July/Aug 2014 Reference Cases Residential Schools Compassionate Care

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Bench Marks

Cases that Change the Legal Landscape

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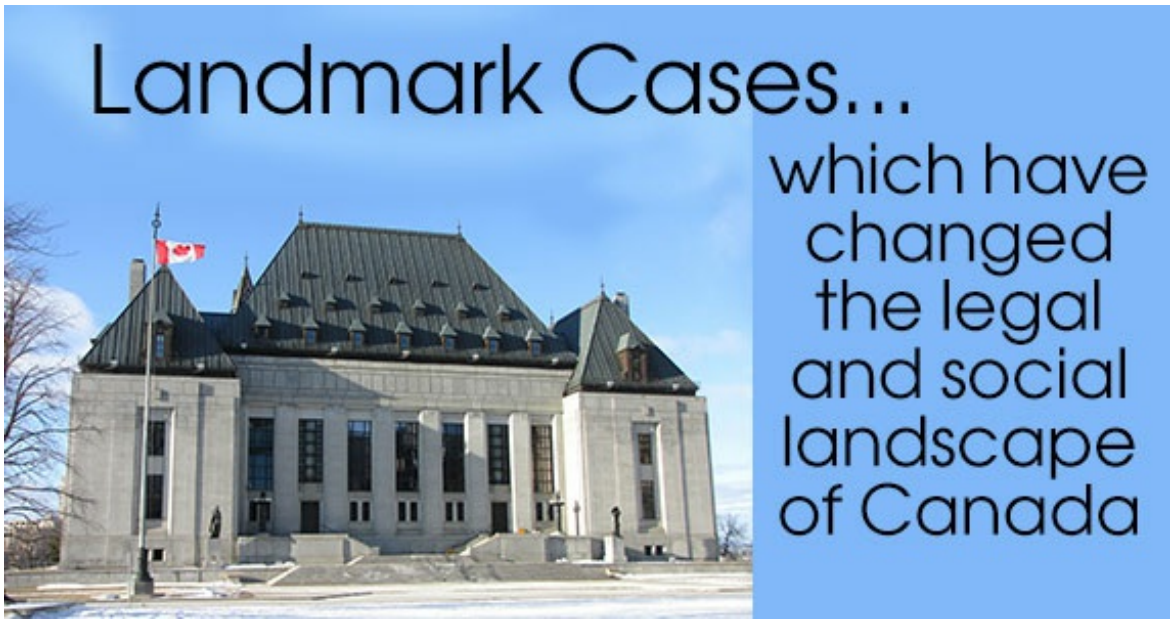
Landmark Cases: Cases which have changed the Legal and Social Landscape of Canada



Judgments may constitute landmark decisions in the social context of their time such as the Persons Case *(Edwards v. Canada (Attorney General), 1930*) — where the Privy Council determined that women were eligible to be appointed to the Senate — but may not seem so very startling to our modern sensibilities. Although the Privy Council in *Edwards* did not embrace the concept of the rights of women, the decision marks an early incremental change to the systemic prejudice against women. The year 1982 heralded a new era for judicial opinion with the birth of the *Constitution Act* and a veritable bonanza of challenges to legislation. Today, society more vigorously contests injustice and inequality, leading to some hotly contentious pronouncements. However, disputes brought before the courts have resulted in positive societal change, perhaps in unforeseen ways.

Quiet Iconoclasm

There are quietly iconoclastic decisions such as the 1985 case of *Big M Drug Mart Ltd.,* [1985] 1 SCR 295 heard by the Supreme Court of Canada. Its unassuming beginning occurred on May 30, 1982 when Big M Drug Mart was charged with selling groceries, plastic cups and a bicycle lock thereby “unlawfully carrying on the sale of goods” contrary to the federal *Lord’s Day Act*. This decision resulted in the transformation of commercial activity and a concomitant change in society’s shopping habits. In response, Big M Drug Mart challenged the constitutionality of the legislation, alleging, in part, that the Act offended the s. 2 *Charter* guarantee of “freedom of conscience and religion.”

The “Lord’s Day” was defined as “the period of time that begins at midnight on Saturday night and ends at midnight on the following night.” Performing work or commercial activity during that time was subject to sanction. Reviewing the historical context led the Court to quote from Saxon Dooms, a law promulgated in Anglo-Saxon England by Ine, King of Wessex from 688 to 725:

“If a theowman [slave] work on Sunday by his lord’s command, let him be free; and let the lord pay thirty shillings as a fine. But if the theow work without his knowledge, let him suffer in his hide, or in hide-gild [money paid in lieu of corporal punishment]. But if a freeman work on that day without his lord’s command, let him forfeit his freedom, or

sixty shillings; and be a priest doubly liable."

The Court moved from Saxon times, through the Tudors and Stuarts and the intervening Commonwealth, to pre-Confederation legislation before concluding that "*The Lord's Day Act* is enacted pursuant to the criminal law power under s. 91(27) of the *Constitution Act, 1867*. In providing for the compulsory observance of the religious institution of the Sabbath (Sunday), the Act and especially s. 4 thereof does infringe on the guarantee of freedom of conscience and religion in s. 2(a) of the *Canadian Charter of Rights and Freedoms* and this infringement cannot be justified on the basis of s. 1 of the *Charter*. I would declare the *Lord's Day Act* to be of no force or effect, by reason of s. 52(1) of the *Constitution Act, 1982."*

This decision resulted in the transformation of commercial activity and a concomitant change in society's shopping habits. However, the Supreme Court of Canada has also curbed advertising powers to protect a vulnerable segment of the Canadian population, as the next case shows.

Advertising

Freedom of expression includes commercial freedom, and corporations are able to persuade us of the desirability of their products with constitutional abandon, except in Quebec. Irwin Toy Ltd. challenged the constitutional validity of the provincial *Consumer Protection Act* which prohibited advertising to children under 13 years of age (*Irwin Toy Ltd. v. Quebec (AttorneyGeneral),* [1989] 1 SCR 927). The Supreme Court of Canada held that although the legislation infringed a constitutional guarantee, the legislation was reasonable and demonstrably justified and therefore the prohibition was valid:

"Children are not as equipped as adults to evaluate the persuasive force of advertising and advertisements directed at children would take advantage of this. The legislature reasonably concluded that advertisers should be precluded from taking advantage of children both by inciting them to make purchases and by inciting them to have their parents make purchases. Either way, the advertiser would not be able to capitalize upon children's credulity."

Not all landmark decisions are so socially subtle. For example, the repatriation of the Constitution and the resulting jurisprudence defined modern Canada.

Seismic Iconoclasm

1982 and the Patriation of the Constitution

The year 1982 heralded a new era for judicial opinion with the birth of the *Constitution Act* and a veritable bonanza of challenges to legislation. Barristers enthusiastically adapted legal memoranda with creative *Charter* arguments, resulting in panoply of jurisprudence by a predominantly patient judiciary.

The Charter of Rights and Freedoms

There are now entire libraries of criminal law which soften close encounters with the police. Momentous criminal decisions usually have the judicially created procedure named after them, for example: *Garofoli* hearing; K.G.B. statements. This has altered and shaped the trial process. In some circumstances, decisions by the Supreme Court of Canada result in Parliament changing legislation. There are now entire libraries of criminal law which soften close encounters with the police. For example, its decision in the 1997 case of *R. v. Feeney,* [1997] 2 SCR 13 resulted in Parliament amending section 529.1 of the Canadian *Criminal Code* to make it clear that the common law power to arrest on private property must comply with the *Charter of Rights and Freedoms*. Now, police must exercise their power to enter private houses to arrest a suspect under *Feeney* warrants.

The Supreme Court of Canada has affirmed the right to be secure in your own home but, being Canadians, the right to privacy is not limited to your own castle but also to rudimentary shelters (*Colet v. The Queen,* [1981] 1 SCR 2):

"It is true that the appellant's place of residence was nothing more than a shack or shelter which no doubt was considered inappropriate by the City of Prince Rupert, but what is involved here is the longstanding right of a citizen o this country to the control and enjoyment of his own property, including the right to determine who shall and who shall not be permitted to invade it. The common law principle has been firmly engrafted in our law since Semayne's case in 1604 where it was said 'That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose …'"

Charter of Rights and Freedoms decisions have had an impact on every aspect of Canadian life, spearheading a different societal view. However, landmark decisions also reflect change, including scientific discoveries and societal values. The court's consideration of the evolving Canadian social and scientific landscape drives the evolution of the common law, on occasion resulting in the Court revisiting and revising former precedents.

Impact of medical advances on the criminal law

In 1998, the Supreme Court of Canada, in *R. v. Cuerrier,* [1998] 2 SCR 37 released the landmark decision that non-disclosure of HIV status transformed an otherwise lawful encounter into criminal behaviour by vitiating the consent of the uninformed participant. The court's consideration of the evolving Canadian social and scientific landscape drives the evolution of the common law, on occasion resulting in the Court revisiting and revising former precedents. Over the next fourteen years, the Canadian judiciary considered the *Cuerrier* test in the many prosecutions where the application of that test was disputed. Over that same fourteen years, scientific advances brought significant improvement in the treatment of the disease and a resulting reduction in its transmission rates. These factors, viewed through the filter of *Charter* values, inform the decision of *R. v. Mabior,* [2012] 2 SCR 584.

The Supreme Court of Canada in *Mabior* considered whether an HIV positive person engaging in sexual activity without first explaining his/her medical condition commits aggravated sexual assault. *Cuerrier* previously decided such circumstances met the elements of aggravated sexual assault. After reviewing the common law of fraud vitiating consent from the nineteenth century onwards, Chief Justice McLachlin wrote: "*Charter* values of equality, autonomy, liberty, privacy and human dignity require full recognition of the right to consent or to withhold consent to sexual relations." These values, when applied to the law of sexual assault, show not only a crime of physical and emotional harm but also "the wrongful exploitation of another human being."

Against this background, the Court considered the essential criminal element of "significant risk of serious bodily harm" necessary for a conviction. That risk would be the transmission of HIV and such a risk should be a realistic one. If a person receives antiretroviral treatment, some evidence shows the risk of transmission is reduced by 89 to 96% which, combined with condom use, substantially reduces the chance of harm. In these circumstances, non-disclosure will not vitiate consent and there would not be a conviction for aggravated sexual assault.

Interestingly, the Supreme Court of Canada made allowances for future judicial change, noting further medical advances may result in the failure to disclose no longer constituting "fraud vitiating consent." *Mabior*, in such circumstances, would not remain the judicial precedent.

The fluid nature of precedent was recently quietly considered within the more eventful consideration of the sexual trade provisions in the *Criminal Code.*

The effect of changing social assumptions

"When, if ever, may a lower court not follow precedent set by a higher court?" was one of the issues in the recent decision of *Bedford* (*Canada (Attorney General) v. Bedford,* [2013] 3 SCR 1101). The three applicants in that case

were granted public interest standing to challenge the constitutionality of provisions of the *Criminal Code* governing bawdy houses, living off the avails of prostitution and street prostitution. “When, if ever, may a lower court not follow precedent set by a higher court?” was one of the issues in the recent decision of *Bedford* Although the Supreme Court of Canada had previously upheld this legislation in 1991 in the *Prostitution Reference* (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.),* [1990] 1 S.C.R. 1123), the Superior Court of Ontario found it could not only consider the public interest application but also declare the provisions unconstitutional. The Court justified not following precedent because: *Charter* jurisprudence on the doctrines of arbitrariness, overbreadth and gross disproportionality had developed substantially since the *Prostitution Reference*; as had the availability of complex social science research; and, importantly, that “the social, political and economic assumptions underlying the *Prostitution Reference* may no longer be valid.”

The Supreme Court of Canada noted:

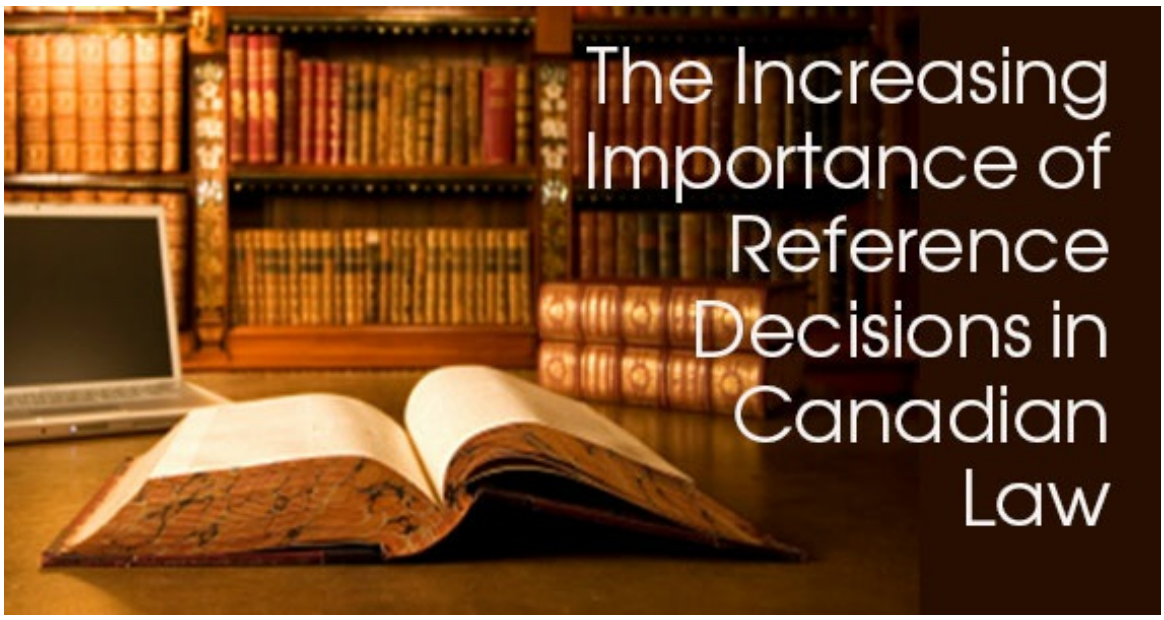
… a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

After applying those factors to the case and deferring to the Superior Court’s findings on social and legislative facts, the Supreme Court of Canada declared the impugned provisions to be unconstitutional. The Court also acknowledged this did not mean Parliament cannot legislate limits on sexual trade and new legislation is presently being considered.

Conclusions

Some of the decisions referred to in this article have had an unanticipated impact on everyday life. However, today we enjoy a more enlightened society than historically has been the case. The prevalence of a greater tolerance and adaptability is, in part, the result of landmark decisions by the courts which educate, reflect and reinforce the values of most Canadians.

The Increasing Importance of Reference Decisions in Canadian Law



Over the past several years, there have been a number of very significant reference decisions that have and will affect Canada's legal landscape. A reference case is different than a regular civil or criminal case that involves litigating parties. In a reference, the federal or provincial government submits questions to the courts asking for an advisory opinion on major legal issue(s). Often, the question involves the constitutionality of existing or proposed legislation. The federal government submits questions to the Supreme Court of Canada (SCC) under the *Supreme Court Act*. Over the past 15 years, there have been a number of very significant federal and provincial reference questions. For example, in 1998, the SCC was asked by the federal government to opine on whether it was legal, under either Canadian or international law, for Québec to unilaterally secede from Canada Interested parties can apply to the Court to make submissions as interveners. While the opinion given by the Supreme Court of Canada is not considered to be of the same precedential value as the decisions involving regular litigants, governments do not usually ignore the Court's opinion.

Provincial governments are able to submit questions to the provincial Superior Court or Court of Appeal. The process is similar to that of a federal government reference question, except that the government has the right to appeal the provincial court's decision to the SCC.

Over the past 15 years, there have been a number of very significant federal and provincial reference questions. For example, in 1998, the SCC was asked by the federal government to opine on whether it was legal, under either Canadian or international law, for Québec to unilaterally secede from Canada (*Reference re Secession of Québec, [1998] 2 SCR 217*). Fifteen governments and interest groups intervened. Québec refused to take part, so the court appointed an *amicus curiae* (friend of the court) to argue for the sovereigntist side of the case. The Supreme Court of Canada (SCC) wrote an extensive judgment, addressing federalism, the rule of law, democracy, constitutionalism and the protection of minorities as interrelated and equally important principles as to whether Québec could unilaterally secede (separate from Canada). While the SCC concluded that unilateral secession was not possible, it also held that should a referendum decide in favour of independence, the rest of Canada would have to negotiate the terms under which Québec would gain independence. The SCC also opined that the international law on secession did not apply to Québec's situation because international law does not address the situation where component parts of sovereign

states want to legally secede unilaterally from the “parent” state. Both the Canadian government and the Québec government were pleased with the SCC’s decision. [1 and 2] Noting that the meaning of marriage is not fixed to what it meant in 1867, the SCC held that it must evolve in Canada’s pluralistic society. The first impact of this decision occurred when the federal government drafted the *Clarity Act, SC 2000 c 26*, which gave the House of Commons the power to decide whether the proposed referendum question was clear, and whether a clear majority had expressed itself following the referendum vote, among other requirements. Thus, the *Québec Reference* directly influenced the federal government to ensure that the referendum questions were clearly expressed before such an important negotiation to separate would take place.

In 2004, the SCC addressed the issue of same-sex marriage (*Reference re Same-Sex Marriage, [2004] 3 SCR 698*). Before the reference case was heard, several provincial appeal courts had held that same-sex marriage was constitutionally valid. The federal government submitted four questions regarding the validity of proposed same-sex marriage legislation:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

3. Does the freedom of religion guaranteed by paragraph 2(*a*) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law–Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

The SCC held that the federal government had absolute jurisdiction over capacity to marry under the *Constitution Act, 1867, section 91(26)* . Noting that the meaning of marriage is not fixed to what it meant in 1867, the SCC held that it must evolve in Canada’s pluralistic society. The Court clearly said that the proposed legislation addressed only civil marriage as a legal institution, and had no effect on religious marriage. The overall effect of finding most sections of the proposed *Civil Marriage Act SC 2005, c 33* to be constitutional meant that there would likely be no court challenge after the Act was passed. Further, Canada became the fourth country (currently there are 16 countries) to legalize same-sex marriage.

In 2010, Québec initiated a reference to its Court of Appeal regarding the constitutionality of the *Assisted Human Reproduction Act,* SC 2004, c 2. The federal and Québec governments appealed the Québec Court of Appeal’s decision to the SCC (*Reference re Assisted Human Reproduction Act, 2010 SCC 61*). The result of the case was that several significant provisions were repealed. The Assisted Human Reproduction Agency was dissolved, and section 12 of the Act was amended to remove the requirement for a licence to reimburse expenditures. At issue was whether the federal legislation was a valid exercise of the criminal law power under *Constitution Act, 1867, s 91(27)*, or whether some sections were actually attempts to regulate medical practice and research, and thus outside of the legislative jurisdiction of the federal government.

The result of the case was that several significant provisions were repealed. The Assisted Human Reproduction Agency was dissolved, and section 12 of the Act was amended to remove the requirement for a licence to reimburse expenditures. All responsibilities under the amended Act were assigned to the Minister of Health. The decision allows provincial and territorial governments to re-examine their laws and regulations that govern fertility issues. The federal government continues to determine what expenses are allowed to be paid for surrogacy, organ and sperm donation.

Another provincial reference was made in 2011 to the British Columbia Supreme Court on the issue of polygamy. This was the *Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588*. Looking at the list of interveners (11 of them) and the length of the judgment itself, it seems that the Court dealt with the issues in a comprehensive manner. The BCSC's judgment is over 1300 paragraphs long. The reference was before the trial court, and there were many witnesses and a great deal of evidence for Chief Justice Bauman to consider. Because both the federal Attorney General and the British Columbia Attorney General argued that the polygamy prohibition was constitutional, the Court appointed an *amicus curiae* to argue that the polygamy provision (*Criminal Code section 293*) was unconstitutional.

According to section 293 of the *Criminal Code of Canada*, it is illegal for people to practice polygamy, which is a type of matrimonial or conjugal union involving multiple spouses. Under s 293, not only is any form of polygamy illegal, but any type of polygamous union that *purports* to result from a rite of polygamy (e.g., a "celestial marriage ceremony") is illegal. However, there is a community of polygamists in Bountiful, British Columbia, which, to date, the authorities in British Columbia have refrained from prosecuting. The apparent rationale for this non-prosecution has been a belief that s 293 would not withstand a challenge under the freedom of religion provision, section 2(a), of the *Canadian Charter of Rights and Freedoms*.

After hearing all of the evidence, Chief Justice Bauman concluded that there was compelling evidence of harm in polygamy. He also found that polygamy is harmful to society as it engenders higher rates of poverty and institutionalizes gender inequality.

Chief Justice Bauman held that s 293 offends *Charter* s 2(a) freedom of religion but is saved by *Charter* s. 1, as it is demonstrably justified in a free and democratic society. Chief Justice Bauman also concluded that s 293 violates the *Charter* s 7 liberty interests of children between 12 and 17 who are married into polygamy, and that *Charter* s. 1 does not save this violation. He ordered that s 293 be read down not to apply to prosecution of these children. Chief Justice Bauman concluded that *Criminal Code* s 293 does not offend *Charter* s 2(b) freedom of expression, nor s 2(d) freedom of association. Further, *Charter* s 15 is not offended as there is no religious or marital status discrimination.

To date in 2014, there have been two reference cases, which have had quite a bit of public attention. In *Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21*, the SCC was asked to address the naming of Federal Court of Appeal Judge Marc Nadon to the Supreme Court of Canada. The *Constitution Act, 1982* requires changes to the Supreme Court and its composition to be subject to the constitutional amending procedures—requiring the unanimous consent of Parliament and the provincial legislatures. Eligibility requirements for appointment to the SCC include that three judges are to be appointed from among judges of the Québec Court of Appeal or the Superior Court of Québec, or from *current* advocates with at least 10 years standing at the Barreau du Québec. Honourable Marc Nadon was formerly a member of the Québec Bar and was at the time of nomination a supernumerary judge from the Federal Court of Appeal.

First, the SCC held that the *Supreme Court Act, RSC 1985, c S-26, s 6* could not be read so as to allow the appointment of someone who was *at any time* an advocate in the Quebec Bar for 10 years. Next, the SCC held that Parliament could not enact legislation to make such a person eligible for one of the three Québec seats. The *Constitution Act, 1982* requires changes to the Supreme Court and its composition to be subject to the constitutional amending procedures—requiring the unanimous consent of Parliament and the provincial legislatures.

Most recently, in the *Reference Re Senate Reform 2014 SCC 32*, the SCC was asked to deal with six constitutional questions. …abolition of the Senate requires the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces. The SCC held that the Parliament of Canada did **not** have the authority to:

- make amendments to section 29 of the *Constitution Act, 1867*, to provide for fixed terms for Senators, renewable terms for Senators, term limits or retrospective term limits;

- enact legislation that provides a means of consulting the population of each province and territory as to its preferences for potential nominees for appointment to the Senate;
- establish a framework setting out a basis for provincial and territorial legislatures to enact legislation to consult their population as to their preferences for potential nominees for appointment to the Senate; or
- make an amendment to the Constitution to abolish the Senate by using the general amending procedure set out in section 38 of the *Constitution Act, 1982.*

The SCC held also that Parliament does have the authority under the *Constitution Act, 1982*, section 44 to repeal section 23(4) of the *Constitution Act, 1867,* regarding property qualifications for Senators (seven provinces and 50 percent of the population). On the other hand, a full repeal of section 23(3) would require a resolution of the legislative assembly of Québec. Finally, the abolition of the Senate requires the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces. Thus, while at least some Canadians want Senate reform, the SCC did not approve the unilateral approach to reform adopted by the current federal government.

These are but a few of the reference decisions that will have a significant impact on Canada's legal landscape. The advisory opinions that are issued can provide guidance to the federal and provincial governments as to important constitutional questions of the day.

Notes:

1. Lucien Bouchard's position as published by Le Secrétariat aux affaires intergouvernementales canadiennes

2. Lois Harder, ed. *The Chrétien Legacy: Politics and Public Policy in Canada* (McGill – Queen's Press 2006) p. 47.

Supreme Court Reins in Social Credit

The *Reference Re Alberta Statutes* case of 1938 (*Reference Re Alberta Statutes – The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act,* [1938] SCR 100) has been written about elsewhere but this monumental decision of the Supreme Court continues to possess vitality and serves as an inspiration to me as a lawyer and citizen, particularly in considering our country's commitment to fundamental rights.

… the opening act unfolded with trumpets resounding in the Alberta legislature, as the highly unorthodox new Social Credit government enacted a string of laws designed to raise the blood pressure of legal scholars and court political observers throughout the land. The case that went before the Supreme Court is also a fascinating drama performed by larger-than-life lawyers, politicians and justices who arguably for the first time were performing at a level that could attract admiration on the part of citizens and the legal community.

I also need to own up to a personal attachment to this court reference dating back to 1998, the 50 th Anniversary of th decision. My friend Dale Gibson, the distinguished legal scholar, had called me up one winter evening and asked whether I might like to perform as one of the Supreme Court justices in a re-enactment of this famous case. I was quick to say "yes, of course," and prepared to perform as Justice Arthur Cannon, appointed from the province of Quebec and an individual who was a key player in advancing our understanding of the underpinnings of the Canadian Constitution, with his creative and innovative decision-making in this matter. That might have been the one time in my life I was handed the opportunity to ask "penetrating" questions of great Edmonton lawyers in a dramatic role.

Returning to the actual case and the year 1936, the opening act unfolded with trumpets resounding in the Alberta legislature, as the highly unorthodox new Social Credit government enacted a string of laws designed to raise the blood pressure of legal scholars and court political observers throughout the land.

Premier William Aberhart's party had swept to power on the wings of an arcane and rather dubious economic theory which had as a central plank a promise of a monthly payment of $25 to every adult in the province. My father has told me a number of times about the way his mother seized on the promise, at a time of extreme poverty and desperation for many in the province, and proclaimed in ringing tones that he had the family's vote. The Great Depression had led to massive unemployment and hit the Prairie Provinces, dependent on agriculture and reasonable credit arrangements that could respond to a cyclical economy, as hard or harder than anywhere in the world. The matrix of Social Credit legislation, which, when put into law, proposed to radically alter the entire economy and manner of

governing the province, had major obstacles to overcome if it were to operate as intended. These new laws were designed to heavily regulate and tax all banks and establish new credit mechanisms. They also sought to forge a new relationship between the government and citizenry by creating obligations that would go along with receipt of the monthly dividends. However, the laws had to operate within Canada's federal system, where certain powers are set out in the Constitution as being exclusively federal in nature. Further, Albertans possessed citizenship rights that surely had to be taken into account.

I lack space to describe the various remarkable, not to say bizarre, aspects of the bills the government rammed through with no consideration for objections from the opposition. Let me just indicate that the dubious nature of the "social credit" laws would have been well known to the Premier, as his own Attorney General, John Hugill, is known now to have offered legal advice, recommending they not proceed as written. Premier Aberhart, known as "Bible Bill" to many due to his "Back to the Bible" radio broadcasts made as a fundamentalist preacher and righteous educator, was not the politician to be swayed by what he considered the minor inconvenience of contrary legal advice. Accordingly, the Premier pushed through an extensive legislative package despite the fact that legal experts across the country considered the overall social credit scheme to be beyond provincial competence because it invaded federal jurisdiction. Indeed, in a famous episode, the Lieutenant-Governor at one point asked Mr. Hugill whether the problematic bills could possibly be constitutionally valid. With refreshing candour the Attorney General, seated next to the Premier, admitted that they were not, ensuring that he would swiftly be asked for his resignation.

It was ultimately determined that the contentious Social Credit legislation would be dealt with by way of a reference by Ottawa to the Supreme Court of Canada in order to determine their validity. Two particular objects of scorn of the Social Credit government feature prominently in the legislation to be considered – banks and journalists not writing for the party newspaper. Premier Aberhart, known as "Bible Bill" to many due to his "Back to the Bible" radio broadcasts made as a fundamentalist preacher and righteous educator, was not the politician to be swayed by what he considered the minor inconvenience of contrary legal advice Both the *Bank Taxation Act* and the *Credit of Alberta Regulation Act* would, without much ado, be found by the Supreme Court to be beyond the province's powers, as dealing with banking and currency regulation, matters allotted to Parliament under our Constitution.

The attempt to rein in and severely restrict the powers of the press was laid out in the *Accurate News and Information Act*. Pieces of legislation with such grandiose titles are generally documents the informed citizen has learned to be wary of, as they usually portend content greatly at odds with the statutory brand name. Indeed, this legislation in reality was far less concerned with accuracy than with a desire to remove the ability of newspapers to operate as independent news gathering entities. For instance, the "*Alberta Press Act*" as it was generally referred to, enabled government to review all articles for possible offence and demand that equal space and prominence be allowed for a government communiqué in the offending paper, "correcting the record" as it were. As well, government could demand the complete disclosure of all journalistic sources and the naming of all contributors. Failure to comply could result in large fines or even closure of the newspaper. At any time, Big Brother could also prohibit the publication of information obtained from specified persons or censor the writings of targeted journalists.

The *Reference Re Alberta Statutes* was heard by the Supreme Court in Ottawa in January 1938. It has echoed down through history firstly because of the creative and innovative written and oral argument of the distinguished counsel involved. With regard to the Press Bill there were two ground-breaking judgments which stand to this very day as powerful statements of support for the importance of freedom of expression and freedom of the press as necessary aspects of our constitutional democracy. The most remarkable factum, or written argument, was filed on behalf of the Attorney General of Canada, who argued against validity. The barrister in question was Aimé Geoffrion K.C. of Montreal, a true powerhouse of the Canadian bar. He was equally at home in French and English and possessed a cultivated wit. Geoffrion was a leading "Canadian nationalist" in the best sense.

Geoffrion's argument included a "Brandeis brief" of 138 pages, designed to show just how radical and potentially disruptive to the Canadian legal and political order the legislation would in reality be. The brief contained in addition to straight legal argument diverse news releases of the Aberhart government, quotes from legislative debates, radio scripts and excerpts from books and articles on the "wacky" and potentially revolutionary aspects of Social Credit

theory. He fended off the argument that this was all irrelevant by persuading the Court that this was all properly linked to a contextual understanding of the legislation.

With regard to the Press Bill there were two ground-breaking judgments which stand to this very day as powerful statements of support for the importance of freedom of expression and freedom of the press as necessary aspects of our constitutional democracy. Chief Justice Lyman Duff rendered the judgment remembered as the first affirmation of an "implied bill of rights" which may be gleaned from basic principles said to underpin the text of the *British North America Act*, now the *Constitution Act, 1867*. Building on what Geoffrion had argued before him, Duff closely examined the combined effect of the Preamble to our Constitution, declaring that it is to be one similar in principle to the Constitution of the United Kingdom, and the power allocated to Parliament to make laws for the "peace, order and good government" of the country. He discerned that these encompass the protection of the public's access to an independent press in order that citizens may learn about, evaluate and periodically dismiss, if they wish, the government of the day. Duff conceived this right as one embracing the interests of the citizenry right across Canada and that of the federal government. As a consequence, a direct effort to dictate what the public will learn through newspapers and an impairment of its access to news sources must amount to an invasion of federal jurisdiction and so be beyond the power of a province. The Chief Justice, in eloquent language, enunciates that there is a fundamental right of public discussion, subject to limits such as the laws of defamation and sedition. In situating freedom of speech at the heart of our democracy, Duff quotes Lord Wright – freedom of discussion is "freedom governed by law." He concludes that the Press Bill would interfere with freedom of speech and of the press so as to substantially interfere with the workings of parliamentary institutions, having regard to their fundamental characteristics.

Justice Arthur Cannon provided a concurring judgment on the invalidity of the Press Bill that is striking as well. The Chief Justice, in eloquent language, enunciates that there is a fundamental right of public discussion, subject to limits such as the laws of defamation and sedition. His careful and lucid analysis reaches the conclusion that the Bill amounts to criminal law. It regulated the press not from the viewpoint of private wrongs or civil injuries but from the viewpoint of public wrongs or crimes. "The Alberta Legislature by this retrograde bill is attempting to revise the old theory of the crime of seditious libel."

The *Reference Re Alberta Statutes* has exerted considerable influence, by recognizing that a fundamental freedom – political expression is integral to Canadian democracy and the Canadian Constitution, and has been referred to in other major decisions of the Supreme Court, including *Switzman v. Elblingand A.G. of Quebec,* [1957] SCR 285 and *Reference Re Secession of Québec*, [1998] 2SCR217. Indeed, one could draw some fascinating connections between the latter decision of the Lamer Court -in 1998 and the 1938 decision. In the *Québec Secession Reference*, the *Reference Re Alberta Statutes* is seen to have initiated a line of cases which have developed a democracy principle, informing the design of our constitutional structure and now perceived to be an underlying constitutional principle that is a vital means of interpreting the written portions of the Constitution. It can create substantive legal obligations, and the Alberta government's efforts to interfere with political speech and the relationship between citizens and their government triggered the conclusion that basic rights, although not part of the text of the *Constitution Act*, had been violated.

The Whatcott Case: Balancing Free Speech and Social Harmony

Introduction: a Clash of Rights

The freedoms of conscience, religion, thought, belief, opinion and expression comprise some of our "fundamental freedoms" listed in section 2 of the *Charter of Rights and Freedoms*. They assure the free exchange of ideas, the practice of one's faith, the development of new ways of thinking and valuable social, legal, political and democratic progress. We exercise our free expression rights almost every day through our text messages, email, tweets and Facebook posts.

While free expression of our conscience, thoughts, beliefs and opinions usually is innocuous, it can also be critical and angry. There is no constitutional right to be free from feeling offended. Beliefs and opinions about others and the way we think they should live – their religion, their practices, their appearance, their culture, their sexual orientation – are sourced from stereotypes, personal perceptions or experiences. Some originate in our own values, distinctions between right and wrong, religion or ideology. Some people hold to these beliefs and convictions more steadfastly than others do.

Another right protected by the *Charter* and provincial human rights legislation is the equality of individuals under law on the basis of race, religion, ethnicity, disability, gender, age, sexual orientation, etc. Canadian law goes further – it prohibits the expression of hateful statements against an identifiable group on the basis of one of these defining attributes.

Canada has 14 different human rights statutes, one for each province and territory and the federal jurisdiction, each with its section related to discrimination and hateful statements:

- Canada (Federal): *Canadian Human Rights Act, R.S.C., 1985, c. H-6* , s. 13(1)
- Alberta: *Alberta Human Rights Ac, RSA 2000, c A-25.5* , s. 3(1)(a)(b)
- British Columbia: *Human Rights Code, RSBC 1996, c 210*, s. 7(1)(a)(b)
- Saskatchewan: *The Saskatchewan Human Rights Code, SS 1979, c S-24.1*, s. 14(1)(b)

- Manitoba: *The Human Rights Code, CCSM c H175*, s. 18(a)(b)
- Ontario: *Human Rights Code, RSO 1990, c H.19*, s. 13(1)
- Quebec: *Charter of Human Rights and Freedoms, CQLR c C-12* , s. 11
- Newfoundland and Labrador: *Human Rights Act, SNL 2010, c H-13.1* , s. 19(1)(a)(b)
- Prince Edward Island: *Human Rights Act, RSPEI 1988, c H-12* , s. 12(1)
- Nova Scotia: *Human Rights Act, RSNS 1989, c 214*, s. 7(1)
- New Brunswick: *Human Rights Act, RSNB 2011, c 171* , s. 7(1)(a)(b)
- Yukon: *Human Rights Act, SY 2002, c 116*, s. 12
- Northwest Territories: *Human Rights Act, SNWT 2002, c 18* , 13(1)(a)(b)(c)
- Nunavut: *Human Rights Act, SNu 2003, c 12* , s. 14(1)(a)(b)(c)(d)

Each statute is similar in principle to each other despite slightly different wording. The *Saskatchewan Human Rights Code* is typical:

> *No person shall publish or display… representation that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground. (s. 14(1)b)*

While the *Charter* protects the freedom and expression of conscience, religion, thoughts, beliefs and opinions, these things do not offend anyone unless and until they are *expressed* in some way. Then we ask: what should be the legal limits, if any, of our free speech?

What is Wrong with Hate Speech?

The concern with hate speech stems from how it could dehumanize a group and cause some people to have extreme detestation for members of that group. The presumption is that the targeted group appears inferior and its contribution to society decreases as members of the group feel rejected and are deprived of their basic human rights due to extreme societal detestation. The Supreme Court of Canada says hate speech "lays the groundwork for later, broad attacks on vulnerable groups that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide." (*Saskatchewan (Human Rights Commission) v. Whatcott, [2013] 1 SCR 467, 2013 SCC 11 (CanLII)*)

While this is the premise given to justify prohibition – even criminalization – of hate speech, legal restriction on hate speech remains controversial in Canada. Free speech proponents ask how suppression of strongly held views and religious convictions leads to greater social harmony. Can the expression of opinion on important social and political matters of the day ever be separated from what some people claim as harm to them? There is no constitutional right to be free from feeling offended. Is verifiable truth also to be legally suppressed because it may hurt feelings? Who is more 'vulnerable' – the expresser or the person who feels offended? Where do we draw the line on what word or tone is legal and that which is illegal?

The *Whatcott* Case

This brings us to the recent Supreme Court of Canada case of William Whatcott who expressed strong religious convictions against homosexuals. The Supreme Court of Canada says hate speech "lays the groundwork for later, broad attacks on vulnerable groups that can range from discrimination, to ostracism, segregation, deportation,

violence and, in the most extreme cases, to genocide." He was arrested 27 times, but was successfully prosecuted on only two. He was involved in over 21 judicial decisions, including the one decided by the Supreme Court of Canada that is the subject of this article. It deals with the balance between religion and free expression on one hand and the inflammatory hate speech on the other. It was a landmark case as evidenced by setting a record of attracting the most interveners in the Supreme Court's history: 26, when the average is 4.1. [1]

Whatcott, a socially conservative Christian, campaigned against homosexuality, Islam and abortion. He picketed and distributed flyers and posters to the public opposing these things, using what he admitted were "deliberately provocative" words. During 2001 and 2002 in Saskatoon and Regina, Whatcott's flyers entitled "Keep Homosexuality out of Saskatoon's Public Schools!" and "Sodomites in our Public Schools", drew complaints to the Saskatchewan Human Rights Commission. The claim was that the flyers promoted hatred against homosexuals.

The case eventually made its way to the Supreme Court of Canada. The main determination was whether Saskatchewan's section 14(1)(b), violated the *Charter's* right to free expression, but was nevertheless a "reasonable limit" and therefore legally acceptable.

The Supreme Court of Canada Analysis

What is "Hatred"?

The definition of "hatred" for the purposes of hate speech regulation was established in 1990 (*Canada (Human Rights Commission) v. Taylor, [1990] 3 SCR 892, 1990 CanLII 26 (SCC)*).

- First, courts apply the hate speech prohibitions objectively by asking whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred.
- Second, the legislative term "hatred" or "hatred or contempt" must be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This ignores repugnant and offensive expression which does not incite the level of abhorrence and rejection that might cause discrimination or worse.
- Third, tribunals must focus on the effect of the expression – whether it is likely to expose the targeted person or group to hatred by others. The offensiveness of the ideas expressed cannot justify restricting the expression. It is irrelevant whether the expresser intended to incite hatred or discrimination.

Free Expression is Violated by These Hate Restrictions

The Court found that the Saskatchewan prohibition against hate speech in section 14(1)(b) infringed freedom of expression guaranteed under the *Charter*.

Are Prohibitions Against Hate Speech Reasonable Limits?

The Court also found that the provincial rules against hate speech were limitations prescribed by law within the meaning of s. 1 of the *Charter of Rights* and are demonstrably justified in a free and democratic society. The Court, however, concluded the part of the Saskatchewan legislation prohibiting speech that " 'ridicules, belittles or otherwise affronts the dignity of' did not rise to the level of ardent and extreme feelings constituting hatred required to uphold the constitutionality of a prohibition of freedom of expression in human rights legislation." Those words in section 14(1)(b) of the Saskatchewan *Code* were not rationally connected to reducing discrimination and they unjustifiably infringed free expression. The Court struck them from the *Code*.

The Court went on to add that an expresser cannot hide behind morality, the sincerity of the belief, public policy debate, political discourse or even truth to justify what is otherwise hate speech.

Critique

Limiting free speech on matters of conscience and public policy should not be lightly done in a healthy democracy. It was a landmark case as evidenced by setting a record of attracting the most interveners in the Supreme Court's history: 26, when the average is 4.1.[1] The different conclusions reached by the different judges in *Whatcott* demonstrate that this is not an easy decision. One lower court judge declared, "anything that limits debate on the morality of behaviour is an intrusion on the right of freedom of expression." It appears that the federal Parliament agreed, as it had voted to repeal section 13 *Canadian Human Rights Act*, the equivalent of this Saskatchewan provision, before the Court delivered its *Whatcott* decision. [2]

Canada is a multicultural, multi-faith society. Shutting down peaceful expression of certain beliefs perilously interferes with public policy dialogue and is a prelude to state-sponsored speech and censorship. Governments and judges must be reluctant to quiet selected voices in the public square that they speculate might be considered "hate", itself a loaded concept. Whatcott himself claimed his advocacy was not against any individual group; he opposed some activities that some people engaged in and which was subject to legal debate and reform.

The basis for censorship remains shaky: is there less discrimination under a ban on public expression of opinions? Group rights are tricky to elaborate and judges should be slow to expand and pronounce on them at the expense of individual rights to religious beliefs and expression. The mantra of tolerance can be horribly intolerant to people whose actions we dislike.

The *Whatcott* decision creates some interesting distinctions. For example, one can legally ridicule, belittle and insult the dignity of others but one may not express anything that "exposes or tends to expose [anyone] to hatred" on the basis of gender, age, race, religion, disability, sexual orientation, etc. This will be adjudicated on a case-by-case basis. The lines of separation between opposing and denouncing something versus being very offensive versus likely promoting hatred are not obvious ones. Various judges in this case were unable to reach any consensus on these issues and facts, until it reached the Supreme Court of Canada, which rendered a unanimous decision.

Conclusion

After a dozen years and millions of dollars in time and money, the Court upheld the tribunal's decision regarding two of the four challenged pamphlets. Whatcott was ordered to pay $7,500 to the government-funded Saskatchewan Human Rights Commission and its legal costs throughout, even though Whatcott was successful in having half of his impugned flyers judged acceptable and more than half of the ordered compensation – as well as a major part of the legislation – struck out.

Notes:

1. Alarie, Benjamin R. D. and Green, Andrew J. " Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance." *Osgoode Hall Law Journal,* 48.3/4 (2010) : 381-410.

2. s. 13. (1) It is a discriminatory practice for a person or a group . . . to cause to be so communicated . . . *any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination*. [emphasis added] S.C. 1976-77, c. 33 (now R.S.C. 1985, c. H-6). This section was repealed by Bill C-304, *An Act to amend the Canadian Human Rights Act (protecting freedom)*, 1st Sess., 41st Parl., June 6, 2012, which received Royal Assent on June 26, 2013.

Indian Residential Schools: A Chronology

This chronology was compiled to convey, by historic milestones, how the Indian Residential School system came to be, how it embodied attitudes of its time, how critics were dismissed, and how, finally, the deep harm it did to many members of generations of Indian children was exposed in the course of a reconciliation process that continues. While Canada is doing its best to compensate, in many senses, for the failings of the system, much of the damage to individuals, and to First Nations culture, can never be put right.

1755 – Indian Department created as branch of British military to establish and maintain relations with Indians.

1820 – This decade sees Anglican and Methodist missionary schools established in Upper Canada and Red River settlement.

1842 – Governor General Sir Charles Bagot appoints Commission to report on "the Affairs of the Indians in Canada."

1844 – Bagot Commission finds reserve communities in a "half-civilized state"; recommends assimilationist policy, including establishment of boarding schools distant from child's community, to provide training in manual labour and agriculture; portends major shift away from *Royal Proclamation of 1763* policy that Indians were autonomous entities under Crown protection.

1847 – Dr. Adolphus Egerton Ryerson, Methodist minister and educational reformer, commissioned by Assistant Superintendent General of Indian Affairs to study Native education, supports Bagot approach (as does Governor General Lord Elgin); proposes model on which Indian Residential School system was built.

1856 – "Any hope of raising the Indians … to the … level of their white neighbours, is yet a … distant spark": Governor General Sir Edmund Head's Commission "to Investigate Indian Affairs in Canada."

1857 – *Gradual Civilization Act* passed; males "sufficiently advanced in the elementary branches of education" could be enfranchised (they would no longer be "Indians," and could vote).

1861 – St. Mary's Mission Indian Residential School, Mission, and Presbyterian Coqualeetza Indian Residential School, Chilliwack, first residential schools in B.C., established.

1862 – Blue Quills Indian Residential School (Hospice of St. Joseph / Lac la Biche Boarding School) established at St. Paul, AB; first residential school on the Prairies.

1896 – Programme of Studies issued; stresses importance of replacing "native tongue" with English. … This continued to be the policy for life of the system.

1867 – Confederation: *British North America Act* (now *Constitution Act, 1867*) establishes federal jurisdiction over Indians. Thus, while education is under provincial jurisdiction, Indian matter,s including education, are federal.

Fort Providence and Fort Resolution Indian Residential Schools established; first residential schools north of 60º.

1871 – Treaty No. 1 entered into at Lower Fort Garry: "Her Majesty agrees to maintain a school on each reserve …

whenever the Indians of the reserve should desire it." This promise, repeated in subsequent treaties (though hedged in Treaties No. 5 on), reflected desire of Indian leadership to ensure transition of their youth to demands of anticipated newcomer society.

1876 – *Indian Act* passed into law by Parliament.

1879 – Nicholas Flood Davin, journalist and defeated Tory candidate, commissioned by Prime Minister Macdonald, also Minister of the Interior, to produce proposal for Indian education; visits U.S. industrial schools grounded in policy of "aggressive civilization"; produces *Report on Industrial Schools for Indians and Half-Breeds*. Four residential schools already operated in Ontario; "mission schools" planned for the west. This date is generally taken to mark beginning of Indian Residential Schools, though the system had early predecessors in New France and New Brunswick, and several schools were already operating.

Duncan Campbell Scott, best known later as a "Confederation poet," joins Indian Affairs at age 17 as "copying clerk," at direction of Macdonald.

1885 – Residential schools necessary to remove children from influence of the home only way "of advancing the Indian in civilization": Lawrence Vankoughnet, Deputy Superintendent General, to Prime Minister Macdonald. Despite treaty promises, reserves lacked schools; removal, often forcible, of pupils to residential schools is option chosen by government.

1890 – Physician Dr. G. Orton reports to Indian Affairs that tuberculosis in the schools could be reduced by half; measures rejected as "too costly."

1892 – Regulations passed giving control over daily school administration to churches: Catholic, Anglican, Presbyterian, Methodist. (In 1925, Methodists joined most Presbyterians and others to form United Church, which continued to run schools.)

1896 – Programme of Studies issued; stresses importance of replacing "native tongue" with English. Children forbidden to speak their native language, even to each other, and punished for doing so. This continued to be the policy for life of the system.

1920 – "I want to get rid of the Indian problem." – D.C. Scott to Parliamentary Committee.

1904 – Dr. Peter Bryce appointed "Medical Inspector" to the Departments of the Interior and Indian Affairs.

1904 – Minister Sir Clifford Sifton announces closure of industrial schools – large urban institutions – in favour of boarding schools. They are closed over the next two decades.

1907 – Dr. Bryce visits 35 schools; reports appallingly unsanitary conditions, micro-organism-bearing ventilation, high death rates; "the almost invariable cause" is tuberculosis.

"The appalling number of deaths among the younger children … brings the Department within unpleasant nearness to the charge of manslaughter": Hon. S.H. Blake, K.C., Chair of Advisory Board on Indian Education (partner in what is now national law firm Blake, Cassels & Graydon), to Minister Frank Oliver.

1908 – Indian Affairs Accountant F.H. Paget reports school buildings in bad condition.

1909 – Duncan Campbell Scott appointed Superintendent of Indian Education.

1910 – "I can safely say that barely half of the children in our Indian schools survive to take advantage of the education we are offering them.": Scott to Major D.M. McKay, Indian Affairs Agent General in B.C.

The children "catch the disease … in a building … burdened with Tuberculosis Bacilli": Duck Lake Indian Agent

MacArthur.

1913 –Scott appointed Deputy Superintendent General of Indian Affairs (Deputy Minister), reporting to Minister of the Interior and Superintendent General Dr. William A. Roche.

1919 – Position of Medical Inspector for Indian Agencies and Residential Schools abolished (in the year of the Spanish 'flu) by Order- in-Council on recommendation of Scott "for reasons of economy."

1920 – "I want to get rid of the Indian problem." – D.C. Scott to Parliamentary Committee. A Scott-instigated amendment to the *Indian Act*, with church concurrence, compelled school attendance of all children aged seven to fifteen. Though no particular kind of school was stipulated, Scott favoured residential schooling to eliminate the influences of home and reserve and hasten assimilation.

1922 – Dr. Bryce publishes *A National Crime*: "The Story of a National Crime: Being an Appeal for Justice to the Indians of Canada, the Wards of the Nation, Our Allies in the Revolutionary War, Our Brothers-in-Arms in the Great War." He charges that, for 1894-1908, within five years of entry 30% to 60% of students had died, an avoidable mortality rate had healthy children not been exposed to children with tuberculosis: A "trail of disease and death has gone on almost unchecked by any serious efforts on the part of the Department of Indian Affairs." His 1907 recommendations on tuberculosis control not given effect, he says, "owing to the active opposition of Mr. D.C. Scott."

1923 – "Residential Schools" adopted as official term, replacing "boarding" (55) and "industrial" (16), housing 5,347 children.

1932 – Scott retires as Deputy Superintendent General after more than 52 years in the department. The anthologist John Garvin writes that Scott's "policy of assimilating the Indians had been so much in keeping with the thinking of the time that he was widely praised for his capable administration." He embodied a fundamental contradiction: While a rigid and often heartless bureaucrat, "his sensibilities as a poet [were] saddened by the waning of an ancient culture" (Canadian Encyclopedia).

1939 – 9,027 children are in 79 residential schools run by Catholic (60%), Anglican (25%), United and Presbyterian churches. "1939 [was] the approximate mid-point of the history of the system": John S. Milloy, *A National Crime*.

1944 – Consensus develops among senior Indian Affairs officials that integration into provincial systems should replace segregated Aboriginal education.

1951 – *Indian Act* of 1876, with many amendments, repealed; replaced with modernized *Indian Act* (today's Act, with amendments) conceptually similar to previous Act.

1955 – Jean Lesage, Minister of Northern Affairs and National Resources, department responsible for Inuit (then known as Eskimos), gets Cabinet approval for broad education policy in North. General policy is to substitute settlements for nomadic life. A school is built at Chesterfield Inlet, followed by Coppermine, and ten "hostels." Some Inuit had formerly been sent south to Indian Affairs schools. "Destitute" Métis were sometimes also enrolled.

1969 – Indian Affairs takes over sole management of residential schools from churches.

1969 – Indian Affairs Minister Jean Chretien produces assimilationist "White Paper" to abolish Indian status; strongly opposed by Indian organizations. Alberta Indian Association produces *Citizens Plus*, known as "Red Paper," in response. White Paper retracted two years later.

1971 – Blue Quills School, St. Paul, AB, becomes first Indian-run school, following month-long contentious occupation by elders and others.

1972 – National Indian Brotherhood (NIB, predecessor of Assembly of First Nations) produces *Indian Control of Indian Education*, advocating greater band control of education on reserves; adopted next year by government.

1975 – Six residential schools close this year; 15 remain.

1976 – NIB proposes amendments to *Indian Act* to provide legal basis for Indian control of education; rejected by government.

1996 – Royal Commission on Aboriginal Peoples recommends public investigation into violence and abuses at residential schools.

1978 – National Film Board produces first film ever on residential schools: *Wandering Spirit Survival School*, about a non-traditional school organized by parents who had themselves survived residential schools.

1984 – 187 bands are operating own (day) schools, half in B.C.; rest mainly on Prairies.

1993 – Archbishop Michael Peers, Primate of Anglican Church of Canada, apologizes to survivors of Indian residential schools on behalf of the Church.

1996 – Gordon Indian Residential School, Punnichy, Saskatchewan, closes; last of 139 Indian Residential Schools in Canada.

1996 – Royal Commission on Aboriginal Peoples recommends public investigation into violence and abuses at residential schools. Report brings these issues to national attention.

1998 – Government responds to RCAP Report with Statement of Reconciliation, including apology to those sexually or physically abused while attending residential schools, and establishment of Aboriginal Healing Foundation to assist Aboriginal communities to build healing processes that address legacy of system, with $350 million endowment.

2001 – Federal Office of Indian Residential Schools Resolution Canada created to manage and resolve large number of abuse claims filed by former students, resulting in 17 court judgments.

2003 – National Resolution Framework launched, including Alternative Dispute Resolution process, an out of court process providing compensation and psychological support for former students who were physically or sexually abused or had been wrongfully confined.

2004 – Assembly of First Nations (AFN) Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools leads to resolution discussions.

RCMP Commissioner Giuliano Zaccardelli expresses sorrow for the Force's role in the residential school system.

2005 – $1.9 billion compensation package announced to benefit former residential school students.

2007 – Indian Residential Schools Settlement Agreement, largest class action settlement in Canadian history, negotiated and approved by parties, and courts in nine jurisdictions, implemented. Of the 139 schools ultimately included in the settlement, 64 were Roman Catholic, 35 Anglican, 14 United Church, and the balance other or no denomination. The objective was reconciliation with the estimated 80,000 former students then still living, of over 150,000 enrolled since 1879. Elements are:

- Common Experience Payment to be paid to all eligible former students who resided at a recognized Indian Residential School;
- Independent Assessment Process for claims of sexual or serious physical abuse;
- Truth and Reconciliation Commission;
- Commemoration Activities;
- Measures to support healing such as the Indian Residential Schools Resolution Health Support Program and an endowment to the Aboriginal Healing Foundation.

Survivors report harsh and cruel punishments, suicides of others, physical, psychological and sexual abuse, poor quality and meagre rations and shabby clothing in the schools, and inability on leaving to belong in either the Aboriginal or larger world. Post-traumatic stress disorder, major depression, anxiety disorder and borderline personality disorder have been diagnosed, and many have criminal records.

2008 – Prime Minister Harper offers formal apology in Parliament for the Indian Residential Schools, in presence of Aboriginal delegates and church leaders. Indian Residential Schools Truth and Reconciliation Commission established June 1, with five-year mandate, later extended to 2015.

2009 – AFN Chief Phil Fontaine meets Pope Benedict XVI at Vatican. Pope Benedict expresses “sorrow” and “sympathy and prayerful solidarity”, but avoids apologizing.

After a rocky start, with resignations of original Commissioners, Truth and Reconciliation Commission begins work under Justice Murray Sinclair, an Aboriginal Manitoba judge who became the province’s Associate Chief Justice in 1988.

2010 – Truth and Reconciliation Commission begins hearings in Winnipeg.

2011 – University of Manitoba President David Barnard apologizes to Truth and Reconciliation Commission of Canada for institution’s role in educating people who operated the residential school system.

2012 – Truth and Reconciliation Commission releases Interim Report (PDF); reviews progress, explains statement gathering and document collection process. Tells of degrading treatment, unwarranted punishments, and physical and sexual abuse by “loveless institutions.” Makes numerous recommendations respecting public education about residential schools and about mental health and wellness programs, especially in the North, and that Canada and churches establish a cultural revival fund. Notes mandate to establish a National Research Centre.

Over 105,000 applications for Common Experience Payments were received by Canada by 2012 deadline; over 79,000 were found eligible and paid, the average amount being $19,412. September 19 was final deadline for Independent Assessment Process claims.

2014 – Commission’s hearings in more than 300 communities wrap up. “National Events,” in Winnipeg, Inuvik, Halifax, Saskatoon, Montreal and Vancouver have been held, as required by the Settlement Agreement, the final one taking place March 27-30 in Edmonton. A closing ceremony is planned for 2015. A final report is expected.

The Indian Act – Exemption from Taxation

The Canada Revenue Agency notes on its website that "We recognize that many First Nations people in Canada prefer not to describe themselves as **Indians**. However, we use the term Indian because it has a legal meaning in the *Indian Act*." For the same reason, the author uses the term in this article.

Aboriginal persons are subject to the same income tax laws as any other Canadian, however Section 87 of the *Indian Act* , which provides that "the personal property of an Indian or a band situated on a reserve" shall be exempt from taxation. This legislation predates the *Income Tax Act*, and considerable case law has developed over the years addressing the exemption's application to income tax matters. It is important to note that it is the location of the income which is determinative – simply living on a reserve does not guarantee all of an Indian's income is exempt. Similarly, an Indian living off-reserve can still earn income which is situated on a reserve and thus exempt from tax. The courts have concluded that income can be "personal property", and that the determination of whether such property is "situated on a reserve" is a question of fact requiring a review of all factors connecting the income to a reserve.

Over the years, a considerable body of interpretations and court decisions has accumulated, and the law in this area continues to evolve regularly. As such, this article can only provide basic information on the state of the law at this time, and specific advice will be required for any given set of facts. It is important to note that it is the location of the income which is determinative – simply living on a reserve does not guarantee all of an Indian's income is exempt. Similarly, an Indian living off-reserve can still earn income which is situated on a reserve and thus exempt from tax.

Some First Nations have entered self-governing agreements with the federal government, commonly giving up the rights to this exemption for their members.

Income from Employment

As employment income is common, considerable law has developed. Furthermore, the Canada Revenue Agency (CRA) has developed the following guidelines to determine when employment income will usually be exempt:

(a) The work is performed on a reserve – where at least 90% of the work is performed on a reserve, the employment income will all be exempt. Where less than 90% of duties are performed on the reserve, that portion of the income which is earned on the reserve will be exempt (for example, if the employee works on a reserve two out of five days, 40% of the income would be exempt).

(b) The employer is resident on a reserve AND the Indian employee lives on a reserve. Where an Indian receives EI benefits, CRA looks to the nature of the employment income which generated the EI rights. To the extent that income was exempt, the EI will also be exempt. However, where an employment agency is created on a reserve to engage the services of Indians for off-reserve employment, CRA looks to the residence of the off-reserve employer and will not apply this Guideline.

(c) Either the employer is resident on a reserve or the Indian employee lives on a reserve, AND more than half

the work is performed on a reserve - in this case, all of the income will usually be exempt.

(d) The most limited, and most complex guideline applies where the **employer is** either **an Indian band** which has a reserve, **a Tribal Council** representing one or more such bands, or **an organization controlled by such entities**, is **resident on a reserve** and is **dedicated exclusively** to social, cultural, educational or economic **development of Indians** who for the most part live on reserves. If the duties of **employment** are in connection with **non-commercial activities** carried out exclusively **for the benefit of Indians** who for the most part live on reserves, that employment income will usually be exempt.

It must be noted that these are guidelines, and the CRA has identified situations where the income is not connected to a reserve, despite technically falling within one of the above guidelines.

Employment Insurance (EI)

Where an Indian receives EI benefits, the CRA looks to the nature of the employment income which generated the EI rights. To the extent that income was exempt, the EI will also be exempt. For example, if Jake had two jobs, one which was exempt and accounted for 1/3 of his benefits while the other was not exempt, CRA would consider 1/3 of his EI benefits tax-exempt.

Income from Business/Self-Employment

Only a status Indian can benefit from the exemption, so it only applies to an unincorporated business. The shareholders of a private corporation are typically employees of their corporation – employment earnings would be subject to the guidelines discussed above. Most child support is non-taxable under current law. Where payments are received by an Indian living on a reserve, such receipts, whether for spousal or child support, will qualify for the exemption. If dividends are received, these would be considered investment income as discussed below.

The most significant connecting factor for self-employment income is the location where the business carries on its revenue-generating activities. The location of customers is also an important factor. Less important factors include whether the following are on a reserve:

- the residence of business owner;
- the business office;
- the books and records;
- administrative, clerical or accounting activities.

Here again,the CRA accepts that, where revenue-generating activities take place in part on a reserve, and in part off-reserve, the portion of the business income generated on a reserve can be exempted. The CRA has more detailed guidance for farming and fishing businesses specifically on its web site.

Investment Income

Based on a Supreme Court decision in 2011, the CRA considers interest income exempt where all of the following conditions are met:

- the interest arises from a chequing or savings account, term deposit or guaranteed income certificate (GIC) at a financial institution (eg a credit union or bank branch) located on a reserve;
- the financial institution is required to pay the interest to the Indian at a location of the financial institution on a reserve; and

- for a term deposit or GIC, the interest rate is fixed or can be determined when the investment is acquired.

The CRA considers dividend income will be exempt if the corporation operates only on a reserve, CRA considers dividend income will be exempt if the corporation operates only on a reserve, which requires the head office, management and principal income-generating activities of the corporation all be situated on a reserve.which requires the head office, management and principal income-generating activities of the corporation all be situated on a reserve. This is a more stringent test than that applied to business income, as discussed above.

Similarly, income from a Trust would be exempt if the income itself is connected to a reserve.

Rental and royalty income would be exempt where the rental property, or the resource generating the royalties, is located on a reserve. Rental of moveable property requires a more detailed review of the connecting factors, much like business income.

The location of the underlying property would determine whether capital gains are exempt. For assets used in a business,the CRA takes the position that the exemption would be pro-rated on the same basis as the business income.

Pension Income

Exempt income does not give rise to Registered Retirement Savings Plan (RRSP) contribution room, and as such no exemption would be available for funds withdrawn from an RRSP, or from a Registered Retirement Income Fund (RRIF).

Canada Pension Plan (CPP) premiums generally are not required on exempt employment or self-employment income. Old Age Security, including the Guaranteed Income Supplement, is considered unrelated to any other source of income. As OAS has no connection to a reserve, these amounts are not exempt. However, the individual can elect to pay premiums on such income. In such cases, a portion of the CPP benefits would be exempt, proportionate to the exempt income the benefits are based on. This is similar to the rule for EI discussed above. Similarly, pension income, retiring allowances and other amounts related to employment would be exempt in proportion to the employment income on which it is generated. As this could relate to income earned over a lengthy career, considerable analysis might be required to determine the exempt portion.

Old Age Security, including the Guaranteed Income Supplement, is considered unrelated to any other source of income. As OAS has no connection to a reserve, these amounts are not exempt.

Foreign Income

The CRA takes the position that income arising from a foreign country, such as the United States, cannot be connected to a reserve in Canada, and as such the exemption will not apply to such income.

Scholarships and Training Allowances

Scholarships received as a student in respect of a program which entitles the student to claim the education amount are exempt from taxation for all Canadians. Where a scholarship, bursary or fellowship does not qualify for this broad exception, but is paid by Indian and Northern Affairs Canada, the CRA presently accepts it is exempt. However, that policy is under review at the time this article was written (May, 2014).

The CRA takes the position that a training allowance will be exempt only if the training takes place on a reserve.

Spousal and Child Support

Most child support is non-taxable under current law. Where payments are received by an Indian living on a reserve, such receipts, whether for spousal or child support, will qualify for the exemption.

Goods and Services Tax (GST/HST)

The applicability of the *Indian Act* exemption to income tax is, as seen above, quite complex. In respect of the GST, as a general rule, goods bought on a reserve by Indians, Indian bands and unincorporated entities empowered by the band, are exempt from GST/HST. Goods bought off-reserve do not enjoy this exemption – the exempt person must take possession of the goods on a reserve. The vendor should maintain evidence of the transfer of possession, in order to demonstrate why they were not required to collect GST/HST. Goods imported from outside Canada are still subject to GST/HST.

Similarly, services provided on a reserve are GST/HST exempt. Services related to real estate on a reserve are exempt even where provided off-reserve.

Claiming the exemption requires the Indian to show proof of status (typically the Certificate of Indian Status), and the vendor should maintain evidence of the status of the purchaser and on-reserve delivery. Where GST/HST is paid in error, the Indian can apply for a refund of the GST/HST paid on Form GST 189.

Conclusion

Exemption from tax is clearly very valuable. However, eligibility for the exemption can be complex and uncertain. This area of the law will doubtless continue to evolve, and cases are regularly heard by the Tax Court on its application. It would be prudent, especially where eligibility may be uncertain, to maintain sufficient funds to pay the taxes in the event of a successful CRA challenge to the exemption.

Aboriginal Children and Child Welfare Policies

Although nearly everyone has heard the term, “Residential Schools,” it would appear that few really have a proper comprehension of the cruel realities and shame of Canada’s collective history. With its origins in “civilizing the ‘petits sauvages’” [1] for the purpose of serving as wives and mothers to British Colonists, to the later modification of trying to contain “the problem of indigenous populations,” [1] our First Nations people have been put through the wringer, and the legacy lingers on.

The mandate of the Residential School system was, “Remove. Isolate. Assimilate.” [2] Under an umbrella of “coercive recruitment,” [3] and a government motto of “kill the Indian in the child,” [3] First Nations children between the ages of six and sixteen were taken from their homes to live in religious boarding schools. A recent and provocative argument has suggested that the Child Welfare System has become the modernized version of the Residential School System. The government scheme was aggressive and imbalanced, and generally speaking, its plan was achieved.

Whereas the phrase “coercive recruitment” might have left room for interpretation, “apprehension of children” does not. Once the Residential School system was allegedly abolished in Canada, “Child welfare authorities faced growing caseloads of indigenous youngsters.” [3] A recent and provocative argument has suggested that the child welfare system has become the modernized version of the Residential School System. It has also been proposed that the child welfare system sought to replace the Residential School system as the preferred method of care for First Nations children because of the idea that these children were neglected by their families and were better off in state care. [4]

A fundamental difference was that by now, First Nations families were in a state of disconnect due to Residential Schools, and this meant that many parents lacked the necessary skills to raise their children. [4] The racism that underpinned the Residential School system had not been abolished alongside the schools themselves. Instead, many First Nations children ended up back in the state institutions they were supposed to be freed from. [4]

Child welfare services to First Nations people have created conflict between the federal and provincial governments. The *Constitution Act*, section 91(24) gave exclusive authority to the federal government to overlook “Indians and lands reserved for Indians.” The racism that underpinned the Residential School system had not been abolished alongside the schools themselves. Instead, many First Nations children ended up back in the state institutions they were supposed to be freed from. [4] The federal government later enacted the *Indian Act* to regulate the administration of treaty and status Indians. [5] Although the *Indian Act* remained silent on issues of child welfare, it was amended in 1951 to provide for the general application of provincial laws to Indian people insofar as they were inconsistent with the *Indian Act* itself or any treaties between Indians and the Crown. [6] As of 1951, the provision of provincial child welfare was extended to include First Nations people living on reserves. The outcome saw the provinces receiving the power to infiltrate jurisdiction that had normally been held by the federal government. [6] It was an overt discharge of responsibility.

When the Alberta child welfare system is examined in the context of the services it provides to First Nations families, it is difficult to see beyond the number of apprehensions that occur. In fact, it has been suggested that a new scoop of

First Nations children is occurring in the form of child seizures. [7] When I worked in Child Welfare Docket Court in Edmonton, it did not go unnoticed that most of the apprehended children and their parents were First Nations. Only nine per cent of Alberta children are aboriginal, yet they account for a staggering 78 per cent of children who have died in foster care since 1999. [8] These numbers demonstrate that the claim of a new scoop is rooted in something solid. Furthermore, it has been argued that the child welfare system is more damaging than the Residential School system due to the fact that children who are apprehended and placed in care spend even more time in isolation from other First Nations children, which results in a greater sense of vulnerability and cultural harm. [9]

There are echoes of, "Remove – Isolate – Assimilate" in the Alberta child welfare policies that should raise alarm. More troublesome is that these guidelines are open to interpretation, but the predominant interpretive method is one narrow lens: the Canadian colonial perspective. Nuance, cultural understanding, and acceptance of cultural differences does not factor into these decisions. Because of this, First Nations children are reported disproportionately to other children, and apprehended more often. When I worked in Child Welfare Docket Court in Edmonton, it did not go unnoticed that most of the apprehended children and their parents were First Nations. It baffled me: who was doing the reporting? Why the obvious disproportionality? Worse, why are so many parents appearing at court, confused and without any sort of official support, other than a First Nations Social Worker? What appeared missing was any sort of explanation from the province as to why the children were taken, and how the parents could get them back. That knowledge gap was a direct colonial tactic and a very successful one. The philosophy is similar to that of the Residential School mandate: keep impressionable First Nations children away from their families in order to protect them. Nothing promotes the loss of cultural identity more than separation. Apprehending First Nations children and placing them in predominantly white, Christian homes, seems to perpetuate the mandate of the Residential Schools.

The test used by the courts when considering child apprehensions and placements is the "best interest of the child". [10] This test often leads to a specific result: namely, that First Nations children are placed in non-Aboriginal homes. These numbers demonstrate that the claim of a new scoop is rooted in something solid. The focus on a good substitute home, a stable two-parent family, access to good health and educational facilities all but rules out many First Nations families from any chance of qualifying as placement homes for First Nations children. [11] For instance, many families do not have two parents, and reserves often have inadequate funding structures, which result in substandard infrastructure. [12] It is also unlikely that adequate housing, and access to a hospital and school are a reality for most First Nations families on reserves.

This also affirms that those kept in poverty situations make good targets for child apprehensions by the very government that put them in the poor situation in the first place. The "best interest of the child" legal standard all but guarantees the removal of First Nations children from their traditional homes into Canadian Christian homes. The outcome is a stripped identity, a reinforcement of systemic racist practices and continues to exacerbate an already damaged relationship. Until we ask genuinely, "What can we do to fix what we have created?" our chances for reconciliation remain a distant dream.

Notes: 1. Veronica Strong-Boag, "Fostering Nation? Canada Confronts Its History of Childhood Disadvantages" (Toronto: Wilfrid Laurier Press, 2011).

2. Erin Hanson, "The Residential School System*", Indigenous Foundations, University of British Columbia.*

3. J. Milloy, "A National Crime: The Canadian Government and the Residential School System 1879 – 1986," (Winnipeg: University of Manitoba Press, 1999).

4. Marilyn Bennett, Cindy Blackstock & Richard De La Ronde, "A Literature Review and Annotated Bibliography on Aspects of Aboriginal Child Welfare in Canada," *First Nations Caring Society of Canada,* 2005.

5. Andrew Norman Gull, "The Indian Policy of the Anglican Church of Canada from 1945 to the 1970's," (Peterborough: Trent University Press, 1992.

6. Erin Hanson, “The Indian Act: 1951 amendments” *Indigenous Foundations, University of British Columbia*.

7. Cindy Blackstock, “Why if Canada wins, Canadians lose: The Canadian Human Rights Tribunal on First Nations Child Welfare. *Children and Youth Services Review*, 33, 187-194, at 188.

8. Darcy Henton, “Death of Aboriginal Children in Foster Care is No Fluke of Statistics,” *The Edmonton Journal,* January 28, 2014.

9. A. Armitage, “Family and Child Welfare in the First Nations Communities,” *Rethinking Child Welfare in Canada*, ed. B. Wharf, (Toronto: Oxford University Press, 1993).

10.*United Nations Human Rights,* “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration,” *Convention on the Rights of the Child,* Article 3.1.

11. Samuel Bull, “The Special Case of the Native Child,” *The Advocate,* 1989, 523-531 12. See for example: “First Nations housing in dire need of overhaul”, CBC News, Nov. 28, 2011, but one of many articles showing substandard care by government agencies on reserves.

12. See for example: “First Nations housing in dire need of overhaul”, CBC News, Nov. 28, 2011, but one of many articles showing substandard care by government agencies on reserves.

Viewpoint 38-6: A Bench Mark case indeed!

Just as we were preparing the final touches to this issue of LawNow, my editorial assistant reminded me that we did not have a Viewpoint column. Perhaps I can blame the lead-up to summer time that this omission had slipped my notice. However, we were handed a gift by the Supreme Court of Canada on June 26, 2014. It released a landmark decision – historic and full of import for Canada – one that fits well into the theme for this issue. The theme is called **Bench Marks: Cases that Change the Legal Landscape**. And, the case is about Aboriginal Law, the focus of our Special Report. The Court's decision neatly encapsulates the ideas we are exploring in this issue.

The case is called *Tsilhqot'in Nation v. British Columbia, 2014 SCC 44*.

The unanimous judgment was delivered by Chief Justice Beverley McLachlin. The plaintiff, the Tsilhqot'in Nation, is a group of six bands with a common culture and history that live in a beautiful, remote valley bounded by rivers and mountains in central British Columbia. The Nation has never signed a treaty with the Crown and has always regarded the land as theirs. When the Province of British Columbia granted a forestry company logging rights on the land, the Nation sought a declaration prohibiting commercial logging and asked for aboriginal title on behalf of its people. After a very lengthy trial, a British Columbia Supreme Court judge agreed that the Tsilhqot'in were, in principle, entitled to their claim. The British Columbia Court of Appeal overturned that decision, and an appeal to the Supreme Court of Canada ensued.

The Supreme Court of Canada was asked to answer: what is the test for Aboriginal title to land, and if title is established, what rights does it confer? The Supreme Court ruled that aboriginal title flows from occupation of the land, in the sense of regular and exclusive use, which must be sufficient, continuous and exclusive. "Sufficient occupation" looks at aboriginal culture and practices and compares this in a culturally sensitive way to what is necessary to establish title in common law. Occupation includes sites of settlement as well as tracts of land regularly used for hunting and fishing. The Court found that the evidence accepted by the trial judge established the Tsilhqot'in claim to aboriginal title.

What rights does this finding of title confer? The Court wrote: "The nature of Aboriginal Title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land for future generations".

The Court set out what governments must do in their dealings with First Nations. Governments are already required to consult in good faith with aboriginal groups asserting title about proposed uses, and accommodate their interests. Now, the Court wrote: "Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and also must be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group. Governments must justify any incursions on Aboriginal title lands by ensuring that the proposed action meets the requirements of s. 35 of *the Constitution Act 1982.* That section recognizes and confirms the aboriginal and treaty rights of the aboriginal peoples of Canada. Governments must demonstrate a compelling and substantive government objective that goes no further than necessary to achieve their goals and the benefits that flow from the incursion must not outweigh harm to aboriginal interests.

The import of this decision can hardly be understated. This decision marks the first time that a court has recognized aboriginal title to a specific piece of land. First Nations people still own their ancestral land if they have not signed a

treaty with the Crown, and governments must respect that ownership. Going forward, the implications for natural resources-based industries and projects such as the Northern Gateway Pipeline are huge. Bob Rae, the chief negotiator on the Ring of Fire project in Ontario said: “Fundamentally, what the Court is saying is that governments and companies have to take aboriginal rights seriously.”

The ramifications of this decision will be felt across the country. Besides B.C. there are many places in Canada where treaties are not in place. One aboriginal rights lawyer is quoted as saying that the ruling could apply to as much as 40% of Quebec’s territory. The “Peace and Friendship” treaties entered into between aboriginal groups and the Crown in the Maritime Provinces have already been found by the Supreme Court of Canada as insufficient to settle ownership of unceded land.

This decision has the potential to fundamentally change the relationship between aboriginal and non-aboriginal Canadians. It has the potential to determine the development of our resource-based economy. It could shift the balance of power and negotiating strengths between governments and First Nations. It could spell a whole new world for aboriginal peoples. A Bench Mark case indeed!

Researching Aboriginal Law

Aboriginal law is a diverse and complex topic, which encompasses issues such as land claims, hunting and fishing rights, residential school settlements and self-government, among others. This article outlines some of the key legal documents, useful Internet sites, databases and other resources available when researching these legal issues. We at the Alberta Law Libraries have the legal resources and research expertise to help you with this and other areas of law.

As a starting point, *Halsbury's Laws of Canada* (available in print, or electronically on Quicklaw) has an entire volume devoted to Aboriginal Law. As well, Toronto lawyer Bill Henderson has a website with a helpful historical overview, titled A Brief Introduction to Aboriginal Law in Canada.

Other Useful Overview Sites

- Native Law Centre – University of Saskatchewan
- Aboriginal Affairs and Northern Development Canada (AANDC) – Government of Canada
- Royal Commission Report on Aboriginal Peoples – 1996
- Aboriginal Justice – Government of Alberta information on initiatives and programs currently underway in Alberta, as well as other topics of interest
- University of Alberta Library – Aboriginal Law Sources
- Bora Laskin Law Library (University of Toronto) – Aboriginal Law in Canada

Legislation

- Acts, Bills and Legislation – as collected by AANDC
- *Indian Act* (RSC, 1985, c I-5)– this is a central and contentious piece of legislation, in which such issues as Indian status, taxation and Aboriginal governance are included
- First Nations Gazette – the stated mission of the FNG is "to provide public notice of First Nation laws, by-laws, land codes, and other First Nation legislation, and to otherwise serve as the authoritative reference for First Nation law in Canada"
- CanLII – a useful site for searching both legislation and case law, which interprets the legislation. Further case law resources are provided below.

Treaties

- Treaty-Making in Canada – a comprehensive site by AANDC which includes the
- Treaty Texts and
- Maps of Treaty-Making in Canada

Land Claims

- This site is also part of the larger AANDC site and discusses both Comprehensive and Specific Claims. It provides information regarding the unfinished business of the Treaties and other related laws.

Case Law

- *Canadian Native Law Cases* – a 9-volume set covering Aboriginal cases from 1763 to 1978. Major cases are covered by *CNLR* after this period.
- *Canadian Native Law Reporter (CNLR)* - available in print at some Alberta Law Libraries and in Quicklaw
- *Aboriginal Law Netletter* (monthly digests by Quicklaw)
- *Aboriginal Law – Canadian Abridgment eDigest* – weekly updates with summaries of new cases related to aboriginal law including land claims, hunting rights, status under legislation. This is a Westlaw Canada product, but available for free online, including back issues.

A few key Supreme Court of Canada decisions:

- Assembly of First Nations – Council of the First Nations Chiefs *R v Marshall*, [1999] 3 SCR 456; [1999] 3 SCR 533 – clarification that Native fishing rights applied to fisheries only and not to all natural resources
- *R v Gladue*, [1999] 1 SCR 688 – there are special considerations that the courts must take into account when sentencing Aboriginals convicted of criminal offences
- *R v Sparrow*, [1990] 1 SCR 1075 – the Court for the first time set out criteria for determining whether a right can be considered an "existing" right and whether the government is justified in curtailing such a right

Advocacy and Awareness Groups

- Assembly of First Nations – Council of the First Nations Chiefs
- The Congress of Aboriginal Peoples, formerly the Native Council of Canada, advocates for non-status and off-reserve First Nations people, as well as Métis people.
- Metis National Council – represents the Métis Nation nationally and internationally
- Centre for First Nations Governance – one of a few organizations pushing for Aboriginal self –governance
- BearPaw Legal Education and Resource Centre – stated goal of this Alberta-based Centre is to help Aboriginal people navigate the legal system and gain awareness of their legal rights and obligations
- Native Counselling Services – an Alberta-wide organization which promotes wellness of Aboriginal individuals, families and communities through programs and services such as court workers, restorative justice, media productions, legal research and education

Residential School Settlements

- Indian Residential Schools Settlement – Official Court Website
- Truth and Reconciliation Commission – many good resources, not just legal ones

What Alberta Law Library Offers

Alberta Law Libraries is a network of libraries throughout the Province, which offers many legal resources to help both lawyers and lay people in their research:

- Access to paid online databases, including HeinOnline, in any of our locations, Quicklaw in Calgary and Edmonton, and Westlaw Canada in our other locations. These databases, in addition to legislation and case law, contain books and articles discussing Aboriginal legal issues.
- Many print resources, some of which are also available electronically, and most of which are listed in our Aboriginal Law Research Guide, including:
    - *Indigenous Law Journal* by the University of Toronto Faculty of Law
    - *Aboriginal Law Handbook* by Olthuis, Kleer and Imai
    - *Aboriginal Law: Cases, Materials and Commentary* by Borrows and Rotman
    - *Native Law* by Woodward
    - *Treaty Rights in the Constitution of Canada* by Henderson
    - *Treaty Rights in the Historic Treaties of Canada* by Isaac and Annis
- Professional law librarians who can assist you in your legal research. Consider Alberta Law Libraries your legal information navigator; please feel free to contact us!

Human Rights of Transgender Persons

Transgender persons are recognized in medicine as those who are born with the physical attributes of one gender, but who know at a deep level that their physical bodies do not match their inner gender. Federal and provincial human rights laws often protect transgender persons from discrimination in the areas of employment, services customarily available to the public, public notices, tenancy and membership in trade unions on the grounds of "gender", "identity" or "disability". For example, transgender people are protected from discrimination and harassment in employment, and in any terms and conditions of employment. Employers have a duty to accommodate a trans-identified person who needs time off work for medical reasons, such as surgery or recovery from surgery. Employers also have a duty to accommodate trans-identified persons who return to work, presenting in their "new" gender. This is the transgender person's inner identity. There is currently a case before the Alberta Human Rights Commission involving a transgender person's claim of employment discrimination (see: *Greater St. Alberta Roman Catholic Separate School District No. 734 v Buterman, 2014 ABQB 14*).

In addition to human rights decisions, there is an interesting *Canadian Charter of Rights* decision involving a transgender individual and the government. In *CF v Alberta (Vital Statistics), 2014 ABQB 237*, CF was born physically male, but believed at a deep level that she was female even as a child. Employers have a duty to accommodate a trans-identified person who needs time off work for medical reasons, such as surgery or recovery from surgery. Employers also have a duty to accommodate trans-identified persons who return to work, presenting in their "new" gender. Once an adult, CF transitioned to living as a female, and legally changed her name in June 2011 to reflect her identity as a female. Alberta's Director of Vital Statistics ("Director") issued a birth certificate with CF's new name, but the certificate still reported her sex as "male". The Director interpreted the applicable statute, The *Vital Statistics Act*, RSA 2000, c V-4 ("*VSA*") (repealed and replaced by SA 2007, c-4.1), as requiring transgender people to have genital reconstructive surgery in order to have the sex indicator on their birth certificate changed. CF was "content with the anatomical sex structure she was born with" and applied under the *VSA* to ask the Director to correct the error on her birth certificate. CF included documentation that attested to her lived identity as female. Nevertheless, the Director rejected CF's application in March 2012, because at the time of birth, the sex indicator was based on the evidence she was male, and thus there was no error as required by the legislation. The *VSA* required that in order to change the sex on CF's birth certificate, genital surgery would be required.

CF argued that the Director's decision denied her rights under *Charter* section 7 (life, liberty and security of the person) and section 15(1) (equality). CF argued that the *VSA* and the Director's interpretation of it "deprived her of liberty and security of the person by making it impossible for her to have an accurate birth certificate unless she submitted to unwanted and potentially dangerous surgery". While this argument was not abandoned formally, it was not addressed in the written or oral submissions made at the hearing. The case focused on the *Charter* section 15(1) "equality" issues.

CF argued under *Charter* section 15(1) that the *VSA* and the Director's interpretation of it discriminated against transgender people, who are "forced to have birth registrations that do *not* reflect their lived sex unless they submit to Genital Surgery" (para 20, emphasis original). CF argued that this amounted to discrimination on the combined grounds of sex, mental or physical disability, gender identity and trans status.

The Director argued that the *VSA* provided a benefit to a disadvantaged group (i.e., transgender persons who have undergone genital surgery) and thus was an ameliorative program under *Charter* section 15(2). This section permits governments to establish ameliorative programs that are targeted at disadvantaged groups and thereby protects

these programs from claims of “reverse discrimination”. Justice B.R. Burrows dismissed this argument, holding that the accommodation provided by the *VSA* for transgender persons who have genital surgery is not relevant to those who do not have surgery. The discrimination actually results from the *VSA* not recognizing the fact that CF has transitioned and is now female.

In discussing whether there was discrimination under *Charter* section 15(1), Justice Burrows followed a two step analysis that was set out in *R v Kapp, 2008 SCC 41* (para 17):

(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

In analyzing step one of *Kapp*, Justice Burrows relied on an Ontario decision that occurred before Ontario amended its human rights legislation, (*Human Rights Code, RSO 1990, c H.19*) to include “gender identity” as a protected ground (amended SO 2012, c7, s1). In *XY v Ontario (Minister of Government and Consumer Services), 2012 HRTO 726*, the Ontario government conceded that their existing law that required surgery drew a distinction based on disability, sex, or both grounds. … courts and tribunals are starting to recognize the disadvantage faced by transgender persons and are willing to provide appropriate remedies for the human rights violations experienced by them. The Ontario Human Rights Tribunal concluded that transgender persons were covered under its *Human Rights Code*, RSO 1990, c H.19, under either the basis of sex or disability. Justice Burrows noted that while there had been no concession by the Alberta government in the CF case, he had no difficulty holding that the *VSA* birth registration system treated transgender persons differently than non-transgender persons, and differently than those transgender persons who were willing to have genital surgery. While Justice Borrows did not identify gender identity or transgender status as an analogous ground under *Charter* section 15(1), he did hold that transgender persons in CF’s position, who wish to have their birth certificates reflect their true identity without having surgery, are treated differently and disadvantageously under the *VSA*.

In analyzing step two of *Kapp*, Justice Burrows relied on the affidavit evidence from psychiatrist Dr. Dan Karasic, which established the “disadvantage, vulnerability, stereotyping suffered by transgendered persons”. Dr. Karasic also provided evidence indicating that the vast majority of transgender persons do not have surgery due to access difficulties and personal preferences. CF provided evidence of her treatment at the hands of the government—described by Justice Borrows as “insensitive at best”. Justice Burrows noted that the response of the Director sends the message to transgender persons that the prejudice they experience is insignificant and that they should ‘come out’ as members of a third sex….and expect to be accepted without question” . Justice Burrows found that the *VSA* birth registration regime thus amounted to discrimination contrary to *Charter* section 15(1). He held that to the extent that the *VSA* did not permit CF to obtain a birth certificate that contained her lived sex, it was inconsistent with the *Charter* and was of no force or effect. He also ordered the Director to issue CF a birth certificate recording her sex as female within 30 days of the judgment (using *Charter* section 24(1)).

The Alberta government introduced an amendment to the *VSA* on May 5, 2014, which allows the Registrar to amend a birth certificate under certain circumstances even if there was no error (as was required previously).

These cases indicate that courts and tribunals are starting to recognize the disadvantage faced by transgender persons and are willing to provide appropriate remedies for the human rights violations experienced by them.

For a more in depth discussion of the CF case, please see: Jennifer Koshan “A Vital Judgment: Upholding Transgendered Rights in Alberta” ABlawg.ca, May 7, 2014. I have relied on some of this blog article for the discussion of the *CF* case.

New legislation eases moves into or out of Alberta for not-for-profits

In mid-May a measure was quietly passed in the Alberta Legislative Assembly that will allow existing not-for-profit corporations to transfer into or out of the province without having to go through re-incorporation or amalgamation and the accompanying onerous paperwork.

Not-for-profit corporations are generally constituted as a legal structure known as a non-share capital corporation, although they are familiar to the public as not-for-profits. Bill 12, the *Statutes Amendment Act* (2014), included provisions allowing for 'continuance' of entities incorporated under federalor provincial non-share capital corporation legislation, into Alberta, and for continuance of Alberta *Societies Act* corporations into other jurisdictions. Whether the continuance is into or out of Alberta, it must also be permitted by the legislation elsewhere.

"Non-share capital corporation" and "not-for-profit" are both distinct from "non-profit organization", which – like "registered charity" – is a federal *Income Tax Act* term, and is associated with preferential tax treatment, rather than corporate status. Whether a non-share capital corporation or not-for-profit has to pay tax is based on what it does and how any proceeds it generates are used, not on its legal form.

Before the new legislation, a not-for-profit corporation wanting to move to Alberta needed to establish or assume control of a separate corporation in the province and then transfer its assets into that corporation if it wanted to switch jurisdictions.

Where the not-for-profit was a registered charity, this entailed getting charitable status from the Canada Revenue Agency for the separate corporation prior to conveying any assets from the old entity to the corporation in the new jurisdiction. Broadly, governments are moving away from statutes mandating direct regulatory oversight and limitations on powers of non-share capital corporations to an approach that relies more on transparency and accountability or stakeholder mechanisms to provide checks and balances on corporate actions. Even where getting charitable status wasn't necessary, the not-for-profit often faced a major administrative burden to transfer its assets and liabilities to the second corporation. Continuance allows all the corporation's assets to be transferred automatically, rather than being conveyed through separately documented transactions.

The new provisions bring welcome flexibility as various jurisdictions are in the process of updating their not-for-profit or non-share capital corporation statutes. This has led many organizations to re-examine their corporate structure and determine whether it is the most appropriate available and/or whether it reflects their current operations.

Often, corporate structures have not changed for many years, and have failed to keep pace with the evolution of the organization in other areas. Not infrequently, groups will have altered their mission, their programming or their procedures without actually taking the steps to update the legal framework within which they operate to reflect those changes.

Moreover, there has been an important shift in the model used for corporate legislation. Broadly, governments are moving away from statutes mandating direct regulatory oversight and limitations on powers of non-share capital corporations to an approach that relies more on transparency and accountability, or stakeholder mechanisms to provide checks and balances on corporate actions.

While generally laudable, and in keeping with the model that has been adopted with respect to the statutory

framework of for-profit corporations in recent years, moving to this approach is not as simple – or as appealing – for many voluntary sector groups as at first it might appear. Continuing into a jurisdiction with a more appropriate corporate statute is an option often exercised by for-profit corporations, and which should be available to not-for-profits as well.

The challenges for organizations of moving to this new approach found in most recent non-share capital corporate statutes have been apparent during the introduction of *Canada Not-for-profit Corporations Act* (*CNCA*). The *CNCA* replaces the *Canada Corporations Act* (*CCA*), and organizations are expected to transition to it within a three-year period that ends in October 2014. Both for governance and cost reasons many groups are reluctant to operate under the *CNCA.*

The regulatory approach adopted in the *CNCA* closely parallels the one in for-profit corporate legislation, with members being treated as the same as, or at least akin to, shareholders. For not-for-profit groups that focus exclusively or primarily on providing services to their members, that makes some sense. However, for groups that serve a larger public purpose – whether as charities or non-profit organizations – members are only one of their stakeholders, and holding the organization accountable largely through members can give short shrift to the role of those other constituencies.

This is recognized to a limited extent in the *CNCA* by providing a faith-based defence where an action or decision of *CNCA* religious corporation made on the basis of a tenet of faith held by the corporation's members is challenged. The provision offers some acknowledgement that a model based on member accountability is not appropriate in every instance. That said, for non-religious groups the *CNCA* provides much less flexibility for designing a structure taking into account multiple stakeholders than did the old *CCA* or does the current *Societies Act*.

Perhaps of even greater concern are the cost implications of certain *CNCA* provisions designed to promote corporate accountability. These include thresholds mandating the type of financial review an organization must have. These can force a corporation to pay for an expensive audit done by a qualified Public Accountant, even where the circumstances of the corporation may not warrant that level of review of its finances. The *Societies Act* allows more flexibility for the organization to determine for itself the type of review that is appropriate for it.

Given these and other considerations, the opportunity for organizations to more easily opt to become an Alberta society, rather than be constituted under some other legislation, should be embraced.

As of the time of writing, the new Alberta legislation had received Royal Assent, but had not been proclaimed in force. Once that is done, there will be more and better options for not-for-profit corporations: the sooner, the better.

Compassionate Care: A New Basis for Temporary Unpaid Leave from Work

> *. . . provisions for eight weeks of unpaid compassionate care leave for individuals charged with caring for terminally ill family members. This Bill would help to ensure that Albertans do not have to risk employment and careers while performing their familial duties.*
>
> *- Mr. Jeneroux, on introduction of Bill 203, the Employment Standards Compassionate Care Leave Amendment Act, 2012, in the Alberta legislature (Hansard)*

Introduction

We say that work-life balance is important to us. According to the Canadian Mental Health Association, 58% of Canadians report feeling overloaded when trying to balance pressures of work, home and social life. They are looking for work that emphasizes and allows for this work-life balance.

Work-life balance is sometimes achieved by obtaining leave from work for annual vacation, parental leave, military leave and other necessary times of domestic pressure. With new "compassionate care" leave provisions brought into force on February 1st, 2014, (*Employment Standards Code*, RSA 2000, c E-9, Division 7.2) Alberta joins other Canadian jurisdictions in creating another new minimum legislated leave requirement for employers to follow. Compassionate care leave is job-protected, unpaid leave for up to eight weeks to allow a worker to provide care or support to a seriously ill family member. Compassionate care leave is a welcome respite for those in difficult family situations and employees now have another category of protection with which to balance work-life demands.

This article describes the new compassionate care leave law in Alberta from the perspective of both employers and employees. Alberta's provisions will also be compared to those in other provinces, and this new compassionate care leave is compared to other forms of leave such as parental leave.

What is Compassionate Care Leave?

Compassionate care leave is job-protected, unpaid leave for up to eight weeks to allow a worker to provide care or support to a seriously ill family member. An employee is entitled to take the leave only once the employee has worked at least 52 consecutive weeks with the employer *and* is the primary caregiver of the ill family member.

The employee can be part-time or full-time and still meet the requirement of 52 consecutive weeks of employment with the same employer. The eight weeks of leave must be taken within 26 weeks, but can be broken into two different periods. If the leave is taken in two periods then each period must be at least one week long. Normally, an employee is required to provide an employer with two weeks notice prior to beginning the leave, but this will be waived where circumstances justify a shorter period. The family member being cared for must be so "seriously ill" as to be near death. A physician must issue a certificate stating the dependent family member has a medical condition with a significant risk of death within 26 weeks. If the family member does not die within 26 weeks, then an employee can follow the same requirements to get another eight-week leave for the next 26-week period.

Eligible Family Members

The Alberta definition of “family member” is very expansive and includes:

- a spouse or common-law partner of the employee;
- a child of the employee or of the employee’s spouse or common-law partner;
- a parent of the employee or a spouse or common-law partner of the parent;
- a sibling or half-sibling;
- grandparents of the employee or the employee’s partner;
- a parent of the employee’s partner;
- the partner of the employee’s grandchild;
- the partner of a parent of the employee’s partner;
- the partner of a sibling or half-sibling;
- a child of the partner of the employee’s parent;
- an uncle or aunt of the employee or the employee’s partner;
- the partner of the employee’s uncle or aunt;
- a nephew or niece of the employee or employee’s partner;
- the partner of the employee’s nephew or niece;
- a current or former foster parent of the employee or employee’s partner;
- a current or former foster child of the employee, and the foster child’s partner;
- a current or former ward of the employee or employee’s partner;
- a current or former guardian of the employee, and this guardian’s partner;
- the adult interdependent partner of the employee and this partner’s child;
- the adult interdependent partner of the employee’s parent; and
- a person whether or not related to the employee by blood, adoption, marriage or common-law partnership, or by virtue of an adult interdependent relationship, who considers the employee to be like a close relative or whom the employee considers to be like a close relative.

See this illustration (PDF) for a graphical depiction of the expansiveness of who is eligible as a family member.

Qualifying for Compassionate Care Leave

The family member being cared for must be so “seriously ill” as to be near death. A physician must issue a certificate stating the dependent family member has a medical condition with a significant risk of death within 26 weeks. The primary caregiver can change, but only one family member can be a primary caregiver at any given time.The physiciar must also state on the certificate that this family member requires the care or support of other family members for an employee to be able to take leave. Providing *any* amount of care or support to an ill family member is insufficient to ge compassionate care leave. The employee needs to be the “primary caregiver.” The employee then gives this certificate to the employer prior to beginning the compassionate care leave, except in emergency situations.

The primary caregiver can change, but only one family member can be a primary caregiver at any given time. Sharing compassionate care leave is in the laws of other provinces. For example, New Brunswick’s compassionate care law states that the combined amount of leave taken by two or more employees for the care of the same person cannot

exceed eight weeks.

Returning to Work

An employee's compassionate care leave ends after eight weeks or at the death of the seriously ill family member, whichever comes first. An employee should give the employer at least two weeks written notice of returning to work, although employers can postpone the return to work for another four weeks in writing. The employer can return the employee to the original job, or provide the employee with *alternative work of a comparable nature* with no reduction ir compensation. In some cases, a different job or title might mean a lot to the employee, who expected to return to the same position.

Comparing Alberta's Compassionate Care Leave

Alberta is the last province or territory in Canada to introduce compassionate care legislation to guarantee job-protected leave for employees. Compared with other provinces, Alberta is the only jurisdiction to require 52 weeks of continuous employment prior to being eligible for leave. Most other provinces require no length of employment to be eligible. The provisions were largely introduced to complement federal compassionate care benefits paid under the Employment Insurance program. Federal statistics show that approximately 500 Albertans per year received EI benefits on compassionate care grounds over the last five years. Despite many similarities between the two programs, one may be eligible for provincial compassionate care leave and not for federal compassionate care benefits, and vice-versa.

Compared with other provinces, Alberta is the only jurisdiction to require 52 weeks of continuous employment prior to being eligible for leave. Most other provinces require no length of employment to be eligible. The longest period after Alberta is three months, in Nova Scotia and Quebec. Alberta's requirements of two weeks notice prior to taking leave is more stringent compared to provinces such as British Columbia where no advance notice is required, but the Alberta rules are also flexible. Any employer in Canada can at any time voluntarily extend more than these legislated minimums.

See this Chart (PDF) for a more detailed comparison of the laws of compassionate care leave across the country.

Compassionate Care and Other Leaves in Alberta

Other leaves under Alberta's *Employment Standards Code* include maternity leave, parental leave, and reservist leave. Similar to compassionate care leave, these other three leaves all allow for employees to get their previous (or equivalent) jobs back when they return to work.

For maternity leave a pregnant woman also needs 52 consecutive weeks of work, similar to compassionate care leave. Maternity leave requires at least six weeks notice prior to leave, triple that of compassionate care leave. A medical certificate attesting to the pregnancy is not required unless requested by the employer. The leave allows for up to 15 weeks and must begin during the 12 weeks prior to the estimated delivery date.

Parental leave requirements are similar to maternity leave. A working parent of a newborn needs to have had 52 consecutive weeks of work with an employer, and needs to provide six weeks notice with some exceptions. Parental leave extends to 37 weeks within a 52-week period after the child's birth or adoption.

Reservist leave is for working Canadian Forces military reservists deployed to a military operation. The reservist needs to have logged at least 26 consecutive weeks of employment and an employer can request proof of the reservis call, but this is optional, unlike the medical certificate for compassionate care.

These other leaves grant much more leave time, and do so on less proof of eligibility. Alberta is the only province in

Canada not to have bereavement leave which can be taken after the death of a family member.

Can a landlord charge a tenant for renovations?

I just got a question from a tenant. The landlord replaced all the windows in the rental property, and then gave the tenant a bill for half the cost of the renovations. Seriously.

The tenant doesn't have to pay the landlord the money. There are some costs that are simply the costs of doing business, and maintaining the property by replacing windows is just one of many costs this landlord is going to run into.

If the tenant had broken a window because, I don't know, there was an intense game of indoor baseball going on, then yes, for sure, the landlord could charge the tenant for the repair and replacement of the window. Or the landlord could charge the tenant when the tenant moved, and keep some of the security deposit to cover the cost.

The Alberta *Residential Tenancies Act* doesn't actually set out who is responsible for repairs and that's why sometimes, there is confusion about what repairs the landlord can charge the tenant for, and what repairs the landlord can't. The common sense approach is that any "big" repairs are the landlord's responsibility and "teeny tiny" repairs are the tenant's responsibility. So, while the tenant can change the lightbulb, it's the landlord that installs the new light fixtures when the old ones break.

There are also the Minimum Housing and Health Standards that can help us to decide who should pay for repairs. One of the landlord's responsibilities is to make sure that the rental property meets these standards. The standards set out that the windows must be in good repair, free of cracks and weatherproof. So, if the windows in the property do not meet this standard, then it's the landlord's job to make sure that the windows get repaired or replaced. If the property is not being maintained, then the tenant can call Environmental Public Health and talk to an inspector about the problem that they're having with the rental.

What should the tenant do? The tenant should tell the landlord, in writing, that he or she is not going to pay for the windows. The tenant could put in reasons why she isn't paying (and while it might be tempting to write that you aren't paying because the charge is ridiculous, it's probably better to refrain). Hopefully the landlord will just go away at this point. If the landlord still insists on being paid, then there are three ways the landlord may react.

- The landlord could sue the tenant for half of the cost of the renovation. The landlord is going to have to convince a judge that the tenant should have to pay for the windows, which seems unlikely.
- The landlord could keep the security deposit when the tenant moves out. If the tenant doesn't agree with a charge made against the security deposit, then the tenant can bring an application in Provincial Court or through the Residential Tenancy Dispute Resolution Service for return of the security deposit.
- The landlord could pass the bill to a collection agency. If the tenant is contacted by a collection agency, then the tenant can inform the agency in writing that the tenant is disputing the debt, and ask that the landlord prove the debt in court. If the tenant does that, then the collection agency cannot contact the tenant any longer. Service Alberta has a tipsheet about dealing with collection agencies.

In the meantime, the tenant might want to think about moving. If the landlord thinks that the tenant should pay for the windows, what else does he think the tenant should pay for?

Note: Laws about renting are different in each province and territory. Here is a list of places where you can find out about the law in your province.

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Protection Orders in Dangerous Circumstances

When trying to deal with family violence, everything can feel overwhelming, especially navigating the legal system. Victims of violence sometimes require a protection order that provides for no contact between them and the perpetrator of violence. There are several legal remedies available including:

- criminal charges and conditions;
- Emergency Protection Orders (EPOs);
- Queen's Bench Protection Orders (QBPOs);
- Restraining Orders; and
- no contact conditions in other family law orders.

Factors such as police intervention, the parties' relationship, the nature of the violence, and the degree of urgency all play a part in choosing the best type of order.

First, a victim of violence must decide if a protection order is even necessary. Orders that prevent people from doing things they are normally free to do, such as travel about and communicate with other people (orders that restrict someone's liberty) are taken very seriously by judges. It is expected that victims also explore non-legal options to protect themselves. This doesn't mean that victims need to turn their lives upside down and go on the run; after all, it is the perpetrator who is acting inappropriately and blame should only rest on that person. However, victims should take other steps to keep themselves safe, in addition to seeking legal remedies, such as blocking phone and social media contact with the perpetrator. Sometimes these steps are effective in stopping the violence. However, if they prove to be ineffective, or if there is no safe alternative step, then seeking a court order will be appropriate.

Second, it is a basic rule of fairness that people should be given notice that an order is being made against them and they should have the opportunity to respond. There are always (at least) two sides to every story. Only in very limited circumstances should a judge make an order without notice to the other party. Those who experience family violence often require court orders for other matters such as parenting time or financial support because these issues are usually intimately connected. In these cases, no contact conditions can be combined with parenting or support orders. Such circumstances may include where it is impractical because of an emergency or when giving notice would put the victim in a dangerous situation. If it is possible to safely give notice to the perpetrator of violence, then notice should be given. Generally, if the perpetrator has a lawyer, notice, even if it is very short, should be given to that lawyer.

Most acts of violence are criminal offences, so a victim should contact the police and see what assistance they can offer. If charges are laid, often the perpetrator will be subject to conditions not to contact the victim. These conditions may be enough for the victim and no further legal remedies may be required. The police and parole/probation officers will enforce and monitor these conditions. However, there are many reasons why police may not be able to lay a charge in the first place or, they may not be able to put no contact conditions in place. So, it may be appropriate for a victim to instead, or in addition, obtain an order under civil/family law.

Emergency Protection Orders (EPOs) and Queen's Bench Protection Orders (QBPOs) in Alberta

The Alberta *Protection Against Family Violence Act* creates two types of orders, EPOs and QBPOs. This law strictly defines "family members" and "family violence". If a victim's situation does not fit into these definitions, they should apply for a different type of order. This does not mean that their experiences do not qualify as abusive or that they don't need protecting, just that they need a different order.

The definition of family members covers all family relationships of blood, marriage, or adult interdependent relationships, including unmarried people who have a child together. It also covers unmarried couples so long as they lived together in an intimate relationship. It does not cover couples who are dating but never lived together, friends, or roommates who are not intimately involved.

Family violence under this legislation is limited to acts or omissions such as:

- acts that cause injury or property damage and that intimidates or harms a family member;
- threats that intimidate a family member by creating a fear of property damage or injury to a family member;
- forced confinement;
- abuse; and
- stalking.

Other types of violence, such as verbal abuse (that does not threaten property damage or injury), are not included in the definition of violence under this legislation. Also, threats regarding custody and access of children are not included.

EPOs are granted without notice to the other party, so they should only be sought when giving notice would be unsafe. There will be a review hearing set for the other party to respond. Only in very limited circumstances should a judge make an order without notice to the other party. Such circumstances may include where it is impractical because of an emergency or when giving notice would put the victim in a dangerous situation. If it is possible to give notice, then the claimant should seek a QBPO.

EPOs and QBPOs are enforced by the police.

The Edmonton Protection Order Program and Calgary Protection Order Program can assist victims of violence who wish to apply for an EPO.

Retraining Orders

Restraining Orders are granted at the discretion of a judge and are not limited by strict definitions of family members and violence. A judge must simply be convinced that the order is necessary in the circumstances. The terms of the order and how it is enforced (by the police or further court applications) is up to the judge. Restraining Orders can be applied for without notice if it is not safe to do so. However, notice should be given if it is possible. Whether or not the Restraining Order applies to family members will affect in which court the application is made. The Family Law Information Centres (FLIC) and Law Information Centres (LINC) around the province can assist with Restraining Order applications.

Other Orders

Those who experience family violence often require court orders for other matters such as parenting time or financial support because these issues are usually intimately connected. In these cases, no contact conditions can be combined with parenting or support orders. As with restraining orders, there are no strict definitions of violence. The parties, possibly with the help of their lawyer, or the judge will set the terms of the order that fit the situation and set out the consequences of not following the order.

Whatever Happened to … Childs v. Desormeaux: Killer Hospitality

Can you be held legally responsible if you serve a friend alcohol at your house and he or she then drives away and injures or kills another person? Alcohol-fueled social gatherings give rise to the issue of social host liability, both to guests and to third parties who may be affected by your hospitality. The Supreme Court of Canada answered this in the tragic case of *Childs v. Desormeaux, 2006 SCC 18 (CanLII)*.

Facts

Desmond Desormeaux, 39 years old in 1998, had grown up in Ottawa where he met Dwight Courrier in his teenage years. Mr. Desormeaux and Mr. Courrier became good friends who would see each other about two or three times a month over 20 years, and would drink heavily together at some of these meetings.

In October of 1990, Desormeaux's brother died and he turned to alcohol to cope with the loss. His work was sporadic and he did not hold a stable job. He moved back in with his parents. He earned an impaired driving conviction in 1991, and a second conviction in 1994. To put the heavy drinking into perspective, a former girlfriend of Courrier described Desormeaux as falling down and urinating in his pants on occasion during the pair's drinking sessions.

On New Year's Eve of 1998, Courrier and his common-law spouse Julie Zimmerman decided to host a party. It was a BYOB (bring your own booze) event, and Desormeaux showed up with a 24-pack of beer. The hosts served three-quarters of a bottle of champagne to ring in the New Year as well.

There was a lot of drinking. An altercation took place when one of Desormeaux's friends wiped his hands on another guest's jacket. After this, Desormeaux and his two friends decided to leave. The social host needs to take part in the "creation or exacerbation of risk" in order to be found liable to injured third parties. When Desormeaux walked to his car after midnight to leave, the host, Courrier asked, "Are you okay, bro?" Desormeaux responded "No problem!"

But there was a problem, a very big problem. Desormeaux was not fit to drive. He had consumed about a dozen beers over two and a half hours at the party, and was almost three times over the legal limit when he left the party and started to drive away.

At about 1:30 a.m., Desormeaux's car crossed into oncoming traffic and collided head-on with Patricia Hadden's vehicle. Desormeaux's car carried two passengers and four passengers were in Ms. Hadden's car. One of her passengers, Derek Dupre, was killed in the collision and his girlfriend, 18-year old Zoe Childs, had her spine severed. She was rendered a paraplegic.

Desormeaux eventually pleaded guilty to criminal offences and was sentenced to 10 years in jail. He received a 10-year driving ban, the maximum allowed under the law. Where did that leave Childs in terms of financial compensation for her serious and permanent injuries?

Desormeaux had no insurance coverage at the time of the accident. Childs sued Desormeaux, and liability was easily found, as drivers owe a duty to other vehicles travelling on the road. However, it is common to attempt to spread the liability in accident cases, and so Childs also sued the hosts of the party, Courrier and Zimmerman. She claimed that they were liable as the social hosts of the party on the grounds that they supplied alcohol to Desormeaux and allowed him to drive away, causing this tragedy.

The Civil Lawsuit

The courts were asked whether the social hosts owed a duty to Childs to prevent Mr. Desormeaux from driving and injuring her. Commercial host liability was very well established. The trial judge determined that the social hosts did owe a duty of care to Childs but did not hold them liable due to a broader public policy consideration, namely that the liability burden placed on social hosts would outweigh the potential benefits for users of the road. In the past, the courts have held that commercial establishments such as bars clearly owed a duty to guests and third parties and needed to take steps to prevent injuries caused by their patrons. (*Jordan House Ltd. v. Menow, [1974] S.C.R. 239*; and *Crocker v. Sundance Northwest Resorts Ltd., [1988] 1 S.C.R. 1186*)

Both the trial judge and the Ontario Court of Appeal agreed that Courrier and Zimmerman were not liable for Childs' injuries, although for different reasons.

The trial judge determined that the social hosts did owe a duty of care to Childs but did not hold them liable due to a broader public policy consideration, namely that the liability burden placed on social hosts would outweigh the potential benefits for users of the road. This burden would require social hosts to monitor all guests and question them about their intoxication levels at arrival and departure. If social hosts found guests to be intoxicated, they would have to tell them not to drive. If guests did not comply, then the social hosts would be required to report this to the police. These obligations would be too onerous on social hosts. The trial judge said there was no liability for the social hosts because of this.

The Ontario Court of Appeal disagreed with the trial judge's finding that a duty of care from the social hosts to Childs existed in this case. It said simply that, because the hosts here did not know Desormeaux was intoxicated when he left, it was not foreseeable that Childs would be injured.

Supreme Court of Canada Decides

In 2006 the case reached the Supreme Court of Canada, eight years after the tragic event. The Court questioned whether there was a proximate relationship between the social hosts and Childs and concluded there was not. It was not even foreseeable that Desormeaux was intoxicated when he got into his car. The trial judge had made a finding of fact that, although Desormeaux drank enough alcohol to guarantee he was intoxicated, Courrier or Zimmerman may not have seen any outward signs of this intoxication. In 2006 the case reached the Supreme Court of Canada, eight years after the tragic event. The Court questioned whether there was a proximate relationship between the social hosts and Childs and concluded there was not. Even though the social hosts knew of Desormeaux's history of drunk driving and drunken behaviour, the Court concluded that visible signs of intoxication were needed.

The unanimous Supreme Court of Canada then said that, even if there was foreseeability, that there still would not be a duty of care owed in this type of case. The Court differentiated commercial establishments from social parties. Bars and other businesses stand to profit more when a person gets drunk and they monitor how many drinks are served by charging the customer for these drinks. There are rules and regulations for these businesses, but not for the average person having friends over where alcohol is consumed. Courrier and Zimmerman only *failed to act* in this case by not stopping Desormeaux, but a positive duty to act had to first exist for them to be liable. They did not create the danger to Childs by organizing a social event and facilitating the consumption of alcohol at their home.

A positive duty to act may arise in law where one "intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls." But hosting a house party is not an inherently risky activity on its own. The Court stated "more is required" to create a dangerous environment. A possible example is that of a host who continues to serve alcohol to an intoxicated guest, knowing the guest will be driving. The social host needs to take part in the "creation or exacerbation of risk" in order to be found liable to injured third parties.

For those holding house parties this seems like a victory, but hosts will still need to take precautions to ensure they do

not become legally responsible. Games of beer pong or encouraging someone to drink heavily on their birthday are examples of activities that might result in the “creation or exacerbation of risk,” and this will result in hosts being liable.

Where are These Parties Today?

Desormeaux apologized to Childs at his criminal sentencing, saying he did not want this to happen. The judge described Desormeaux as a “ticking bomb” in a downward spiral that led to the accident. He was sentenced in 2000, and was given about 4 years credit for time spent in pre-trial custody. With a 10-year sentence and an opportunity for parole, we expect he was released before 2006. His driving ban ended in 2010.

Childs was unsuccessful in her lawsuit against the social hosts, and she even had to pay their legal costs for this case’s journey through the courts. Before the criminal trial judge sentenced Desormeaux to 10 years in jail, he praised young Childs for her courage and compared her to Christopher Reeve, a late, famous quadriplegic. She still has to spend the rest of her life in a wheelchair.