are often very willing to accommodate such possibilities and practices when it comes to fashioning probation orders, firearms prohibition orders and similar forms of punishment.

Of course, nothing in what I have written in this or my earlier column should lead to the conclusion that all northerners are alcoholics or criminals or wounded and lost individuals. A unique aspect of practice in the North is that the courts (and even Crown prosecutors) appreciate that such traditional practices as “going on the land” have rehabilitative value for individuals who have come into conflict with the criminal law. Northern communities should not be seen as hotbeds of rampant crime. Most northerners, including those who have suffered in their lives, do not break the law, and even those who do often change their lifestyles and habits over the years, sometimes to the extent that they ultimately become respected elders and leaders in their communities. Just as it is distressing to hear the tragic and sad tales of personal loss and grief which are the histories of many of our clients, it is equally encouraging and up-lifting when we encounter such examples of resilience and strength.

Protecting Yourself from Consumer Fraud and Scams

Been offered tickets for a free cruise? Received a heartfelt plea to help a distant relative? Had a bank or credit card company email you for your password and account details? You may have been contacted by scammers looking for your money or your personal information. Every year Canadians lose millions of dollars through consumer frauds and scams. These schemes can come via telephone, email, websites, text messaging, direct mail or even in person.

Scammers aren't choosy – they target people of all ages and backgrounds. Sometimes you may not even be aware that you've been the victim of a scam until unusual activity shows up on your credit card or bank statement. The first step you can take to protect yourself is to be aware of some of the tactics con artists use to rip you off. The Canadian Anti-Fraud Centre (CAFC) offers help in recognizing scams, including the old warning about 'if it sounds too good to be true…' The site outlines some of the most common schemes seen in Canada such as 419 scams (a.k.a Nigerian or advance fee scams), cheque overpayment fraud, and so-called emergency scams (sometimes referred to as grandparent scams), where people are tricked into thinking they are sending money to a relative in need.

The RCMP is a key partner of the Canadian Anti-Fraud Centre and their Scams and Fraud website includes information on scams targeting seniors, identity theft, email fraud and phishing, as well as fraud on the Internet. The Government of Canada has passed new anti-spam legislation which will take effect in July 1, 2014. If you have experienced identity theft or identity fraud, the RCMP's Identity Theft and Identity Fraud Victim Assistance Guide sets out some basic steps that you can follow to help minimize the negative impact and help prevent further crimes.

The Competition Bureau also works to prevent cases of fraud by helping Canadians to "recognize it, report it and stop it". The Bureau's *Little Black Book of Scams* contains information that can help you to protect yourself from becoming a victim of consumer fraud. The guide tells you what to look for before acting on an unsolicited offer and what to do if you get scammed.

Spam (a.k.a unsolicited or junk emails) is one of the most common methods used by scammers to get access to your personal or financial information. The Government of Canada has passed new anti-spam legislation which will take effect in July 1, 2014. Once in force, the new law will apply to any individual or business that sends commercial messages using electronic channels to sell or promote products or services. Individuals, businesses and organizations can learn more about the new law at fightspam.gc.ca.

Still on the subject of email, phishing is a particularly nasty type of spam. Phishing emails, which can look legitimate, are designed to trick you into disclosing information. Sometimes you may not even be aware that you've been the victim of a scam until unusual activity shows up on your credit card or bank statement. The first step you can take to protect yourself is to be aware of some of the tactics con artists use to rip you off. As the Canadian Bankers Association (CBA) cautions on its website "If you receive a phishing e-mail pretending to be from a bank that asks for personal or financial information, there are two things you should do: report it and delete it." The CBA site also provides links to the email fraud pages on individual bank websites. Phishing emails seem to become more popular during tax season and the Canada Revenue Agency (CRA) has issued a reminder that the CRA does not email Canadians to request personal or financial information. Details as to how the Agency safeguards taxpayer data and measures for protecting yourself from fraudulent activity are available on its Fraud Prevention webpage.

Industry Canada's Office of Consumer Affairs maintains the consumerinformation.ca website – a collection of resources gathered from federal, provincial and territorial governments, as well as non-government sources such as consumer groups and Better Business Bureaus across the country . The site covers a range of consumer protection

issues such as security of private and personal information and avoiding financial scams and fraud. Consumer Affairs is also responsible for the *Canadian Consumer Handbook* which offers information on a wide range of topics to protect consumers and help them to make informed decisions. Their practical tips can help you avoid potential pitfalls when purchasing goods or services offered via telemarketing, through online shopping sites, or by door-to-door sales. The Handbook can be accessed online in its entirety or you can create and print your own customized version by selecting topics of particular interest.

Like consumers, business owners and non-profit organizations are also at risk of falling victim to fraud. The Fraud Awareness for Commercial Targets (FACT) campaign is an initiative of the Competition Bureau to help organizations learn more about fraud prevention. Some of the most common types of fraud that business owners may encounter are bogus invoice and directory scams. The FACT site suggests guidelines to help organizations to develop an anti-fraud plan and conduct staff training on fraud awareness.

If you suspect you may have been the victim of fraud you can contact the Canadian Anti-Fraud Centre for information and advice. Don't be embarrassed if you've been caught out, with over 40,000 complaints of mass marketing fraud reported to CAFC in 2012, you're in good company.

What ever happened to … The Law of Sniffer Dog Searches: Part 2

Introduction: The Flux of Law

This article illustrates how quickly and remarkably the common law can adjust when judicial principles change and when new judges are appointed to the Supreme Court of Canada.

The common law is generally intended to endure. Judges describe what they do as not *making* the law as much as *declaring* what the law has always been. They see themselves in terms of Lady Justice – as neutral experts loyal to principle and reason, unencumbered by personal ideologies and biases.

Judges will adapt the common law to reflect social change over time. However, occasionally, a radical change in the law can be traced to nothing more than a shift in thinking or putting new judges on the Supreme Court of Canada. To illustrate, we profile the abrupt five-year change to sniffer dog law.

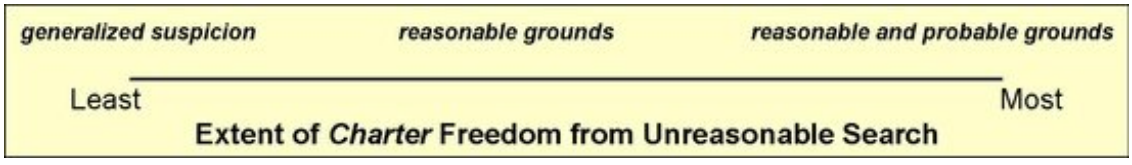
Kang-Brown, 2008

In the last "Whatever Happened to . . ." column in *LawNow*, we highlighted the *Kang-Brown, [2008] 1 SCR 456* decision from the Supreme Court of Canada. At the Calgary Greyhound bus terminal, a trained sniffer dog detected a large quantity of illegal drugs in Kang-Brown's bag.

According to the law, a dog conducts a search when it sniffs. Since the dog is an extension of the police who are state agents, the legal and factual groundwork for the sniff search must exist before any illegal things discovered can be used in evidence at a criminal trial.

One judge in the top court said police who form a *generalized suspicion* that one is in possession of illegal drugs can use sniffer dogs to search. This standard would have encompassed the suspicious eye contact with Kang-Brown. Four judges declared a more onerous *reasonable suspicion* to apply. The other four judges upheld the existing even higher standard of *reasonable and probable grounds*. These last four judges said sniffer dog searches are illegal unless a statute authorizes them. In the end, six of the nine judges said this sniff search was unconstitutional and none of the illegal drugs possessed by Kang-Brown could be used as evidence against him. He was not guilty. Note that *Kang-Brown* was decided at the same time as *R. v. A.M., 2008 SCC 19 (CanLII)* by the identical Court with the same outcome. In *A.M.*, sniffer dog detection of drugs in a student's backpack in the gymnasium was ruled an unconstitutional search.

The following illustration shows how these standards relate to the extent of freedom from unreasonable search.



Sniffer dog detections have been used by law enforcement for a long time and are highly reliable, low tech, non-invasive and low cost. One would think their legality (or illegality) should be a simple, well established issue by now.

Police need to know whether the evidence will be admissible in court. It is the difference between guilt and innocent for the accused.

The Supreme Court's *Kang-Brown* decision in 2008 confirmed that sniffer dog searches are permitted only after police have reasonable and probable grounds to believe someone is bearing illegal drugs.

Chehil and MacKenzie, 2013

The Supreme Court of Canada saw a turnover of four judges between 2008 and 2013. Justices Binnie, Bastarache, Deschamps and Charron had retired. The Supreme Court's unanimous blessing of the sniff search in *Chehil* lies at odds to *Kang-Brown* only five years earlier in the same Court. Justices Cromwell, Moldaver, Karakatsanis and Wagner had joined the Court to replace them. The 2013 Court, with the four new judges, abandoned the *Kang-Brown* precedent in favour of the lower standard of *reasonable suspicion* (*R. v. Chehil (2013), SCC 49*; *R. v. MacKenzie (2013), SCC 50)*.

In what serves as the binding majority judgment in the earlier case, three judges (LeBel, Fish and Abella) had stated authoritatively in *Kang-Brown* (para.1):

[We] would not lower the threshold for the exercise of police powers to one of "reasonable suspicion" since to do so would impair the important safeguards found in s. 8 of the *Charter* against unjustified state intrusion. [We] would apply the existing and well-established standard of "reasonable and probable grounds" to hold that the search did not meet this standard.

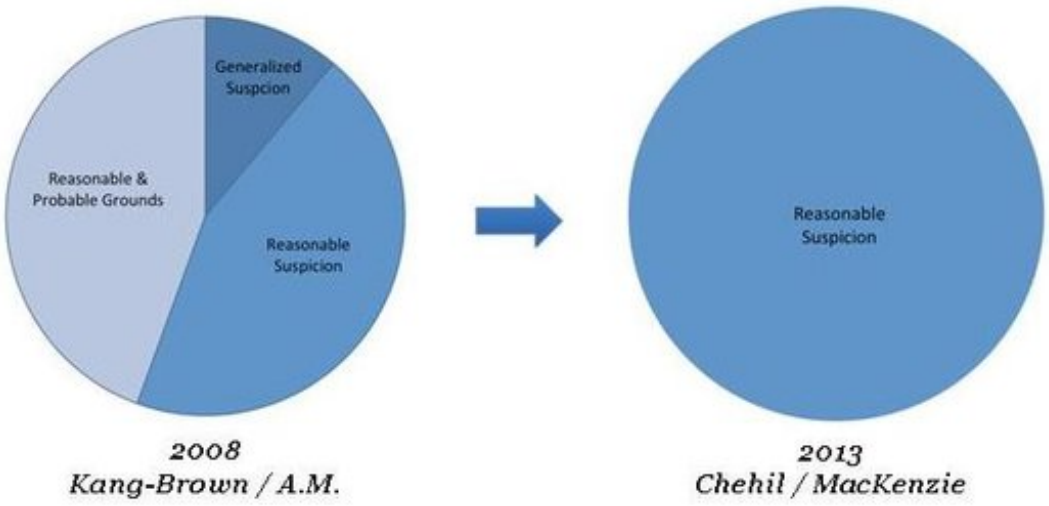
They feared the "the Court would create a new common law rule on the basis of little more than unverified and… unverifiable assumptions" and further that "a downgrading of the standard of reasonable and probable cause to a standard of reasonable suspicion…might lead to an even looser test of generalized suspicion." They also said there was no legal authority for sniffer dog searches.

Nevertheless, five years later in *Chehil* and *MacKenzie* they signed on, without comment, to the now-unanimous *reasonable suspicion* standard. Legal authority for such searches – nonexistent in 2008 – was apparently by now assumed by the same three judges to exist in 2013. Only two of the five judges who decided both the 2008 and 2013 cases were consistent on this critical constitutional principle that usually represents the evidentiary difference between guilt and innocence.

The four new judges, unhobbled by the *Kang-Brown* precedent, all embraced the *reasonable suspicion* standard. Indeed one of the new appointees to the Court (Karakatsanis) wrote the unanimous *Chehil* decision and in her first paragraph arguably mis-stated the *Kang-Brown* holding:

[1] In *R. v. Kang-Brown* . . . the Court balanced the travelling public's privacy interests against the public interest in apprehending those who transport and traffic drugs. The Court concluded that the use of a properly deployed drug detection dog was a search that was authorized by law and reasonable on a lower threshold of "reasonable suspicion".

The following chart illustrates the division of the Court on each standard in 2008 vs. 2013:



Similar Facts – Different Liability Outcomes

The facts in *Chehil* were similar to *Kang-Brown*. The RCMP dispatched a sniffer dog to an airport terminal to investigate Chehil, who they found suspicious based on their interpretation of the flight passenger manifest. What was suspicious? Chehil was travelling alone, had only checked one bag, and bought his ticket last minute with cash (essentially how Kang-Brown had travelled). According to the experience of the RCMP officers, these were telltale signs of a drug courier. The sniffer dog gave a positive indication that drugs were present, Chehil was arrested, and the RCMP found three kilograms of cocaine.

The Supreme Court's unanimous blessing of the sniff search in *Chehil* lies at odds to *Kang-Brown* only five years earlier in the same Court. All nine justices applied the standard of reasonable suspicion, found that the officers were reasonable in their suspicion of Chehil and ruled the dog sniff a legal search. The resulting contraband evidence was admitted at trial. Chehil's objections were dismissed. Now dog sniff searches in public places are legal across Canada after a police officer is possessed of a reasonable suspicion, a significant change from five years ago.

There is no explanation for the change in the law. Sniff searches and dogs, illegal drugs and the methods of transporting them have not undergone revolutionary social or technological change in the last five years. The recent unanimous *Chehil* decision changes the decision in *Kang-Brown* and no explanation was thought to be necessary.

How can the Supreme Court of Canada, on a matter as important as police searches under the *Charter*, change the law within five years? Part of that can be explained by four new judges on the bench. But three judges who carried the day five years earlier also retreated from the conclusions they had held.

Conclusion

The common law system is not easy for most Canadians to understand, perhaps because it is not always coherent.Now dog sniff searches in public places are legal across Canada after a police officer is possessed of a reasonable suspicion, a significant change from five years ago. These dog sniffer cases, decided by the same top court five years apart, are difficult to reconcile.

It used to be that a departure from an entrenched common law principle, especially at the venerable Supreme Court of Canada, came with an explanation that balanced doctrinal stability and the need to accommodate social change. But, changes to the composition of the Supreme Court of Canada and an inclination to overturn precedent can lead to rapid and dramatic change to judge-made law.