March/April 2018

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LAWNOW is published six times per year.

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In This Issue

Tips to grow your new million dollar idea into a thriving business.

Understanding Parole: Paul Bernardo Eligible for Full Parole in February 2018

By Charles Davison

February 2018 marks 25 years since the arrest of Paul Bernardo for the rapes and murders of two young women in Ontario. Following one of the longest and most highly publicized criminal trials in Canadian history, he was convicted of two counts of first degree murder and given the automatic and mandatory sentence required by Canadian law: life imprisonment without eligibility for parole for 25 years. Now that 25 years have passed, Bernardo is eligible to appear before the Parole Board of Canada and seek its permission to leave the correctional institution where he is housed in order to begin reintegration back into Canadian society.

It seems unlikely that Bernardo will exercise this option, and even more unlikely that he will succeed (among other things, he was also responsible for a startling number of other sexual assaults, as well as the death of the sister of his wife and fellow killer Karla Holmoka). However, we can expect that this anniversary may lead to public discussion and controversy about the idea of possible release and return of someone who has committed such terrible crimes to live among the rest of us, in a community somewhere in this country.

It is relatively rare in Canada that someone who is sentenced to imprisonment will actually be in custody for the full length of their sentence. Victims and their supporters (including some vocal political allies) often complain about this and argue for harsher and longer punishments.

However, our system seeks to combine punishment for wrongdoing with correction and rehabilitation in an effort to ensure the individual does not misbehave again in the future. As a result, various forms of early release privileges have long been an essential part of our penal/correctional system. Most offenders who receive fixed term of imprisonment (that is, something less than a life sentence) will be released around the time when they have served two-thirds of the total sentence length. Some offenders are granted parole even earlier than the two-thirds point (where they have been able to demonstrate the risk they will reoffend is very low, and there is no longer a legitimate penal purpose to detain them any longer). At the same time, it is also possible for an offender to be kept in custody for longer than two-thirds

For a person convicted of murder however, the sentence is literally, "for life": the sentence will continue for the rest of the convicted person's life. If they are granted parole and allowed to re-enter the community, it will always be under supervision.

of the sentence – and sometimes right to the very end of the term ordered. This happens most often when, by their conduct as a prisoner the individual has demonstrated that they continue to pose a significant threat to other persons such that they cannot be safely released into the community.

In the case of adults convicted of murder, the mandatory sentence required by law is life imprisonment. However, even these prisoners will be eligible to ask for parole someday. Precisely when depends on the classification of murder as found by the court: for first degree murder, the mandatory waiting period is 25 years, while for second degree murder the parole ineligibility period will be set by the sentencing judge at some point between 10 and 25 years.

All too often the media and the public mistake the parole eligibility date for the length of the sentence; the media frequently incorrectly report on such a sentence as though it ends on the date of parole eligibility (for example, referring to a "25 year sentence" where the individual has actually been ordered to serve 25 years of a life sentence before asking for parole). These dates relate to adults convicted of a single murder. Persons under 18 at the time of the offence will have shorter periods before they can seek release, and persons who are guilty of more than one murder may be ordered to wait even longer than 25 years.

Now that 25 years have passed, Bernardo is eligible to appear before the Parole Board of Canada and seek its permission to leave the correctional institution where he is housed in order to begin reintegration back into Canadian society.

There are two main purposes behind the concept of early release. First, it is hoped that the offer of early release will serve as an incentive to inmates to behave properly, and to take such rehabilitative programming as is offered, while in custody. Second, because early release is under supervision, and can be revoked, it is considered to be a form of transition for the inmate, to assist them in leaving the custodial setting and becoming used to living in society again. We recognize that such a transitional period of control and supervision actually enhances community safety as it offers the offender a somewhat graduated form of return to "normal" life without the restrictions of custody. To release a prisoner from a jail cell directly into society without any form of supervision, support or control is a recipe for reoffending and more crime.

For offenders serving a fixed-length sentence, they eventually will get to the date when they have served their punishment in full (whether they are still in custody or on a form of early release at the time) and their sentence will expire. For a person convicted of murder, however, the sentence is, literally, "for life": the sentence will continue for the rest of the convicted person's life. If they are granted parole and allowed to re-enter the community,

It is relatively rare in Canda that someone who is sentenced to imprisonment will actually be in custody for the full length of thier sentence.

it will always be under supervision. The release can be revoked at any time and the individual will then return to prison to continue serving their sentence in custody. It is worth pointing out that in many, if not most, cases convicted murderers end up doing very well on parole compared to other prisoners, with fewer instances of breaking the rules and being returned to prison.

We grant parole to persons convicted of murder for similar reasons as with all other offenders. We hope that the offer of release back to society will encourage good behavior and engagement in appropriate rehabilitative programs while serving sentences in custody. For persons serving life sentences, we also recognize that there usually comes a time when they – and society – no longer require continued incarceration: they have grown older, have taken the programming and have made full use of the other forms of assistance aimed at helping them reduce their risks of reoffending, and generally no longer pose a significant risk to other persons. At the same time, due to the nature of the offence in question – deliberately taking the life of another person – we recognize that there is an on-going need to supervise and regulate the lives of such persons in order to ensure the continued safety of the public. Therefore, when release comes it is always upon conditions that the offender will have to obey and follow. Failure to do so will lead to a return to prison.

Charles Davison is the Senior Criminal Defence Counsel with the Somba K'e office of the Legal Services Board in Yellowknife, NWT.

By Aaida Peerani

SCC Stomping on Sexual Assault Myths

Recently, the Supreme Court of Canada ("SCC") dismissed an appeal from the Alberta Court of Appeal ("ABCA"). The ABCA had overturned an Alberta Court of Queen's Bench trial decision in a case of sexual assault.

In this case, a man was acquitted of sexual assault against his stepdaughter. The stepdaughter had complained that when she was 11 to 16 years old, her stepfather touched her sexually about 50 times and simulated a sex act. The Judge at trial, Justice Terry Clackson, found that the man could not be held liable because based on "logic and common sense" the stepdaughter should have avoided him, but she did not do so.

The Crown prosecutor appealed the decision to the ABCA. The ABCA overturned the decision saying that Justice Clackson had used myths and stereotypes about victims. This decision was split 2-1, therefore, the man, had an "as of right" appeal to the SCC.

The SCC dismissed the appeal. In doing so, the SCC stated that Justice Clackson committed an error in judging the stepdaughter's credibility based on the difference between her behaviour and the stereotypical behaviour of a victim of sexual assault.

R. v A.R.D., 2017 ABCA 237

http://canlii.ca/t/h4xms

https://www.theglobeandmail.com/news/national/supreme-court-says-victim-stereotype-was-used-in-sexual-assault-case/article37986101/

Publication Bans and Contempt of Court

In another case at the SCC, Canadian Broadcasting Corp. ("CBC") won a victory against a publication ban. The ban was related to a first degree murder of a person under the age of 18. The Crown Prosecutor was granted a publication ban, meaning that any publication or transmission of the identity of the victim was not permitted. However, CBC had already posted the identity of the victim on its website before the publication ban. CBC refused to take down the information. The Crown took CBC to court to find CBC in contempt of court and to force CBC to take down the information as an interlocutory injunction.

An interlocutory injunction is an order by the Judge that forces a party to do something, in the middle of a trial, even though the trial has not finished. This is often done to protect a party from potential harm while the trial is going on. The chambers judge dismissed the application according to a three part test for an interlocutory injunction which required that:

- The Crown show that there would be a strong likelihood at trial that the CBC would be found in criminal contempt. This means that the Crown would have strong evidence that the CBC openly and publicly defied the Crown's orders with intent.
- The Crown show that irreparable harm were the injunction refused. The Crown argued that the administration of justice would be harmed and others would not want to seek justice because of the ongoing display of information and loss of anonymity.
- The Crown balance of convenience would favour the injunction. The balance of convenience asks if the injunction could be balanced with the injury to the defendant, which is in this case to the CBC.

The Chambers judge stated that: a) there was no case made to show that there's a strong likelihood at trial that CBC would be found in criminal contempt 2) the objective of protecting a victim's anonymity loses its importance when the victim is deceased 3) the injury of compromising CBC's freedom of expression and the public interest in the freedom of expression was outweighed by any administration of justice issues.

The ABCA overturned the chambers judge's decision and granted the interlocutory injunction. The ABCA found that the CBC was willfully disobeying the publication ban and was in contempt. Also, the ABCA found that the publication ban should be considered "constitutional" and that freedom of expression is not a defence to contempt. The Supreme Court of Canada found that the Crown did not show that there was a strong likelihood at trial that CBC would be found in criminal contempt by intentionally publicly disobeying the publication ban.

R. v. Canadian Broadcasting Corp., 2018 SCC 5

http://canlii.ca/t/hq979

Consent Tops All

A man in Nova Scotia has been acquitted, by the Nova Scotia Court of Appeal ("NSCA") of causing psychological harm by not disclosing his HIV status prior to having sexual relations with two women. Both women agreed that they had consented to sexual relations with the man. One said a condom was used, the others said it was not. The accused said that he told both of them of his HIV status and a condom was used with both. Neither one of the women

contracted HIV. They claimed aggravated assault as well as psychological harm.

At trial, the Crown was required to prove beyond a reasonable doubt that:

- The accused did not disclose his HIV status;
- That they would not have consented had they known; and
- That the sexual activity either transmitted the virus or there was a realistic possibility of HIV transmission.

The trial judge acquitted the man of aggravated sexual assault. In doing so, she relied on the detail of the accused's anti-retroviral treatments and expert testimony. She found that the Crown did not establish a realistic probability that the HIV would be transmitted. However, she found him guilty of lesser offences, including sexual assault causing bodily harm. She made this finding based on the fact that the complainants suffered psychological harm.

At the NSCA, only the issue of psychological harm was in question. The Court relied on a Supreme Court cases *R v. Currier* and *R v. Mabior,* which stated that a person does not have to disclose their HIV positive status, unless there is a significant risk of bodily harm by transmission or realistic possibility of transmission. Emotional stress or upset, even if it causes bodily harm, is "irrelevant" according to this decision. The women had clearly consented to having sexual relations. Therefore, in a situation where there was no realistic possibility of HIV transmission, consent cannot be vitiated (corrupted or injured) by psychological harm. Interestingly, in this case, the women did not attempt to receive psychological or psychiatric treatment for their stress. The Court also noted that failure to disclose that one has a sexually transmitted disease is morally unacceptable, but it is not usually a crime.

R. v Thompson, 2018 NSCA 13

http://canlii.ca/t/hqf6n

Steps to Starting a Business in Alberta

By Khadija Zeeshan

The information below is not legal advice and different steps or requirements may be necessary according to your specific situation. It is highly recommended that you speak with a lawyer if you are thinking about or are starting a business.

STEP 1: CHOOSE A FORM OF BUSINESS

The first step when starting a business is to choose a form of business. Each form of business has different succession rules, as well as specific tax and liability consequences. Speak to a lawyer about what form of business would be best for you. The three main forms of business are:

(a) **Sole Proprietorship**: A sole proprietorship is a form of business where there is a single owner. The sole owner is fully responsible for the debts, contractual obligations and liabilities. For example, creditors can claim the business owner's personal assets. Profits are taxed as personal income, not business income. It is best to consult a tax lawyer or accountant for all possible tax implications.

(b) **Partnership**: This form of business is governed by Alberta's *Partnership Act,* common law and the partnership agreement. A partnership is defined in the Alberta *Partnership Act* as

"a relationship that subsists between persons carrying on a business in common with a view to profit". It can be created by an agreement, oral or written, or even by the conduct of the parties. The *Partnership Act* has default profit sharing and management schemes, but partners can agree to other arrangements. However, partners are unable to contract out of liabilities owed to third parties. There are different types of partnerships, including:

- General Partnership: All partners manage the business and can be held personally liable for their own and their partners debts, contractual obligations, and liabilities.
- Limited Partnership: There must be one or more general partners, and one or more limited partners. General partners manage the business and accept unlimited liability. Limited partners only contribute capital and are liable for debts up to the amount they have agreed to contribute.
- Limited Liability Partnership: This form is limited to professionals, such as doctors, accountants and lawyers. The partners are responsible for their own debts and obligations, and any negligence or wrongful acts committed. All are responsible for the ordinary debts of the partnership.

(c) **Corporation**: A corporation is a separate legal entity from its shareholders and is considered a person under the law. The shareholders have limited liability and are not held personally liable for the corporation's debts, obligations and acts except in exceptional cases. In a corporation, ownership is transferable, and business operations can continue without the original owner. Corporations must file their taxes annually separate from their owners. Also, incorporation documents are made public.

Corporations are also required to file an annual return, in additon to filing corporate taxes.

STEP 2: CHOOSE THE JURISDICTION

Sole proprietorships and partnerships are governed by provincial law. Corporations can be governed by either federal or provincial law. There are differences in the rules you must follow based on whether you choose to register your corporation under federal or provincial law. These rules relate to the location of the head office, where you can do business, what name you can choose for your business, how to protect your business' name, and annual filings and costs. A lawyer can help you determine whether it's best for you to incorporate federally or provincially.

STEP 3: CHOSE A BUSINESS NAME

Sole Proprietorships and Partnerships

A business' trade name is simply the name used in the course of business. It does not

A corporation is a seperate legal entity from its shareholders and is considered a person under the law.

create a separate legal entity. However, it is still important to choose a unique name: you can be taken to court by an existing business with a similar trade name. The words incorporated, limited or corporation or their abbreviations cannot be used at the end; Limited Liability Partnership or its abbreviation LLP must be used at the end for limited liability partnerships. The sole proprietorship typically carries the name of the business owner and requires no further steps. If a different name is chosen for the sole proprietorship, see further requirements under step four. Partnerships do require a trade name. Thus, it is recommended that sole proprietorships and partnerships obtain a NUANS (Newly Upgrade Automated Name Search) Report which contains registered businesses, trademarks, and corporations with similar names.

Corporations

The name of an Albertan corporation has three elements: distinctive, descriptive, and legal. 'Distinctive' is the unique word(s) of the business name. 'Descriptive' is what the business is or does. In addition, according to Service Alberta, "[a]ll Alberta corporations are all required to have a legal element at the end of the name". Examples include Limited, LTD, Corporation, Corp., etc. The legal element puts the clients on notice that it is a limited liability business. This notice is crucial to avoid being personally held liable for debts and obligations. The number assigned by the Alberta Corporate Registry can be used as the name, for which 'Alberta' always forms the second part and with a legal element at the end (e.g. 1234567 Alberta Ltd.). Unless the corporate number is chosen as the name, a NUANS report must be purchased and examined for any identical or similar names to the corporation. This is required for federal incorporation as well.

Step 4: REGISTER THE BUSINESS AND THE BUSINESS NAME

Sole Proprietorships and Partnerships

A partnership is defined in the Alberta *Partnership Act* as "a relationship that subsists between persons carrying on a business in common with a view to profit."

A sole proprietorship with a name other than the owner's name has to be registered with the province. Otherwise, if it carries the name of the owner, it does not have to be registered. The Declaration of Trade Name form has to be completed. All partnerships have to be registered with the Corporate Registry service provider. A required form for a general partnership is Declaration of Partnership. The forms, for both the sole proprietorship and partnerships, have to be filed with the Registry service provider. The business name information, business name report, valid ID and fee payment will be required at the Registry.

Corporations

Registering a corporation requires several forms. Both the federal and provincial corporations require Articles of Incorporation which includes and the signature of the incorporator authorized signing authority. Federal corporations must submit an Initial Registered Office and First Board of Directors form with the Articles of Incorporation. In Alberta, the following documents must be submitted in Alberta with the Articles of Incorporation:

- a Notice of Address to identify where the corporate documents will be kept and where the corporation can be served with court documents;
- a Notice of Directors which includes the name of the initial director(s) and their addresses;
- and a NUANS report to make sure the corporation trade name is not similar to another.

To incorporate in Alberta, these documents and a fee must be presented to an authorized service provider. If the information qualifies under the *Business Corporations Act* (Alberta), it will be entered into the system.

A federal corporation can be created online through the Online Filing Centre or by submitting the required documents, including Articles of Incorporation and information about proposed directors, by fax, email or mail to Corporations Canada along with the required fee. Corporations Canada may request more information to ensure that the application meets the incorporation requirements under the *Canada Business Corporations Act*.

Additionally, an extra-provincial corporation or out-of-province corporation, including federal corporations, must register in Alberta, if it plans to do business in Alberta. Service Alberta defines a corporation as conducting business in Alberta if it is a corporation:

- that solicits business in Alberta;
- whose name, or any name under which it carries on business, is listed in an Alberta telephone directory or appears in any advertisement with an Alberta address;
- that has a resident agent, representative, warehouse, office or place of business in Alberta;
- that is licensed or registered, or required to be licensed or registered, under any Act of Alberta allowing it to carry on business;
- that owns land in Alberta.

To register an extra-provincial corporation in Alberta, the corporation must provide a government fee, a service fee, an Alberta NUANS report, and a notice of attorney. For the notice of attorney, you must choose a person, your attorney, who will accept the legal documents at an address in the province. The attorney does not have to be a lawyer. You will also need to submit a statement of registration, notice of assumed name, and incorporation documents certified by company official, notary public or a government official. These must be taken to an authorized Alberta service provider. For a complete list of formation documents visit the Service Alberta website. Once the extra-provincial corporation is registered in Alberta, a Certificate of Registration will be provided.

There is an easier route if the company is incorporated in British Columbia, Manitoba, or Saskatchewan. The New West Partnership Trade Agreement allows a simpler process for registration. The registry offices in the home jurisdictions can provide more information.

ADDITIONAL REQUIREMENTS FOR CORPORATIONS:

After the issuance of the Certificate of Incorporation, the directors and the shareholders will hold meetings. The directors will select officers, adopt the form of the shares, issue the shares and pass by-laws which will govern the internal workings of the corporation and address the specifics of their own meetings. The shareholders will then hold a meeting to approve the by-laws, select an auditor and elect the directors. Corporations are also required to file an annual return, in addition to filing corporate taxes. They are also required to file notices of any important changes, such as changes to the directors, shareholders or the address of the office where the records are kept. The records that a corporation is required to maintain are listed under s. 21 of the Alberta's *Business Corporations Act* for provincial corporations and s. 20 under the *Canada Business Corporations Act* for federal corporations. These records are kept in the corporation's minute book.

ADDITIONAL REQUIREMENTS: LICENSING, INSURANCE, REGULATIONS AND BY-LAWS

Depending on the type of business, there may be additional municipal and provincial licensing requirements, insurance obligations, and other regulations and by-laws that you may have to comply with. Again, it is recommended that you speak to a lawyer to make sure you fulfill all the legal requirements when starting a business.

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When the Entrepreneur and Tax Man Meet

By Caitlin Butler

Starting a business can be exciting, but also incredibly nerve-wracking. While tax considerations are often a low priority, some commonly overlooked issues can cause significant headaches. Below we discuss some key general considerations. Specific advice from a tax professional is prudent.

Business or Personal Venture?

Determining if and when a business has commenced can be a confusing matter. In some cases, it may be obvious. In others, not so much. To determine whether one is carrying on a business, the Canada Revenue Agency ("CRA") looks to a number of factors, including: the individual's intended course of action, the historical performance of the undertaking, the potential for future profits, the education and training of the individual, and business risk management/minimization.

Disputing the CRA's assessment is very difficult without proper records.

If the operation is considered a business, income or loss must be reported on the tax return. CRA often questions start-up losses. A written business plan showing how the operation will generate future income can be helpful.

Business Structure

The next step is to determine the legal form of the business. Typically, one of three structures are selected:

a) **A Sole Proprietorship** is the simplest structure. The owner just starts running the business and reports all earnings and expenses on their personal tax return. The business does not have a separate legal status and the owner assumes all risks personally.

b) **A Partnership** is an association or relationship between two or more persons who join together to carry on a business in common, with a view to profit. Each partner contributes money, labour, skills or property, and in turn, is entitled to their share of the profit or loss. Certain partnerships are subject to tax filing requirements. While most partnerships are usually governed by a written agreement, they can be formed by a simple verbal agreement. Some partnerships, with proper structures and legal filings, may limit the partners' business risk to contributions to the partnership.

c) **A Corporation** is a separate legal entity which is established by filing articles of incorporation with the appropriate jurisdiction. The owner transfers money or property into the corporation in exchange for shares. While shareholders enjoy significant protection from corporate debts and risks, its directors could still be liable for some corporate debts such as GST/HST, and payroll withholdings (including EI and CPP).

The Canadian tax system is structured so that, generally, regardless of whether income is earned through a proprietorship, partnership or corporation, the net tax liability is approximately equal. While proprietorships and partnerships are subject to one level of tax, corporate earnings are subject to two: corporate tax, and personal tax when the after corporate tax income is distributed to the shareholders as dividends. As corporate tax rates (especially for smaller businesses) are generally lower than personal rates, more cash can be kept in the corporation to reinvest in the business. However, when the owner withdraws those funds personally, they will be subject to personal tax. Essentially, operating through a corporation permits some tax deferral and greater control over the timing of personal tax.

Regardless of the types of business, however, all earnings must be reported.

It is also possible to operate a business as a proprietorship or partnership for a number of years and then transition to a corporation.

GST/HST and Other Indirect Tax Considerations

A common question of new businesses is whether they should be charging GST/HST (and PST in particular jurisdictions) on their sales. Unfortunately, the answer is not always simple.

Generally, if a business' total revenue from taxable supplies (sales) exceeds $30,000 in a calendar quarter, or over four consecutive quarters combined, they are required to register for, collect and remit GST/HST. Special rules require taxis, commercial ride-sharing and limousine services to register, collect and remit regardless of the quantum of their earnings. The reporting and remittance frequency (ranging from monthly to annual filings) depends on the business's annual taxable supplies. The provision of certain products and services may not be subject to GST/HST (such as many health, medical, and dental services performed by licensed physicians or dentists).

Some, but not all, businesses may be able to recover GST/HST paid on expenses incurred in commercial activities as input tax credits (ITCs). A business required to register which does not do so in a timely fashion may lose ITCs on prior expenses.

It is also possible to operate a business as a proprietorship or partnership for a number of years and then transition to a corporation.

If registered for GST/HST, a business should ensure that their receipts properly disclose the supplier's name, total amount paid/payable, and date of invoice. For purchases greater than $30, GST/HST charged and on what items, and the supplier's business number are also required. Additional information is required for purchases greater than $150.

Depending on one's industry and operations there may be other federal duties, excise taxes, and charges. British Columbia, Manitoba, and Saskatchewan all have provincial sales tax ("PST"), which may require businesses operating in those jurisdictions to register for, collect and remit PST. Québec is subject to a Québec sales tax ("QST") regime.

Workers and Payroll

Businesses need to decide whether to engage independent contractors, employees, or both. Structuring these arrangements, and determining such status is challenging, fraught with error, and subject to considerable interpretation.

Employers are required to pay CPP, EI, and also deduct and remit income tax in respect of employees. Employers who do not properly do so can be responsible for their and the employee's liability for a number of years, in addition to penalties and interest. For assistance on properly determining withholdings for an employee, see the CRA's Payroll Deductions Online Calculator.

Such payroll amounts are not required for contractors. However, if a contractor's terms and conditions of engagement are similar to that of an employee, the CRA may look beyond the contract and require the business to make these payments anyways. This can result in a significant surprise liability that may cripple an organization.

Income Tax Filing

Canada has a self-reporting tax system. Income tax filings depend on the type of business structure used. Proprietors report earnings on their personal tax returns, while partners report their share of the partnership's profit or loss on their tax returns. Corporations file separate corporate tax returns, with dividends they pay being reported on the shareholders' personal tax returns. Regardless of the type of business, however, all earnings must be reported. Costs incurred to earn business income are generally deductible, provided they are reasonable, not capital in nature, and have no personal element. Special rules apply when determining whether certain amounts are deductible for tax purposes, and are beyond the scope of this article.

Once a tax return is filed, the CRA will issue an assessment which essentially states that they have accepted the self-reported amounts, at least initially. If a business disagrees with a CRA assessment, there are a number of dispute resolution mechanisms.

The Canadian tax system is structured so that, generally, regardless of whether income is earned through proprietorship, partnership or corporation, the net tax liability is approximately equal.

A taxpayer realizing they have made an error in past disclosures may make a voluntary disclosure application which will enable the person to get back on side while limiting certain penalties, interest and risk of criminal prosecution. Eligibility for this program is being tightened March 1, 2018.

Record Retention

Records of business earnings and expenses must generally be kept for six years from the end of the year to which they relate. Records relating to capital expenditures must generally be retained for six years after the year that the property is disposed of. Records can be kept in paper or electronic format (provided it is accessible and readable). Disputing the CRA's assessment is very difficult without proper records.

CRA Administration

Businesses obtain a business number by registering with CRA. The business number is used to register for various program accounts, such as GST/HST, payroll, and corporate tax.

Business owners can get online access to CRA tax information by registering for My Business Account. Online access provides the ability to file returns, obtain various account balances,

submit enquiries, update business and direct deposit information, and much more. Gaining access can take a few weeks, so starting the process early is best.

CRA provides various other types of support, such as:

- Liaison Officer Initiative – a program where a CRA officer educates small unincorporated businesses about common tax errors in their industry.
- CRA Mobile Phone Apps – the CRA BizApp and CRA Business Tax Reminder App assists businesses with their tax filing obligations.
- CRA Guide RC4070, Information for Canadian Small Businesses – a CRA Guide which provides basic information for small businesses.
- Various CRA websites – CRA Checklist for Small Businesses and Small Business and Self-employed income websites.

The Government also provides considerable tax incentives for those who are involved in scientific research and development. This may include costs a business incurs to develop or improve an existing product or service. Further details can be found online.

The above note a few key tax considerations that a business starting operations should consider. By addressing these early, significant challenges can be avoided, providing business owners space and capacity to establish and grow their business.

Caitlin L. Butler, CPA, CA is a designated accountant splitting her time between Vancouver, British Columbia and Edmonton, Alberta. She is a member of the Video Tax News editorial board and is a co-writer and presenter of the Video Tax News National Personal Tax and Corporate Tax update courses.

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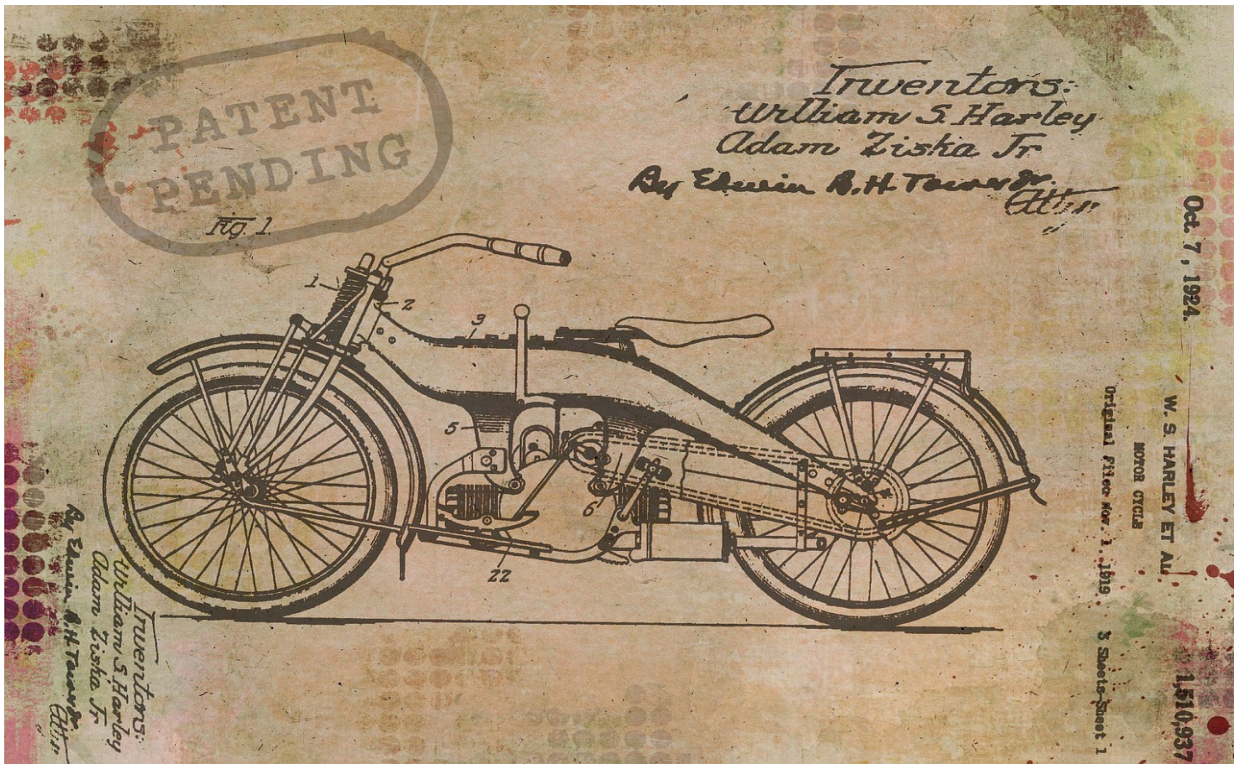

Protecting Your Invention: Tips from an Intellectual Property Lawyer

By Francisco Marquez-Stricker

There is a good reason tha Coca-Cola never patented thier recipe.

The million-dollar idea. It's the holy grail of inventorship, the kind of thing that inventors and entrepreneurs spend their careers pursuing. But those that do manage to turn their efforts into a golden idea are often confronted with an uncomfortable reality: leveraging that invention for a profit is often just as hard, if not harder, than coming up with the invention in the first place. As an intellectual property lawyer, I'm well aware of how daunting the task of commercializing a new invention can seem. Even worse, inexperienced parties venturing into this field for the first time often fall victim to a set of all too common mistakes. In this article, I've attempted to distill some of the key lessons I've learned from past client interactions, presentations and dinner party conversations with would-be inventors into three overarching tips on how to make the most of your million-dollar idea.

"Silence is Golden"

We've all heard the proverb before. While it almost certainly wasn't written with an eye towards intellectual property law, it is still surprisingly good advice for anyone with a promising idea. The first impulse most people have when they come up with a great idea is to tell someone about it. Unfortunately, this is usually the worst thing they can do, for a number of reasons.

First, just because an idea is yours, it doesn't necessarily mean you have the right to stop someone else from using it. The law draws a sharp line between "ideas" and "inventions". An "idea" is a loose thought or concept, whereas an "invention" is a product or process that is well defined enough as to be actual built or used to solve a problem. Often, when someone thinks they have come up with a great concept, all they have is a mere idea. For example, if an inventor came up with the concept of recycling the heat from engine exhaust and using it to reheat a car, this would most likely qualify as a mere idea. The *idea* is the problem which could be solved, and the general method of solving it. The *invention* would be the tangible steps involved in the solution. Unfortunately, the law generally doesn't afford protection for mere ideas. If the inventor were to disclose this idea to a third party, there would likely be nothing stopping that person from taking the idea for themselves.

Second, even if you do have an invention, disclosing it can actually prevent you from eventually obtaining rights. For any inventor, one of the main options available to stop other from using their invention is to obtain a patent (more on that in tip number three). Unfortunately, one of the criteria for obtaining a patent is that the invention cannot have been publicly disclosed. In Canada and the United States, an inventor has only 1 year from the date of disclosure to file a patent before the invention is lost forever. Most other countries in the world do not even afford this slight leniency, and in those countries and disclosure prior to patent filing can be fatal.

A Canadian patent only prevents third parties from making, using or selling the invention *in Canada*.

Finally, and perhaps most importantly, secrecy is often the best and most powerful tool available for the protection of an invention. Some of the most valuable inventions in history, including the recipes for both Coca-Cola and Kentucky Fried Chicken, have utilized secrecy as their primary means of protection.

In short, if you have a good idea, keeping it a secret is usually your best course of action.

Don't Forget The Business Plan!

Surprisingly, one of the most overlooked steps by inventors is asking the simple question: "How am I going to use this invention to make money?" Many inventors operate under the

misguided assumption that once they have arrived at a great idea, someone will come out of nowhere and pay them handsomely for it. More often than not, this isn't the case. Instead, investors are far more likely to invest in a product with a well thought out business plan and a clear path to return on investment.

A lot of goes into developing a good business plan: identifying markets, evaluating potential competitors and projecting revenues, to name a few. Having said that, one issue that should be central to your analysis is identifying what your invention *really* is.

Upon first read, this may seem like an incredibly silly question. After all, how could an inventor not know what their invention is? In reality, very few are able to properly answer this question. While inventors often focus on the specific product or process they have developed, what they have actually invented may in fact be quite a bit broader than that. For example, a hockey stick manufacturer who has developed a revolutionary new hockey stick will typically view the hockey stick in its entirety as his or her "invention". After all, that is the product they're trying to market. However, when pressed about what actually makes their product so different, they will usually be able to narrow things down to one or more particularly innovative features. It may be that the stick is made of a new material, in which case the invention is best viewed as the new material, which may have applications completely unrelated to hockey. Alternatively, it could be that new shape of shaft and a new method of manufacturing the stick blade were used to develop a stick with a more effective flex. In this case the invention could be the new shaft, the new blade, the method for manufacturing the blade, or all three.

Unfortunately, one of the criteria for obtaining a patent is that the invention cannot have been publicly disclosed. In Canada and the United States, an inventor has only *ONE* year from the date of disclosure to file a patent before the invention is lost forever.

Ultimately, when attempting to hone in on the true invention, the key is to analyze the problem that the invention is trying to solve, the pre-existing solutions to the problem, and what is new and innovative about the solution that was developed. When approaching the problem in this way, most inventors walk away with a more broad and robust view of their own invention, which usually leads to greater business options.

To Patent Or Not To Patent?

A patent is essentially a legal document describing an invention which can be filed by an inventor which grants the inventor the right to stop others from making, using or selling the patented invention for a period of 20 years. In short, patents provide some of the broadest rights available for inventors. For that reason, they have become almost synonymous with

commercialization, and many first time inventors can't imagine another route to business success. While it's true that patents are a great option in the right circumstances, they shouldn't be viewed as a one size fits all solution for every invention. When deciding whether or not to pursue a patent, an inventor should at the very least keep in mind the following three factors:

1. First, patents are expensive. While the exact cost will be highly fact specific, you can often expect to pay more than $20,000.00 to obtain an issued patent. Those are just the fees to *obtain* a patent. A patent holder also needs to pay annual maintenance fees in order to *keep* their patent. In Canada, maintenance fees start at $100/year for the first four years, and steadily grow to $450/year. It's important to note that these fees are *per country*. A Canadian patent only prevents third parties from making, using or selling the invention *in Canada*. If you're interested in protection in other countries, you will need to file a patent there as well, which means additional filing and maintenance fees in those jurisdictions.

2. Second, it's up to you to enforce your patent. Much like a contract, a patent is nothing more than a pile of paper that promises you certain rights. If third parties are in breach of your patent, it's up to you to pursue them. At the outset, this means it's up to you to identify infringers. In a lot of cases, this can be more difficult than it sounds (as may be the case, for example, with a manufacturing process which is carried out behind closed doors). If it's unlikely that you'll ever be able to determine that your patent is being breach, then pursuing a patent may not be a great idea. Additionally, if you put a third party on notice that they are breaching your patent, and they ignore your threats, your only recourse is to sue them. It is often a moment of harsh reality for inventors who have gone to great effort to obtain a patent, only to be faced with additional costs and effort to enforce it.

The law draws a sharp line between "ideas" and "inventions."

3. Finally, patents are published. That may not seem like a huge issue until you factor in that (i) patents include a disclosure of your invention; and (ii) patents only last for 20 years. There is a good reason that Coca-Cola never patented their recipe. If they had, their patent would have disclosed the recipe to the world in exchange for a very short period of exclusivity. Upon expiry of the patent early in the 20th century, any of their competitors would have been able to reproduce their recipe with impunity. Instead, by keeping it a secret, Coca-Cola has enjoyed more than a century of control over its recipe. If your invention is something that could effectively be kept a secret, then doing your best to keep it a secret may be a preferable alternative to publishing it with a patent.

In short, while patents have numerous positive attributes, they also have their drawbacks.

Any decision to patent should at the very least factor in cost, the ability to identify and pursue infringers, the effective life of the invention and the ability to identify and pursue infringers.

Ultimately, the tips I have provided are broad statements based on my experience, but cannot replace legal advice tailored to your situation. I would strongly advise anyone considering technology commercialization to arrange a meeting with a lawyer and discuss the best course of action for them. Having said that, hopefully this information can help you avoid common mistakes, make good decisions, and make the most of your next great idea.

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How To Deal With Bankruptcy as a Small Business Owner

By J. Doug Hoyes

Considering bankruptcy is never easy. It's one of the most important – and difficult – financial decisions you will ever have to make. An added worry for some indebted Canadians might be what happens to their financial situation if they are self-employed or running a small business.

You may be surprised to learn that it's a common concern. At my firm, approximately 1 in 10 clients filing for insolvency are self-employed or own their own small business. If you're wondering about how to deal with bankruptcy as a small business owner, I've outlined six key points to help you better understand the process.

One more advantage of a consumer proposal if you are self-employed or operating a small business is that a proposal can be paid off early.

Business or Personal Bankruptcy?

First off let's start with an important distinction: Is your small business incorporated or not?

If your business is in financial trouble and is incorporated, then it is the business that will file bankruptcy because it's a legal entity. If your business is a sole proprietorship or partnership, then from a bankruptcy perspective, it is the individual who is filing personal bankruptcy, not the business.

In this article, I will focus on issues that affect someone who is filing personal bankruptcy as an unincorporated business or self-employed person.

Not All Assets Are Seizable

Filing for personal bankruptcy means you may lose some of your personal investments and assets related to the business. There are some assets that are exempt from seizure in a personal bankruptcy and these exemptions differ by province. In the case of a small business or self-employed worker in Ontario, there is an exemption for "tools of the trade" (equipment that you use to earn a living) for value of up to $11,300.

This can be important if you need to continue to use this equipment to operate your business going forward.

You Can Continue To Run Your Business During Bankruptcy

It might not be obvious, but you can continue to operate your business in a bankruptcy because you are still entitled to earn a living. The important point to consider would be is it *worth* maintaining your business after filing for bankruptcy. The main benefit to going through insolvency is to get debt relief. But, if your business continues to lose money, it won't allow you to have a fresh start financially.

Tax debt can, in fact, be included in bankruptcy

If you do continue to run your business, there might be some issues you will face. For example, access to business credit may be difficult, and you are not permitted to serve as a director of an incorporated business while you are an undischarged bankrupt.

You Might Have A Hard Time Accessing Credit

When you file personal bankruptcy, you must surrender all credit cards. Your current credit accounts will be frozen and will be listed as creditors in your bankruptcy.

Chances are, you won't have access to credit once you file personal bankruptcy. You are required, by law, to state on any credit application that you are an undischarged bankrupt. Some suppliers may still be willing to supply you on credit, but it will be difficult.

After your debts have been cleared and you have rebuilt your credit score by taking steps like obtaining a secured credit card and making regular payments, the opportunity to access credit again will open and you will be able to re-establish yourself among lenders.

When you file personal bankruptcy, you must surrender all credit cards.

You Can Include Tax Debt In Bankruptcy, Depending On Your Situation

From my experience, one of the largest debts for small business owners is income tax. Tax debt can, in fact, be included in bankruptcy. There are exceptions including fraud or if the Canada Revenue Agency has registered a lien against your property before you filed bankruptcy, since the lien makes the debt secured. With a bankruptcy, only unsecured debts can be discharged.

A Consumer Proposal May Be A Better Option

When you file personal bankruptcy, in addition to surrendering certain assets, you may be required to make payments to your bankruptcy estate, based on your income, so the more you earn, the more you may be required to pay into your bankruptcy estate while bankrupt. If you are earning substantial income, these surplus income payments can make your bankruptcy relatively expensive.

If your unsecured debts are under $250,000 (excluding a mortgage on your personal residence), you may be able to file a consumer proposal as an alternative to bankruptcy. With a consumer proposal, you make a deal with your creditors to repay a portion of what you owe over a period of up to 5 years. Your total offer is based on what your assets would be worth in a bankruptcy and your potential surplus income payments, however because you can spread these payments over a period of up to 5 years, the impact on your monthly cash flow is much smaller. In addition, with a consumer proposal you get to keep all your assets and in most cases, repay a small portion of what you owe.

If your debts are above $250,000 you can file something called a Division I Proposal which also allows you to make a partial repayment proposal to your creditors.

It might not be obvious, but you can continue to operate your business in a bankruptcy because you are still entitled to earn a living.

One more advantage of a consumer proposal if you are self-employed or operating a small business is that a proposal can be paid off early. While the length of a personal bankruptcy is set by regulations and cannot be completed any faster than the rules allow, if your business and income improve while in your proposal, you can pay your proposal off sooner.

There are certainly a lot of important facts to know about how a bankruptcy can impact you as a small business owner. If you're self-employed and worried about your unsecured debt, I'd recommend speaking to a debt help professional, like a Licensed Insolvency Trustee as early as you notice financial trouble.

Whether you qualify will depend on your circumstances, but the earlier you seek debt help, the better. In any case, a licensed insolvency trustee can help you better understand your situation, answer all of your questions, and allow you to make the best decision for you and your small business.

J. Douglas Hoyes, B.A., C.A., CPA, CIRP is a Licensed Insolvency Trustee and co-founder of Hoyes, Michalos & Associates Inc. in Ontario, Canada. He is also the host of Debt Free in 30, a weekley podcast about how to handle money and debt.

10 Common Mistakes When Launching a New Business

By Vandana Taxali

Launching a new business for the first time is not always easy. There many factors to take into consideration – whether financing, marketing, customer acquisition or dealing with legal issues. Many new businesses place legal concerns on the back burner due to costs and time constraints. They assume that legal problems can be dealt with later, but it may be too late or even more costly to fix.

Founders needs to be aware that by pitching, sharing a business plan or asking for money could put them offside securities law.

As a mentor for various Canadian startups and entrepreneurs such as OCAD's Imagination Catalyst, George Brown's DigiFest, Oshawa's Community Innovation Lab and Osgoode Hall Law School's, Hack Justice, I noticed that are common mistakes and legal issues that business failed to take into consideration from the outset.

Businesses think that they need to spend less in order to succeed. This is taught to entrepreneurs by the accelerators and start up incubators that teach them about the "lean" start up model as developed by Eric Ries in his book, "The Lean Startup".

However, the principles behind The Lean Startup are not to be thrifty. Rather, being "lean" according to Ries, means to continuously test a start up's vision instead of spending years

developing it and introducing it to a customer afterwards. It's this misconception and misinterpretation of this concept that gets businesses into trouble, especially by failing to get their legal ducks in a row. The following checklist outlines ten common mistakes start ups make by trying to save money on legal costs. Hopefully will help them take the necessary legal steps to be successful in the long run. Spending money wisely saves a business money and headaches later on.

1. Choosing A Business Name Without Rights To An Online Presence

It is important to choose a business name that a business can use online with a website and social media presence. A business should ensure that they can have exclusive right to use it in association with the goods and services of their company to prevent others from hijacking or diverting attention from their brand. A tool to check for a domain and social media name availability is at Name Check, but there are many others.

It is advisable to check the trademark potential and social media status of a business name before proceeding with registering, incorporating or attempting to trademark a business. Once you have checked for its availability online and the potential for trademark protection, then a business should proceed to register it.

2. The Business Name Does Not Comply With Applicable Legislation

The *Trade-marks Act*, the *Canada Business Corporation Act,* and *Canada Corporation Act* have certain requirements when choosing a business name. There are many factors and limitations in choosing a business name. Generally, the business name should be unique and not confuse a consumer with the goods, services, or trademarks of another business. The name should also not falsely describe the business.

3. Failing To Trademark A Business Name

A business must obtain the necessary federal, provincial/territorial and municipal permits and licences, Business Number, registered business name, GST/HST number, corporation income tax, payroll and import/exports accounts. In Alberta, one applies to the Corporate Registry to register cooperatives, corporations, extra-provincial registrations, non-profit companies, societies, trade names and partnerships. In Ontario, this is all done with ServiceOntario. Other offices for other provinces can be found here.

Some people assume that just because they obtained a business registration and/or domain registration and all the necessary requirements for registering a business, that they own the name. This is not true. A business still has to file for a trademark. It's advisable to do so after the recommended name and trademark searches to ensure they have all their rights protected.

Although hiring a lawyer to do a proper name search that costs money early on, it is worth it in the long run. A lawyer will help and supplement Google, industry and business directory searches with NUANS (Newly Upgraded Automated Name Search) searches. The NUANS report provides a list of similar corporate names and trademarks to the proposed business name and reserves that name for 90 days. It is a mandatory requirement before a new corporate name can be approved in most provincial and territorial governments.

Similarly, instead of obtaining proper legal advice, a startup may use generic templates, like shareholder agreements, found on the internet. The danger is that legal concepts found in foreign laws may not be applicable to contracts in the business owner's jurisdiction.

A business may fail to trademark their brand or identity to save money so they can put funds into their invention, venture or idea instead. However, trademark protection should always be a priority for any business owner.

4. Failing To Obtain International Trademark Protection

If a business conducts its operations in the US or Europe, then it is advisable to also obtain copyright, trademark and patent protection in those other countries at the outset and not just in Canada. Failing to do so can jeopardize a business' trademark from being protected in those jurisdictions. The last thing a business wants is to be ready to launch after pitching to funders and investors only to find out that someone else holds the trademark rights. It's important for founders to think about where their markets are or could be in order to protect their brand in those markets.

5. Failing To Properly Secure The Intellectual Property Rights From Co-Founders, Employees, Licensees Etc.

A startup may fail to spend money to obtain the intellectual property rights (patent, trademarks, copyright, including moral rights) from independent contractors such as website developers, software engineers, programmers, graphic designers and their own employees working on and developing ideas and improvements to existing intellectual property rights. It's important to also ensure that any founders or part time independent contractors are not also employees of another company that could be a competing business. Further, the work or contribution they could be doing for their new company could belong to the employer creating conflicting and competing interests.

6. Disclosing An Invention Outside Of The Time Limitation To File A Patent

A patent gives the owner of the patent exclusivity over the right to that invention for a certain period of time in a particular jurisdiction. New business owners make the mistake of

disclosing an invention without the necessary protections and then lose their right to filing a patent leaving it vulnerable for competitors to come in and steal their ideas. It is advisable to not disclose the invention where possible and if absolutely necessary, then to ensure that any parties that an inventor wishes to disclose to, signs a non-disclosure agreement ("NDA") that has been vetted by a lawyer. In addition, business plans should note that all information contained in them are confidential and proprietary.

7. Failure To Sign Agreements With Co-Founders

A startup may take on a co-founder as a way to get free services and not spend money at the outset. In the end, they may find that their partner/co-founder does little to contribute to the business which ends up becoming more expensive in the end. Proper shareholder agreements, intellectual property assignment rights from employees, and co-founders assigning all intellectual property rights to the company are important.

A startup may take on a co-founder as a way to get free services and not spend money at the outset. In the end, they may find that their partner/ co-founder does little to contribute to the business which ends up becoming more expensive in thier end.

By incorporating early instead of waiting later, a company can ensure that the founders are issued shares "subject to vesting". This would prevent a founder from leaving a company and then returning once the venture gets financing or go public. All founders should assign all inventions, ideas, and anything they worked on or contributed to the company's proposed business. This way, if a founder leaves, a company is not in jeopardy of losing the intellectual property rights that go with it.

8. Use Of Generic Non-Disclosure Agreement And Templates

A business may fail to customize an NDA by using templates they obtained from others or on the internet. As a result, certain proprietary formulas or business ideas may not have been included in the NDA resulting in those ideas not being protected.

Similarly, instead of obtaining proper legal advice, a startup may use generic templates, like shareholder agreements, found on the internet. The danger is that legal concepts found in foreign laws may not be applicable to contracts in the business owner's jurisdiction. For instance, a template from the internet may have a clause stating that the governing law is in London, UK but the parties may both reside in British Columbia.

9. Failing To Put Together A Proper Pitch Deck Or Business Plan

It is important for a business to have a good business plan which can even be a one page business plan. The principles for creating a good business plan can be found in the book, "Running Lean" created by Ash Maurya where he talks about "The Lean Canvas". Alexander Osterwalder modified this idea into the "The Lean Model Canvas". The Lean Model Canvas consists of the following elements:

- Problem
- Solution
- Value Proposition or Mission Statement
- Competitive Advantage
- Key Metrics
- Distribution Channels
- Customer Segments
- Cost Structure
- Revenue Streams
- Legal Disclaimers

Without the competitive edge including intellectual property rights or a good business plan, it is difficult for investors, backers or funders to want to invest in a business. Most important, are the legal disclaimers to ensure that the business owner is not violating securities law as further discussed below.

10. (Unknowingly) Violating Securities Laws

Founders need to be aware that by pitching, sharing a business plan or asking for money could put them offside securities laws. There are securities laws and rules when presenting to potential investors. It's important to not add any slides or information regarding fundraising or financing to potential investors such as investment opportunity slides, "ask slides" etc. not permitted under securities legislation. Similarly, it's important to add a disclaimer on any opening slide presentations to make it clear that the business is not soliciting investment from the attendees or potential investors. If a company is pitching to solicit funds, then they need to ensure they are in compliance with the rules around general solicitation. The business plan

should be limited to the product, concept, marketing, strategy, team, vision and competitive edge.

In the rush to get launch a business, a new entrepreneur may miss the important details or be sloppy in protecting their ideas or assets. A business owner may even make things worse in the interest of saving money and time in the short run.

While Eric Ries expounds on the virtues of having a "lean" start up model, the misinterpretation has resulted in many start ups taking the concept of being lean to the extreme and not spending money in areas where they should. Hopefully, this legal checklist dispels that myth and spending money wisely is more important than being lean when starting a new venture. Investing money in the right legal advice at the outset to protect a business's brand, inventions, intellectual property and proprietary interests will protect a business in the long run.

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Charter of Rights and Homeless Persons

By Linda McKay-Panos

Many Canadians are living in poverty, and people from certain groups are overrepresented in those who are suffering poverty's adverse effects, no matter how we measure or define "poverty". For example, a 2015 study by the Edmonton Social Planning Council revealed troublesome statistics:

- one in eight Edmontonians lives below the poverty line;
- Alberta has the largest percentage of working people living in poverty in Canada;
- one in five children under 18 in Edmonton live in poverty, and that number increases to one in two if the family has a single parent;
- Aboriginal persons are twice as likely as non-Aboriginal persons to be living in poverty; and
- Recent immigrants have comparatively lower incomes than other Canadians.

Likewise, a 2012 report authored by the United Way of Calgary and Area, Vibrant Communities Calgary and the City of Calgary indicated that one in ten Calgarians and nearly 400,000 Albertans live in poverty. The report indicates several key factors that contribute to poverty and its effects:

- mental health (60% of homeless persons live with mental illness);
- gender (69% of part time workers in Canada in 2003 were women; female seniors are at particular risk, as are lone-parent families);
- racialized minorities (40% of those living in poverty in 2006);
- sexual orientation (between 20% and 40% of homeless youth in Canada are lesbian, gay, bisexual or transgender);
- children in low-income families; and
- recent immigrants, Aboriginal persons, and persons with disabilities were groups that had significantly lower median incomes than Calgary's median income in 2005.

There have been several philosophical, political and legal debates about whether the Canadian Charter of Rights and Freedoms ("Charter") guarantees that Canadians have a right to adequate housing. To date, although there have been some interesting cases that make Charter arguments about the right to adequate housing or attempting to address the issue in court, these have not been very successful. However, the Charter – in particular Charter ss 7 and 15(1) – has been more successful in shielding homeless individuals who have been charged with bylaw offences or removed by officials from sleeping or living in parks or on other public property, than providing a right to adequate housing.

...a homeless person is an individual "...who has neither a fixed address nor a predictable safe residence to return to on a daily basis."

People living in poverty, including low-income and homeless people, are bound to be negatively affected by municipal bylaws that address public behaviour, such as those governing uses of public parks and transit, and uses of streets. Individuals across Canada have collected very large fines for violating these types of bylaws, yet often their behaviours are based on survival (e.g., riding transit without a ticket because they used the money for rent). Because they are poor and/or homeless, persons with low incomes are unable to pay the fines, which have added up to thousands of dollars.

Victoria v Adams, 2009 BCCA 563 ("Adams, BCCA") is one of the most notable successes in homeless litigation. This decision dealt with a municipal bylaw that prohibited persons from creating overnight shelters in public parks. While this bylaw technically applied to everyone, it was clearly targeted at the "tent cities" of homeless persons sleeping in Victoria's parks. The occupants relied on Charter s 7, which reads:

> *(7) Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

The British Columbia Court of Appeal held that the bylaw infringed section 7 of the Charter because:

- it deprived people of their life and security of the person (people can die when sleeping outside without adequate protection); and
- the bylaw was overbroad and therefore, not in accordance with the principles of fundamental justice (less invasive options would be available to accomplish its societal interests).

Justice Hinkson rejected the idea that the Court has a role in mandating a governmental obligation to help people acquire the basic necessities of life.

Adams, BCCA was an important victory for anti-poverty advocates. It recognized that while governments do not necessarily create the state of homelessness, they cannot legislate in a way that is indifferent to homeless persons' Charter rights. It also emphasized that, just because a case involves publicly owned property, it does not make the case about property rights.

The 2015 British Columbia Supreme Court decision in Abbotsford (City) v Shantz, 2015 BCSC 1909 ("Abbotsford") reiterated the court's reluctance to recognize that the Charter creates obligations on the government to provide social and economic rights. In Abbotsford, the Drug War Survivors (DWS) argued that certain city bylaws are unconstitutional and infringe upon various rights of the homeless under the Charter, including section 7.

The events that lead to Abbotsford began with City employees spreading chicken manure on "the Happy Tree Camp" created by homeless persons on Gladys Avenue with the intention to force homeless persons to dismantle and leave their camp. Shortly after, Mr. Shantz and others created a tent camp in Jubilee Park without permission from the City. Many of the occupants of the tent camp moved into a wooden structure in the parking lot of Jubilee Park. The City obtained a Court Order for the occupants of the tent camp to vacate Jubilee Park. After the homeless people were continually forced to keep moving, with varying outcomes, some of them returned to erect tents along Gladys Avenue. The city also used blanket prohibitions against gathering in public spaces without a permit to keep the homeless forming any visible presence in public parks. By the time the case was presented in Court, the City managed to tolerate a small area of tents for the homeless people.

The DWS argued that the city bylaws in question conflicted with the principles of fundamental justice because they displaced the city's homeless population and excluded their presence from public spaces. As a result of this continuous displacement, homeless people are denied the ability to "obtain the basic necessities of life, including survival, shelter, rest and sleep, community and family, access to safer living spaces, and freedom from the risks and effects of exposure and sleep deprivation".

The DWS argued that there is a lack of accessible shelter for the city's homeless population. Homeless people face a number of barriers in accessing shelter and housing. Also, with the many risks that homeless people face, many prefer to seek shelter out-of-doors and set up camps in order to look after one another. However, the city made the claim that the homeless are sleeping out-of-doors in camps because they are choosing not to follow the rules set out for all members of the. In similar fashion to other cases, the court rejected the assertion that homelessness is a choice.

The DWS also argued that the city failed to provide adequate housing for the homeless. The court's position on the duty of the city to develop housing for the homeless was to reiterate that this falls within the scope of the legislature to decide rather than that of the court, emphasizing the perspective that courts do not create positive social obligations.

...the *Charter* - in particular *Charter ss 7* and 15(1) - has been more sucessful in shielding homeless individuals who have been charged with bylaw offences or removed by officials from sleeping or living in parks or on other public property, that providing a right to adequate housing.

Justice Hinkson concluded in Abbotsford that "homelessness is a risky, but legal activity and enforcement of the impugned bylaws heightens the health and safety risks that the city's homeless face." Justice Hinkson did acknowledge the liberty and security of person interests as outlined as discussed by the Supreme Court of Canada ("SCC") in Carter v Canada, 2015 SCC 5. He also acknowledged that a homeless person's liberty interest is violated when the city bylaw interferes with that person's ability to shelter oneself when there is no other alternative. However, Justice Hinkson rejected the idea that the Court has a role in mandating a governmental obligation to help people acquire the basic necessities of life. In doing so, Justice Hinkson specifically mentioned the definition of a "legal principle", which was previously defined by the SCC in R v. Malmo-Levine, 2003 SCC 74 as one within the sphere of the judiciary and not public policy.

Ola Malik and Megan Van Huizen point to an important thread in how an issue is framed in Adams and Abbotsford, namely that the courts in Adams and Abbotsford recognized that:

> *[T]he homeless have a constitutionally protected liberty right under section 7 of the Charter to sleep overnight in parks under temporarily erected overhead shelters where a municipality does not have sufficient accessible shelter space to accommodate them.*

The court in Abbotsford framed the section 7 Charter question as one which asks if the bylaw is depriving someone of an interest rather than requiring the City to grant the provisions for adequate food, shelter or any other basic necessities of life. Malik and Van Huizen note that while the Courts continue to avoid placing positive obligations on the government to provide for an adequate living standard for everyone, there is a constant reminder in the legal and social spheres that it is an issue that must be addressed in some way, whether by the judiciary or the legislature.

While homeless litigants have been successfully able to rely on Charter section 7 arguments to shield themselves from the adverse effects of bylaws (such as those described above), they have also tried to rely on Charter subsection 15(1), which has taken more of a supporting role in these cases. Charter s 15 reads:

> *15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> *(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

The use of equality arguments such as the disproportionately negative effects of bylaws on a city's more vulnerable population such as the homeless are illustrated in the case of Abbotsford. DWS challenged certain sections of the city's bylaws concerning the use of public spaces and the prohibition of the erection of temporary shelters for homeless persons, and their enforcement, alleging that they targeted the homeless population and infringed their Charter rights under sections 2(c), 2 (d), 7 and 15(1). The Court concluded that homeless individuals should be allowed to erect temporary shelters and to camp overnight in city parks when there is not enough shelter space available.

In trying to pinpoint a definition of homelessness, Justice Hinkson in Abbotsford adopted the accepted definition in Adams, BCCA, which states that a homeless person is an individual "…who has neither a fixed address nor a predictable safe residence to return to on a daily basis". Justice Hinkson noted that homeless people are diverse in character, which increases their vulnerability and often have battles to contend with on many fronts.

In Abbotsford, DWS submitted that the disputed bylaws and displacement tactics by the City discriminated against the homeless and perpetuated and worsened substantive inequality, thus were unconstitutional and violated their subsection 15(1) equality rights under the Charter. They also argued there was a compounding effect on the homeless who generally

are composed of vulnerable groups, such as persons with disabilities, Aboriginal peoples, other racial minorities, and vulnerable economic and social beginnings.

The events that lead to *Abbotsford* began with City employees spreading chicken manure on "the Happy Tree Camp" created by homeless persons on Gladys Avenue with the intention to force homeless persons to dismantle and leave their camp.

In Abbotsford, the contextual factors were never addressed in the substantive equality analysis. Justice Hinkson briefly acknowledged the historical mistreatment of Aboriginal people and persons with disabilities, yet he did delve deeper into a formal equality analysis. Although Chief Justice Hinkson acknowledged the disputed bylaws might have a greater impact on the homeless, he concluded that they are treated in the same way as everyone else. Unfortunately, in this case, the court missed what could have been an excellent opportunity to look at substantive equality through an adverse effects discrimination lens, and to apply this analysis to the bylaws in question and their effect on homeless people.

The next phase of inquiry moves to the question of whether cities and municipalities can justify the violations of either Charter section 7 or 15(1) under section 1 of the Charter.

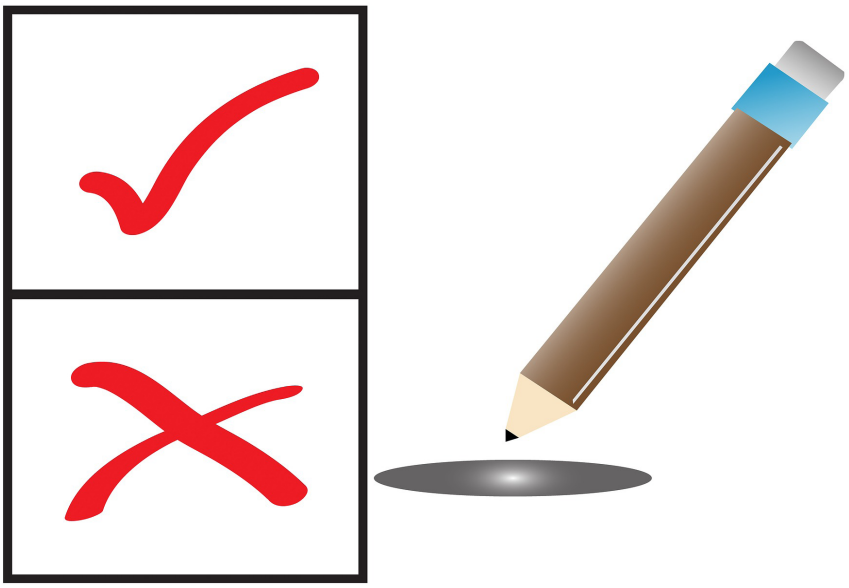
Section 1 of the Charter takes into consideration the greater public interest and is the means by which the government may be justified in infringing an individual's rights and freedoms under the Charter. Charter section 1 states:

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

In both Adams and Abbotsford, the governments' violations of the litigants' Charter s 7 rights were not justified under Charter s 1. The Courts proceeded to provide remedies, such as making a Declaration that overnight sleeping be permitted between 7 p.m. and 9 a.m., and also making a Declaration that Sections of bylaws that apply to homeless persons and prohibit sleeping or being in a City park overnight or erecting a temporary shelter without a permit are of no force or effect.

While sections 7 and 15(1) of the Charter may be successfully used to shield homeless persons from the adverse effects of parks and streets bylaws, much work needs to be done if we seek to rely on the Charter to argue for a right to adequate housing.

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



Greater Electoral Access for the Homeless

By Institute for Research on Public Policy (IRPP) and Anna Kopec

Much more needs to be done to ensure that homeless people are encouraged to vote and given equal opportunity to do so.

Do homeless people vote? Although they are citizens of Canada, the political participation of homeless people has rarely been considered. The health of our democracy should be measured by our commitment to ensuring that the most vulnerable citizens are able to participate in the democratic process. The widespread assumption, however, is that homeless people are apathetic, are not interested in politics and do not vote, so discussions about electoral access tend not to include them. Although election officials do try to reach out to vulnerable populations, and the rules do allow homeless people to vote, much more needs to be done to ensure that homeless people are both encouraged to vote and given equal opportunity to do so.

In research for my master's thesis at the University of Guelph, I examined the barriers to voting for homeless people in Toronto. I conducted 45 qualitative interviews. I interviewed 28 homeless individuals from three shelters and drop-in centres in the city; 9 service providers from seven institutions serving homeless people; 5 politicians (past and current MPs, MPPs and city councillors) representing areas where homeless people are concentrated; and representatives from the elections agencies: Elections Canada, Elections Ontario and the Toronto City Clerk's Office.

I found that homeless people are interested in and knowledgeable about politics. Three-quarters of those I interviewed expressed strong and informed opinions on political parties,

candidates and policies. The homeless people I spoke to were eager to discuss political matters and expressed interest in learning more about how they might vote, particularly since most were not even aware that they were allowed to do so. The marginalization of homeless people often leads to the assumption that they simply aren't interested in participating in politics. In turn, this assumption then reinforces and justifies a lack of policy initiatives to support the political engagement of this segment of the public.

However, my research shows that homeless Canadians do vote. Half of those I interviewed had voted in the October 2015 federal election (the national turnout was 68 percent), although only a third were homeless at the time.

The homeless people I spoke to were eager to discuss political matters and expressed interest in learning more about how they might vote; most were not even aware that they were allowed to do so.

The process of voting for citizens without a permanent address in Canada is complex. It varies from jurisdiction to jurisdiction, with different rules at the federal, provincial and municipal levels. Harmonizing these rules would be a good start to ensure greater electoral access for homeless Canadians. The requirements for identification are among the rules that vary considerably, and lack of acceptable ID is frequently pinpointed as a barrier to voting by politicians, homeless people and service providers. Often, homeless people must provide different documentation as proof of address and they need assistance from service providers at shelters and drop-in centres, but many service providers, politicians and even electoral officials are as ill-informed as the homeless people themselves about the requirements.

While electoral officials insist that they routinely send information and guidelines about the voting process for homeless people to shelters and drop-in centres, the people who work at those organizations often report either not receiving the information or finding the information is too complex and not easily accessible for the target audience. Information about voting must be better distributed, in a comprehensive and accessible fashion. To encourage homeless Canadians to vote and to limit the factors that impede their participation, service providers, politicians and election agencies must work together.

Service providers are often the first line of contact for homeless people accessing services, and they can encourage homeless people to vote and participate in politics. However, the level of activity in service organizations related to elections varies considerably, so does the information they provide to homeless clients about voting; the proportion of homeless people who vote may depend on which services they access, which will influence which organizations they connect with and even which individual service providers they get information from. Furthermore, institutions generally lack the resources to encourage their clients to vote and ensure they are aware of the process, regardless of the intentions and

personal political engagement of service providers.

Politicians are vital actors in ensuring that homeless people are able to exercise their right to vote; however, they rarely include this population in their campaign efforts. This is true even though institutions serving homeless people provide convenient spaces for campaigning, especially for canvassing. If candidates can travel to senior care facilities, surely they can also visit shelters and drop-in centres to meet with citizens there. Adding these locations to the campaign tour would not only encourage homeless people to vote but also begin to bridge the gap between homeless people and their elected officials, improving an often hostile relationship that is identified as contributing to the marginalization of the population.

Election agencies need to ensure that their information on voting actually reaches homeless people, and they should educate service providers so that they can help get the word out. Agencies must also train polling clerks on the process of voting for citizens without a permanent address. Homeless individuals reported being turned away from the polls by officials who told them they could not vote. In other instances, they were told they would have to return at a later time when someone who knows the process would be present. These occurrences add to the embarrassment and discomfort experienced by homeless people and undermines their trust in the electoral system. In Toronto, some polling stations for municipal elections are located within institutions serving homeless people. Participation rates among homeless voters are notably higher at these locations, so this may be a key tool for reducing some of the barriers to voting for this population.

Homeless people are deeply affected by government policy. Their voices are vital not only to ensuring their equal citizenship but also to the production and successful implementation of policies aimed at reducing poverty and homelessness in Canada. When discussions of social policy include consideration of their political participation, homeless people can be seen as contributing citizens. As it stands, their voting tendencies are rarely investigated, adding to their stigmatization and impeding their access to a democratic right — one that is guaranteed to us all.

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Low Income Ontarians More Prone to Debt Problems (Ontario Study)

By J. Doug Hoyes

Over the last two decades, precarious or insecure employment in Canada has increased by almost 50%, as 1 in 7 Canadians lives in poverty. Part-time work is becoming more common. Wages are not increasing fast enough to keep up with rising costs, resulting in higher personal debt levels. All of this explains why a bankruptcy study conducted by my firm found that low income and income insecurity are a much greater determinant now, as compared to previous year, of whether or not someone will have debt problems and file for insolvency.

In our findings, the average debtor in Ontario has an income that's 41% lower than the median income in the province. What's more, almost two-thirds (64%) of insolvent debtors have an after-tax household income in the bottom quartile of household earnings in Ontario.

Our study, called Joe Debtor, is conducted every two years to develop a profile of the average person who files for relief from debt. We then use this information to gain insight and knowledge as to why consumer insolvencies occur.

Our latest report, released in March 2017, reviewed the details of over 6,700 personal insolvencies in Ontario from January 1, 2015 to December 31, 2016. We compared

From my experience, one of the most important steps you can take to get debt relief is to seek help as soon as you start experiencing trouble.

the latest results with our previous Joe Debtor reports and concluded that there is a higher proportion of lower-income earners who are filing insolvency.

In addition, we found that it takes less debt to trigger insolvencies. The average insolvent debtor owed $52,634 in credit card and other unsecured debt, 7% less than two years earlier. Generally, someone files for bankruptcy when something catastrophic happens: they lose their job, become sick, or get a divorce. The result is less income available to repay existing debt. While this is still true, lower income levels can support less debt overall even when rates are low. Hence more low-income earners are declaring bankruptcy today than higher income earners.

Using Debt to Survive

To make ends meet, today's debtor uses debt to make up for low or stagnating income. He uses debt to pay for everyday living expenses. Once debt accumulates, a below-average income makes it almost impossible to manage debt repayment. So, an unfortunate cycle begins.

The issue isn't simply a lack of financial responsibility or discipline. Our average debtor is struggling with the rising cost of living and using credit to supplement a below-average income as:

...senior debtors aged 60 and over now make up 12% of all insolencies, continuing the growing trend that started back in 2011.

- 41% of their income is spent on housing costs (that's more than the recommended 35%)
- 31% is spent on personal and living expenses (above the recommended 20%)
- Just $302 is available each month to meet unsecured debt payments on an average debt d of $52,634.
- Interest costs alone amount to roughly $960 a month
- Overall debt load increases with every passing month

To combat monthly income shortfalls, debtors turn to payday loans more than ever before. 1 in 4 insolvent debtors (25%) are using these loans. In fact, it's actually becoming a scary trend among seniors.

Financially Vulnerable Risk Groups

There are at-risk households that are already experiencing financial distress before considering debt repayment. Four groups in particular are most vulnerable to insolvency:

Generally, someone files for bankruptcy when something catastrophic happens: they lose their job, become sick, or get a divorce.

- **Young debtors**, aged 18-29, account for 14% of all insolvency filings. This is up from 12% in our previous study in 2015. 6 in 10 young insolvent debtors say financial issues are the main cause of insolvency due to student debt and payday loan use.
- On the opposite side, **senior debtors** aged 60 and over now make up 12% of all insolvencies, continuing the growing trend that started back in 2011. 6 in 10 insolvent seniors live alone and struggle to repay debt, on top of a rising cost of living, all on a reduced and fixed income. Compared to our previous studies, they are more likely to be widowed, divorced, on a disability, and retired.
- **Lone parents** account for 17% of all insolvent debtors. Single parents are at a substantially higher risk of filing insolvency than dual-parent families as they are raising a family on an income that is, on average, 28% below that of two-parent households.
- Lastly, **female debtors** are almost twice as likely to have student debt and they are more than three times as likely to be lone parents.

Solutions to Achieving Debt Relief

The statistics certainly paint a dark picture and it's an unfortunate reality that so many Canadians are having to face. But even with debt problems, there is hope for relief.

From my experience, one of the most important steps you can take to get debt relief is to seek help as soon as you start experiencing trouble. It will allow you to have more options for paying down debt, like going to a **credit counsellor** for a **debt management plan** or obtaining a **debt consolidation loan** from your bank.

Over the last two decades, precarious or insecure employment in Canda has increased by almost 50%, as 1 in 7 Canadian lives in poverty.

However, if you're feeling overwhelmed with debt, you might not have to file for bankruptcy. Another effective and affordable debt relief solution is a consumer proposal. Despite our study showing that the average income among insolvents declined, more than half (55%) of all insolvent debtors in our study filed a consumer proposal as an alternative to bankruptcy to deal with their overwhelming debt levels.

A consumer proposal is a legally binding arrangement, filed with a Licensed Insolvency Trustee. You often repay less than what you owe and over a period of up to 5 years. The Trustee negotiates with your creditors on your behalf to come up with an affordable repayment plan for you.

For example, if you owe $50,000 in unsecured credit card debt and other loans, a consumer proposal could allow you to reduce your monthly payments on that total debt amount to just $300 a month, over 5 years, or $18,000 in total.

It is certainly a big saving from paying back the entire $50,000, where minimum payments alone can be $2,000. When you consider the monthly earnings of our average debtor at $2,377, $50,000 becomes a near-impossible debt to pay off.

Financial difficulties happen. And they happen more often than you think. But, if you're struggling with debt, it's a good idea to seek help as early as you can because there are solutions available to help you get back on track with your finances.

J. Douglas Hoyes, B.A., C.A., CPA, CIRP is a Licensed Insolvency Trustee and co-founder of Hoyes, Michalos & Associates Inc. in Ontario, Canada. He is also the host of Debt Free in 30, a weekley podcast about how to handle money and debt.

CRIMINAL LAW

Criminal Court Haters, Take Note: What the #believethevictims Movement Fails to Recognize

By Melody Izadi

No one condones sexual violence, harassment, assault or anything of that nature against women, or anyone else. Not the Judges, Courts, or Defence Lawyers. However, the sharp and profound movement that villainizes any participant of the criminal justice system that is involved in the acquittal of an accused who is alleged to have sexually assaulted one or more women was ignited after Marie Heinen's admirable defence of Jian Ghomeshi. Since then, the internet has been full of ignorant representations of the justice system, and positions that deny the presumption of innocence to anyone charged with a sexual assault. Editorials, reports, blogs and articles drone on and on about the despicable justice system participants that are allegedly complicit in condoning sexual violence.

But is that really the case? Are judges and lawyers really sitting around and inventing ways to prevent justice from occurring and allowing sexual assault to be excused? Perhaps the reality is that each case is heard on its merits. And perhaps some complainants who come forward are more than just inconsistent in small portions of their innocence— they are *proven* to be flat out lying.

There is no room in the courtroom, or in our constitution, for a presumption that every complainant of a sexual assult is being truthful.

Amongst all the noise and chaos that surrounds this movement, there seems to be an unfortunate lack of recognition of cases like the Ontario Court of Appeal's decision is *R. v. McKenzie 2017 ONCA 128* — a decision from a Court that is higher than the Court that heard the case of Jian Ghomeshi.

Mr. McKenzie was convicted of sexually assaulting a 19-year-old colleague at a workplace Christmas party. He pulled her into a washroom, groped her, and partially penetrated her anus with his penis. He stopped the assault because someone knocked on the door. Mr. McKenzie was found guilty.

The victim was believed in this case.

Mr. McKenzie then appealed his sentence. He was not a citizen of Canada, but a permanent resident. His immigration status could be affected by any criminal convictions. Mr. McKenzie was sentenced to 9 months in prison for his crime, in accordance with

The only presumption that must be present, respected, and adhered to is the accused's presumption of innocence.

the status-quo sentence that the Court of Appeal had previously ruled on. He appealed his sentence on the basis that if he received a sentence of 6 months imprisonment or more, he would lose his right to appeal any removal order, a.k.a. deportation, made by the Canadian government.

The Ontario Court of Appeal dismissed Mr. McKenzie's appeal, meaning his 9 month jail sentence was left untouched. The Court held that nine months imprisonment was appropriate because the offence was a serious one. The Court held that trial judge made no error in his ruling when considering this sentence. "To have imposed a sentence of less than six months' imprisonment would have involved reducing the sentence … [in such a way that it] would have resulted in a demonstrably unfit sentence for a "significant sexual assault" involving anal penetration" the Court held.

So even in a case where there are significant arguments to make in favour of a reduced sentence for the accused, the Court took no mercy. For those who have doubt in the justice system or stand by the problematic notion that any complainant who takes the stand is presumed to be a liar should take note of this judgment and other like judgements as an example of how the system is working.

Trials are heard on their merits. The only presumption that must be present, respected, and adhered to is the accused's presumption of innocence. And starting from that checkpoint, evidence and credibility are assessed and analyzed by the trier of fact. There is no room in the courtroom, or in our constitution, for a presumption that every complainant of a sexual assault is being truthful. However, *R. v. McKenzie* should serve as a reminder to those outraged at the Ghomeshi verdict to trust in the process, and to give credence to the constitutionally protected right to the presumption of innocence. Should the Crown prove that a sexual assault occurred beyond a reasonable doubt, as they did in *McKenzie*, then a conviction will be rendered, and at least part of what a victim testified to would be believed. *McKenzie* is evidence that the system is working. #believeintheprocess.

So even in a case where there are significant arguements to make in favour of a reduced sentence for the accused, the Court took no mercy.

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

EMPLOYMENT LAW

#MeToo and Wrongful Dismissal

By Peter Bowal

Introduction

It is said that everyone has their own #MeToo story. Indeed that is exactly the message #MeToo seeks to communicate. I start this column with a story that comes to my mind in this context. This then leads to the main point of this piece: #MeToo makes for captivating human interest stories and an empowering political movement, but it is irreconcilable with civil justice under our modern employment law system.

More than twenty seven years ago, the committee that selected and hired me for my current job included a senior female tenured professor in my academic discipline. Shortly after I started the job, she shared that she was single and available. As strange as it may seem, this did not strike me as inappropriate. I considered her a casual friend who opened up a bit about her personal life.

However, she continued to remind me of her influence in hiring me and implied she could influence the length of my new employment. She pressured me to use a draft of her new book in my teaching. She exerted other subtle persuasions on my work although she had no supervisory role.

Another unsettling element of these spectacular "fire first, ask questions later" terminations is their hasty and public nature.

Another unsettling element of these spectacular 'fire first, ask questions later' terminations is their hasty and public nature. But when my wife gave birth to twins a year later, my colleague's spontaneous comments on my "breeder" qualities were utterly shocking. I withdrew from interacting with her, even though she could sabotage my fledgling career. I am not aware that she did seriously undermine me. My career setbacks were caused by me alone.

What if I raised my hand today and called out her name?

Warning to Employers

What plays sensationally well to the public in the news, often meets with a very different fate years later in the courtroom. It is tempting to submit to the mob rule of #MeToo, of a tweet, a news story, even a rumour to immediately terminate the employment of an employee or manager for an indiscretion alleged by one or more accusers (with unproven motives) to have occurred many years and decades ago.

Sexual harassment must also be distinguished from sexual assault, which is criminal and much more serious.

While the statutory limitation periods have been lifted for civil claims involving "any misconduct of a sexual nature" as discussed in a recent column here, wrongful dismissal claims can be brought up to two years later by terminated employees. Terminated workers simply do not have a fair or reasonable opportunity to refute unsubstantiated allegations of sexual harassment from decades ago in the face of the #MeToo movement, but they have the strong advantage in any ensuing wrongful termination lawsuit.

Sexual harassment must also be distinguished from sexual assault, which is criminal and much more serious.

Most of the stale allegations which drive these firings are of the 'she says, he denies' category. This is the weakest possible basis upon which an employer can defend a wrongful dismissal lawsuit because the defence will ride solely on the integrity, recollection and motives of the accuser(s). Since the dismissal was swift, there will be no objective investigation and evidence available.

Managers and co-workers who are summarily dismissed in the current #MeToo hysteria rarely benefit from objective evaluation of the accusations. Rather thier employers choose to make examples of them in the most public manner possible.

Even if some of the historic allegations are accepted as true, they will not establish sufficient cause for summary dismissal. Some complaints involve behaviours outside of the worker's scope of employment, unrelated to the job. Sexual harassment must also be distinguished from sexual assault, which is criminal and much more serious.

Managers and co-workers who are summarily dismissed in the current #MeToo hysteria rarely benefit from objective evaluation of the accusations. Rather their employers choose to make examples of them in the most public manner possible.

If the employee's work record was otherwise beyond reproach, and the harassing behaviour occurred many years ago, summary dismissal will be virtually impossible for the employer to justify. Even where the misconduct is in the present, progressive discipline – such as a warning or suspension – must be considered and tried before firing. Forcing one to resign is legally synonymous with terminating that employee.

Another unsettling element of these spectacular 'fire first, ask questions later' terminations is their hasty and public nature. This is precisely what the employer intends to do – to stem any public backlash and loss of brand value. Nevertheless, this form of crisis management often translates into high defence and liability costs down the road. Canadian employment law does not permit employers to throw their employees under the bus. If they do, damages can be high.

Some of the top American executives who have fallen victim to this mob rule stand to lose hundreds of millions of dollars and, with their reputations in tatters, they may never be able to rehabilitate their businesses and careers. On the strength of an accuser's mere allegations years and decades after the asserted misconduct, it is not right for employers to immediately sacrifice workers to save the employer's reputation. This will not end well for many employers facing wrongful dismissal lawsuits in the years ahead.

But when my wife gave birth to twins a year later, my colleague's spontaneous comments on my "breeder" qualities were utterly shocking.

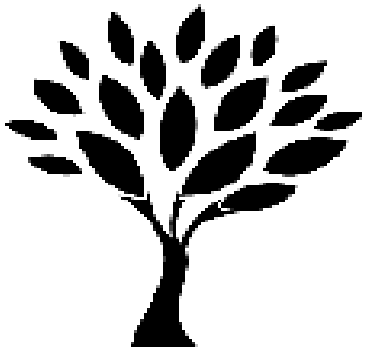
Conclusion

Even back in the day when my senior colleague made her outrageous "breeder" comments, there was awareness of the harm of sexual harassment in the workplace. My employer had a sexual harassment policy and an officer enforcing it who, naturally, was another woman. It was assumed that only men harass, that only women are victims and that only a woman can know what sexual harassment is. The role of our workplace sexual harassment officer was largely advisory and preventative but even in 1992 one could be punished to the point of losing one's job for sexual harassment.

But when my wife gave birth to twins a year later, my colleague's spontaneous comments on my "breeder" qualities were utterly shocking. Not long after the comments, I attended a staff presentation by the sexual harassment advisor. I mentioned the objectionable comments by the unidentified female colleague in authority. The advisor laughed off the comments, and my question. She assured me the colleague "had only been joking". Today the sexual harassment advisor would be seen as an enabler. The new mantra on campus is "We Believe You".

However, I had the opportunity to raise any concern with the co-worker at the time, and to escalate it to the employer if necessary. I decided not to do that then. While she continues to be my colleague today, I am morally and legally bound not to do that a generation later.

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



ENVIRONMENTAL LAW

Are Environmentalists Good or Bad?

By Jeff Surtees

Tree-huggers. Greenies. Enviro-nazis. Eco-terrorists. Eco-extremists. City-dwellers. Radicals. Eco-vangelists. Eco-crazies. Sheeple. Foreign-funded _____ (add any of the preceding epithets).

What ARE environmentalists anyway? Are they good, wise, caring, rational, science-loving people put here to save us? Or are they deluded, uninformed, unreasonable, deranged lunatics out to destroy our jobs and our way of life, probably for personal gain? And what does all of this have to do with environmental law?

In my opinion it has a *lot* to do with environmental law, or at least it has a lot to do to do with how that law develops. When people use negative labels to describe environmentalists, they are attempting to frame the discussion to suit their own purposes. Repetition of the negative labels is meant to shift public opinion and public opinion eventually impacts what becomes law.

If you are brave enough to read through th occasionally soul sucking public comments on environmental news stories and social media pages, you will come away with the impression that there is an epic battle between good and evil taking place.

I grew up thinking that "law" was just about rules. My father was a Crown prosecutor. I had a limited understanding of what he did when he went to work, but I knew that he tried to put the bad guys in jail. There were rules. People who broke them went to jail.

I now think that the law is about so much more than rules. It's about what we want the world to look like. It isn't always a thing, it's often more like a process. The capital "L" Law reflects the society we live in, the one we want to live in, the things we collectively care about, the things that percolate to the top and demand the most attention. It's messy and always slightly out of date, because society is complicated and the systems we have in place for creating law (elections, legislatures, law reform research, public consultations, lobbying) are imperfect. There is always a time lag between an expression of some desire in society and that desire finding its way into what we call law. There will inevitably be compromises.

In other words, society and law are inseparable. There is a continuous, symbiotic, push-pull relationship between the two.

Learning how to teach people to have a stronger environmental ethic may be the most important group of skills needed for those who want to improve our environmental laws.

Environmentalists are everywhere. Some work for non-profit organizations. Some want to change things quickly, even radically. Some work for oil companies, engineering firms, transportation companies, waste disposal companies, governments, law firms, utilities, universities . . . trying to make things better. They are farmers and ranchers. Some like to hunt and fish. Some are backcountry campers, skiers and off highway vehicle users. Jeff Foxworthy could probably work up a routine "If you breathe air and drink water. . . YOU might be an environmentalist". Environmentalists aren't good or bad. They are just us. I'm one. You are probably one too.

Learning how to teach people to have a stronger environmental ethic may be the most important group of skills needed for those who want to improve our environmental laws. If deeper caring for the environment becomes a more engrained societal value, our laws will eventually come to support that value.

For many people, the conversation about environmental issues takes place online. If you are brave enough to read through the occasionally soul-sucking public comments on environmental news stories and social media pages, you will come away with the impression that there is an epic battle between good and evil taking place. Everyone appears to be talking, very few are listening. In the words of the late Strother Martin in the 1967 film *Cool Hand Luke*, "What we've got here is failure to communicate."

When people use negative labels to describe environmentalists, they are attempting to frame the discussion to suit thier own purposes.

Social media exaggerates our differences of opinion and lowers the quality of our conversations. In a short paper (available online) called "Moral Outrage in the Digital Age", Professor Molly Crocket of Yale University concludes that the ease of posting on social media magnifies the triggers of moral outrage, reduces its personal costs and amplifies its personal benefits. Professor Crockett states that if moral outrage is a fire, the internet is like gasoline.

For environmentalists and people who think they are not environmentalists, I propose the following incomplete list of suggestions to improve communication:

- Be selective about what you choose to read and post on social media. Think about whether responding to something is going to do any good. Maybe there are more productive ways to advance your cause. Online forums may look like rational debate but are often staged attempts to manipulate public opinion. Since people tend to only read things that confirm their opinions (confirmation bias), your well-thought out argument will likely only be read by people who already agree with you;
- Fight your own confirmation bias. Try to listen to people with opposing views. Try to truly understand what they are saying and what they care about. You don't have to agree or necessarily compromise. You are in a better position to make your point if you fully understand theirs. And who knows, you might occasionally change your mind;
- Deal with skepticism and mistrust by showing the other person that you are listening and trying to understand their position (easier face to face than online);
- Avoid name-calling. It just undermines what you are saying;
- Stick to the truth but realize that it's difficult to change people's minds by reciting facts. You must understand people's values (including your own) and frame the debate in ways that reinforces those values;
- If you find yourself occasionally drawn into online shouting matches, think about instituting a self-imposed response time delay rule;
- Do your best to not be morally outraged.

For anyone who wants to dive in a little deeper, I highly recommend the 2016 book *I'm Right and You're an Idiot – the Toxic State of Public Discourse and How to Clean it Up* by James Hoggan, a book that should be required reading for anyone who wants to post anything online.

Jeff Surtees B. Comm., JD is the Executive Director of the Centre for Public Legal Education Alberta and is a Graduate Student in the University of Calgary's Natural Resources, Environmental and Energy Law program.

FAMILY LAW

Self-Employment and Family Law: Calculating Income for Support

By Sarah Dargatz

In most cases, the amount of child support a parent has to pay is determined by their income. For an employee, this is generally simple to calculate and is usually set out at line 150 of the employee's tax return. However, many Albertans earn income from self-employment. It can be complicated to assess that parent's income for the support of their child as line 150 may not accurately reflect how much money that parent actually has available.

Under our tax laws, a self-employed person is allowed to deduct business expenses from their total income. Recently, the Alberta Court of Appeal, in *Cunningham v. Seveny*, 2017 ABCA 4, stated that people who have an interest in a business bear the burden of proof to demonstrate that certain business expense deductions are reasonable for the purposes of calculating income for child support. A self-employed parent must provide full financial disclosure to the other parent along with explanations of their compensation and benefits. The reasonableness of an expense is not necessarily determined whether the expense is allowable under the *Income Tax Act*. The court will look at the personal benefits the parent receives such as the personal use of the business' vehicles, computers, cellphones, travel, and entertainment expenses. Expenses that are not reasonable can be "added back" to their income. The court then "imputes" the new income on the self-employed parent and uses it to calculate child support.

Once the value of a business is determined, the divorcing couple must then decide how they will split the value.

If a self-employed parent does not provide adequate disclosure of their compensation, benefits, and explanations for their expenses, a judge can draw an "adverse inference". This means that a judge can make a presumption that the evidence was not provided because it would hurt that person's own case. For example, if information about an expense is not provided, a judge can assume a high percentage of the expense was for the parent's

personal benefit and add most of it back to their income.

In some cases, it may be necessary to have an accounting professional review a business's financial statements to provide an opinion of what the self-employed parent's "guideline income" should be set at to calculate child support.

As with all matrimonial property, the person who owns the business has a positive duty to disclose all relevant information about the business so it can be properly valued.

The same evaluation of a self-employed person's income can be done to calculate spousal or partner support as well.

Dividing Matrimonial Property

When married people separate, all property (except for a few exemptions) that the couple has accumulated throughout the marriage is divided equally between them. If a self-employed person runs an unincorporated business (ex. a sole proprietorship), the equity in the business assets they own under their own name are also matrimonial property to be divided. If a self-employed person runs an incorporated business, the value of the shares in that business are matrimonial property. The value of the shares is determined by the equity in the business assets along with other considerations that affect the value such as long-term contacts or name recognition.

One way to think of the value of a business is consider what a third-party would pay to buy that business. For example, if one party owned a restaurant as an incorporated business, the value of that restaurant would be determined by the equity in the physical assets (such as the equipment, furnishings, and building), the debts owing to creditors (such as the bank, suppliers, and Canada Revenue), and the expected earnings (which would be affected by how well known it is, where it is located, whether it has regular customers or events, how long it has been in operation, etc.) These kinds of factors all come in to play when a buyer considers how much to pay to buy that restaurant.

Since many business owners are unlikely to actually sell their business when they divorce, it may be necessary to have a professional business valuator provide an opinion on the value of the business. As with all matrimonial property, the person who owns the business has a positive duty to disclose all relevant information about the business so it can be properly valued. In the very least, this

If a self-employed person runs an incorporated business, the value of the shares in that business are matrimonial property.

includes providing copies of financial statements, tax returns, bank account statements, copies of cheques issued to the business owner, and information about other benefits the business owner or their family members have received. It may be necessary to provide additional records.

Once the value of a business is determined, the divorcing couple must then decide how they will split the value. One person can buy the other out with cash, they might transfer other property (ex. the matrimonial home) equal in value, or they might transfer their shares in the company. Whenever transfers are made it is important to consult a tax expert and review the business' incorporating documents to ensure the transfer is advisable and allowable.

There are many benefits to being self-employed. However, self-employment should not provide an opportunity for a parent to pay less than what is appropriate in child support or to shield a spouse from receiving their share of matrimonial property. Rather, the benefits of self-employment should extend to the whole family.

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FAMOUS CASES

The Law of Spanking

By Peter Bowal and Cody Stokowski

A person commits an assault when . . . without the consent of another person, he applies force intentionally to that other person, directly or indirectly . . .

Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Criminal Code, sections 265(1) and 43

Introduction

The freedom and choice of parents to discipline their children in the manner they choose, free from interference by the state, raises the question of where the line ought to be drawn between acceptable physical discipline and criminal assault. In a family (non-criminal) law context, spanking may also be viewed as child abuse. Social science research is inconclusive, showing both positive and negative impacts of corporal (physical) punishment.

About half the countries of Europe have made all forms of corporal punishment illegal in schools only. The other half make it illegal in both schools and homes. About half of the American states have illegalized corporal punishment in schools. The other half do not regulate it but allow parents to rule it out at school. Some 67% of Americans approve of spanking.

In Canada, there is no legal distinction between corporal punishment in the home and at school, although – along with the rest of the developed world – the practice in both places appears to be in decline. It would be difficult to find a strap in any modern Canadian school, much less one that has been recently pressed into service.

Degrading, inhuman or harmful force will never be excused. Using objects or blows and slaps to the head are unreasonable.

When is it the crime of assault, and when is it acceptable parenting? This article sets out the current law of spanking in Canada.

Section 43 of the *Criminal Code*

Parents, and guardians and teachers who stand in the role of parents, may "correct" children with "force" that "is reasonable under the circumstances." This prevents a criminal charge of assault and, if such a charge is laid, it provides a defence.

Early Cases Interpreting the Provision

The child must be *under the care* of the corrector, so a bystander adult in a shopping mall cannot use this section to justify smacking another's badly behaving child. Likewise, one child correcting another child in the playground. A babysitter in care of the child will be able to use this defence: *R v Murphy*.

A mentally disabled adult in a residential institution is neither a "child" nor a "pupil". In the 1984 case of *Nixon v R*, a counsellor who used physical force on "a mentally retarded adult" under his supervision received no benefit of section 43. Similarly in the same year in *Ogg-Moss v R*, another counsellor could not claim he was "standing in the place of a parent" or a "schoolteacher" to correct a "child" or "pupil". It probably did not help his case that he hit a severely handicapped twenty-one year old patient several times on the forehead with a large metal spoon after he had spilled his milk.

The force must be used for the *purpose of correction*. If the child is too young or is disabled to understand, this offers no defence to the assault.

The customs and standards of one's original culture must give way to what is acceptable in contemporary Canadian culture. Other foreign cultures may abide more force than Canada will accept: *R v Baptiste* (Ontario, 1980). Nor can religious beliefs be invoked to justify unreasonable force: *R v Poulin* (NL, 2002).

The *Canadian Foundation* Case

The Supreme Court of Canada considered the reasonable force defence in 2004 in *Canadian Foundation for Children, Youth and the Law v Canada*. The Foundation sought a declaration that section 43 be held invalid under the *Charter of Rights,* sections 7 (loss of right to security of the person not according with principles of fundamental justice), 12 (freedom from cruel and unusual punishment) and 15 (equality regardless of age). A 6 to 3 majority of the Court upheld section 43 on all *Charter* grounds and further clarified the parameters of "force … reasonable under the circumstances."

a) Section 7 Loss of Right to Security of the Person not According With Principles of Fundamental Justice

i. *Principle of Fundamental Justice?*

The Foundation argued that children must enjoy independent procedural rights under the *Charter* to due process in the representation of their interests. The majority disagreed: the law does not provide procedural rights for alleged victims of an offence. Even if it did, children's interests are represented at trial by the Crown prosecutor who will discharge this duty properly.

ii. *Best Interest of the Child?*

A principle of fundamental justice must be a "legal principle, that is vital or fundamental to our societal notion of justice and be capable of being identified and applied in situations in a manner that yields predictable results." The best interest of the child is not a principle of fundamental justice because society does not always raise the best interests of the child over all other concerns in the administration of justice and "reasonable people may well disagree about the results that this application will yield."

In 2004, the Supreme Court of Canada approved of spanking, properly restraining, under the *Charter of Rights*. It must be for educative or corrective purposes and the child must be able to benefit from it. The child cannot suffer from a disablility and must be between the age of two and twelve.

iii. *Is Section 43 too vague or overbroad?*

The category of person who is entitled to the section 43 defence is not be too vague. Since the force must be "by way of correction" and must be "reasonable under the circumstances", the section was also not too broad.

For spanking to be corrective, it must be capable of educating the child and the child must be capable of benefiting from it. Children under two years of age and those suffering mental disability cannot benefit from spanking since they have not sufficiently developed cognitively to understand the purpose of spanking.

Reasonable corrective force is a standard long recognised in criminal jurisprudence. What is "reasonable in the circumstances" can be determined from international treaty obligations, judicial interpretation from an objective standpoint and expert evidence. Evidence shows that corporal punishment of teenagers induces aggressive behaviour so the defence will not be available in relation to children over 12 years of age. The section is not too broad.

b) Section 12 Cruel and Unusual Treatment or Punishment

Section 43 only allows for corrective force that is reasonable. Therefore, it can never rise to the level of being "cruel and unusual". Any spanking "so excessive to outrage standards of decency" would not attract section 43 protection.

c) Section 15 Equality

Section 15(1) of the *Charter* ensures "equality before and under the law" and the "right to equal protection . . . without discrimination . . . based on age". The Foundation said "section 43 would permit conduct against children that would otherwise be criminal in the case of adult victims" and therefore the section "decriminalization discriminates against children". Although children are vulnerable and their physical integrity is profound, the majority of the Court found section 43 was Parliament's attempt to balance a safe environment for all children and a child's dependence on "parents and teachers for guidance and discipline, to protect and promote their healthy development within society." The section is "firmly grounded in the actual needs and circumstances of children".

Conclusion

Spanking, the intentional striking of a child, is technically an assault. To decriminalize and regulate this physical form of child discipline, more than 125 years ago Parliament enacted section 43 of the *Criminal Code* where it is captioned "Protection of Persons in Authority".

In 2004, the Supreme Court of Canada approved of spanking, properly restrained, under the *Charter of Rights*. It must be for educative or corrective purposes and the child must be able to benefit from it. The child cannot suffer from a disability and must be between the age of two and twelve. The spanking may only be of an insignificant and temporary nature. What is "reasonable under the circumstances" will be a subjective consideration in light of all the circumstances in the case, including according to societal standards, experts and treaties. Degrading, inhuman or harmful force will never be excused. Using objects or blows and slaps to the head are unreasonable. The corrector's frustration, temper or abusive personality will also undermine the correction and remove the defence.

Despite *Canadian Foundation*, spanking continues to be highly controversial. The 6 to 3 majority almost a generation later might be reversed under a largely re-constituted Supreme Court. A new court challenge might yield a new result.

There have been many legislative attempts to have section 43 repealed or amended, with at least 17 private member's bills being tabled in Parliament since 1994, the latest one last year. None have yet succeeded.

The federal government announced it intends to enforce all of the recommendations of the Truth and Reconciliation Commission. One of these recommendations is to repeal section 43: "the Commission believes that corporal punishment is a relic of a discredited past . . . and has no place in Canadian schools or homes."

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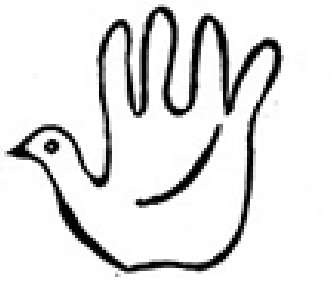
HUMAN RIGHTS LAW



Human Rights Law and Employment: Does Context Trump Relationship?

By Linda McKay-Panos

Human rights legislation across Canada has similarities and differences. Most legislation covers discrimination in specific contexts (such as services customarily available to the public) and membership in professional associations or trade unions, or relationships (such as employment or landlord and tenant). Many also cover statements made in public. People are often protected from discrimination on grounds which include race, religious belief, gender, colour, ethnicity, sexual orientation, disability (mental and physical), age and the like. The wording of various statutory provisions is similar but not identical between jurisdictions. The varying interpretations given by the courts and human rights tribunals to the statutory provisions has led to a very complicated set of cases and principles on employment and discrimination.

In Alberta, the complexity of the caselaw culminated in the case of *Lockerbie & Hole Industrial Inc. v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 3

Human rights legislation has acquired the status of "quasi-constitutional": this is paramount or dominant law, which applies to all other statutes in the jurisdiction, and it can supersede or trump contradictory laws. For example, subsection1(1) of the *Alberta Human Rights Act* ("*AHRA*") reads: "Unless it is expressly declared by an Act of the Legislature that it operates notwithstanding this Act, every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act." Categorizing human rights legislation as quasi-constitutional allows other legislation to be broadly interpreted in order to align with the purposes of human rights law.

Statutes also need to be interpreted under the modern principles of statutory interpretation. As stated by E.A. Driedger, in *Construction of Statutes*, "there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Various human rights laws across Canada all prohibit discrimination against employees both at the hiring stage and during the course of employment.

Recent developments in human rights law, in the employment context in particular, suggest that the differences in wording between statutes may actually matter. Various human rights laws across Canada all prohibit discrimination against employees both at the hiring stage and during the course of employment. While some of the laws include definitions of "employer" or "employment", others rely on judicial interpretations of these terms. Some human rights laws on discrimination in employment provide that "no person" shall discriminate. Others like the *AHRA* provide that "no employer" shall discriminate.

Initially, courts and human rights tribunals were asked to determine whether human rights legislation on employment covered the *relationship* between the complainant and the alleged discriminator (respondent). Over time, the caselaw became quite complex as the nature of "employment" relationships changed, in ways including:

- use of contractors rather than employees
- control and use of volunteers; or
- use of contractors and sub-contractors.

In Alberta, the complexity of the caselaw culminated in the case of *Lockerbie & Hole Industrial Inc. v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 3. At issue was whether Syncrude, the owner of the site where the worker performed his work as a sub-contractor, was an "employer" for the purposes of the human rights legislation. In concluding that the site owner was not an employer for the purposes of Alberta's human rights legislation, the Alberta Court of Appeal ("ABCA") held that there were several indicators of an employment relationship for the purposes of the legislation, and the most crucial factors in the relationship were control and direction. The ABCA set out a non-exhaustive or incomplete list of 13 factors that could indicate an employment or co-employment relationship. Other legal issues have included whether discrimination or harassment has to be "in the course of employment" for the human right protections to apply, or whether the legislation applies to circumstances that occur away from the usual work site.

Human rights legislation has acquired the status of "quasi-constitutional": this is paramount or dominant law, which applies to all other statutes in the jurisdiction, and it can supersede or trump contradictory laws.

More recently, the issue has become whether a person, who is working beside another person on the same project, but who is not employed by the same employer, could be held liable for discrimination (in addition to the employer). The Supreme Court of Canada ("SCC"), in *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 ("*Schrenk*"), expanded the scope of protection under British Columbia's *Human Rights Code* ("*BCHRC*").

Mohammadreza Sheikhzadeh-Mashgoul (the Complainant under the BCHRC) worked on a construction project as a civil engineer. He was harassed on site by a site foreman and superintendent, Edward Schrenk, who allegedly made racist and homophobic statements that were directed at the Complainant. The case occurred on a construction site, and importantly, the two men had different employers.

The Complainant filed a complaint against both Schrenk and his employer; both argued that the Human Rights Tribunal ("Tribunal") had no jurisdiction to hear the complaint because the Complainant had no employment relationship with either of them. The Tribunal found that it had jurisdiction despite the lack of employment relationship. The British Columbia Court of Appeal ("BCCA") overturned this decision, on the grounds that the *BCHRC* only applied when the employer was able to force the complainant to endure the discrimination as a condition of employment.

A majority of the SCC overturned the BCCA, holding that the complaint against both Schrenk and his employer should be allowed to proceed even though there was no direct employment relationship between them and the Complainant. Justice Rowe, speaking for the majority, held that the most important indicator was context, and that there must be a sufficient nexus (or relationship) with the employment context, but discrimination in employment was not limited by the identity of a co-worker's employer. Justice Rowe focussed on the following factors when making the contextual analysis:

- Whether the respondent (Schenk and his employer in this case) was integral to the complainant's workplace;
- Whether the conduct in question occurred in the complainant's workplace; and
- Whether the complainant's work performance or work environment was negatively affected.

Justice Rowe also relied on the specific wording of the *BCHRC*, as it prohibits a "person" from discriminating "regarding employment". He found this wording was sufficiently broad to include the relationships between the Complainant and both Schrenk and his employer. On the other hand, Alberta's legislation prohibits discrimination "by employers".

In a concurring judgment, Justice Abella agreed with the majority's decision. In doing so, she focussed on a broader, purposive approach and suggested that analysis of human rights legislation requires: "that we consider the meaning of employment discrimination in a way that is consistent with, and emerges from, the Court's well-settled human rights principles, and not just the particular words of the *Code*."

Chief Justice McLachlin (now retired) dissented and would have dismissed the appeal, agreeing with the BCCA that the protection covered by the *BCHRC* requires that there be an employer-employee relationship or something similar.

It will be interesting to see whether the majority's approach in *Schrenk* will apply in situations where the applicable human rights legislation is not worded in a manner that would easily permit a similar broad and liberal interpretation.

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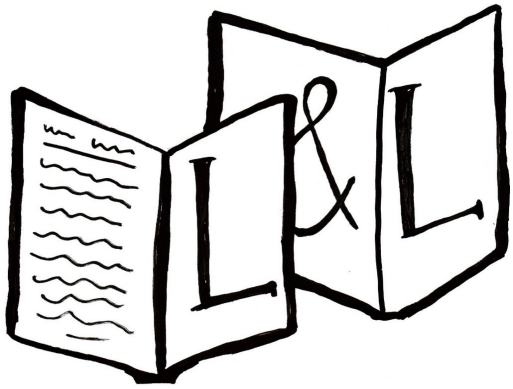
LAW AND LITERATURE



Second Person Singular by Sayed Kashua: Acquiring False Identities At Great Psychic Cost

By Rob Normey

Sayed Kashua wrote his novel, Second Person Singular, as an Arab-Israeli. He has since sadly reflected on his need to leave Israel for the US, after years of trying to find a place for himself in a society that treated him and other Palestinians as second-class participants in a country dominated by hard- right, nationalistic voices.

Before turning to Kashua's novel, I wanted to place it in the harsh and punitive legal context of a variety of repressive laws that have been passed in Israel's Parliament, the Knesset. One such law enacted by Israel in March, 2017 denies entry to any foreigner who has exercised his or her freedom of conscience and of expression to support the international boycott movement that has gained steam. This law comes in an era where the ever-expanding illegal settlements established by the state of Israel calls into question any prospective two-state solution for Israelis and Palestinians that could have any hope of a just and peaceful resolution of the ongoing turmoil endemic to the Palestinian / Israeli situation. It was reported that the vote came as the Israeli government's right wing was clearly emboldened by the election of President Trump and his warm welcome the previous month of Prime Minister Netanyahu, as well as the statements made by key members of his administration which have been highly supportive of the illegal settlements project.

Sayed Kashua wrote his novel, Second Person Singular, as an Arab-Israeli.

Rabbi Rich Jacobs, president of the Union for Reform Judaism, the largest Jewish movement in North America, was quoted in an interview as follows: " It's going to be a giant sign…'Don't come unless you agree with everything we're doing here.' I don't know what kind of democracy makes that statement." A peace activist sees the law as redefining as an enemy of Israel anyone who does not agree that the settlements are now and forever to be part of Israel.

A second law that was enacted in the Knesset some years ago will now be utilized to punish two foreigners who have dared to call for a cultural boycott of Israel or the territory it controls. The 2011 law allows civil suits against those who might call for an economic or cultural boycott, by anyone who can claim economic harm. The law was heavily criticized by Israeli civil liberties groups, and as expected, the criticisms were to no avail.

But I certainly had these reports etched in my mind as I read Kashua's novel. I thought about the fact that one of the protagonists' is a lawyer whose name we never learn, but one who has developed a strong legal practice in Jerusalem. He specializes in representing his fellow Arabs who are accused of various crimes. Perhaps indeed , this character, "the Lawyer" (a nice touch I think , by the author to emphasize the degree to which this man is to be identified almost completely by his career, which has catapulted him into upper-middle class Arab society in Jerusalem), will end up defending various Palestinians who dare to speak out against the settlements. Perhaps he will expand his practice and defend Jewish peace activists whose efforts to defend the fundamental rights of Palestinians and those who advocate on their behalf have met with severe repression by the Netanyahu government in recent years.

I thought about the fact that one of the protagonists' is a lawyer whose name we learn, but one who has developed a strong legal practice in Jerusalem.

The novel is not a political fiction in any obvious way. The point certainly is not to explore specific political and legal problems that wreak havoc on the proper workings of Israeli society. Rather, it is an existential work, looking at questions of social identity and how they are constructed and what happens when pressure builds to construct false identities. We learn that the Lawyer was originally from a small Palestinian village. However, he got a first class education, including a top degree at law school and must perform a role that he has carefully constructed form himself, so that he might succeed in impressing his desired clientele. So he wears a Ralph Lauren tie, though he pretends to not know its make when asked by his friend, the owner of an independent café in Jerusalem's downtown, on King George Street. He finds it necessary to attend to meetings and court in an expensive, German-made luxury car. He does this to win over skeptical Arabs who have joined the professions in Jerusalem and consider that only someone well-versed in the manners and mores of the Israeli Jews will be a substantial and reliable lawyer.

He soon tracks down the novella in a used book and on his way home, spies a note inserted in the book that seems to indicate that his wife has been addressed by an apparent lawyer.

Although the novel does not take us through any trial scene, it describes the work our protagonist does. We learn that he finds the unwinnable criminal cases he conducts for those charged with attacks on Israeli cars in the West Bank on the bypass roads only available to the settlers and other Israeli Jews. There is no potential whatsoever to beat the charges we are told – a conviction and lengthy prison term is unavoidable. However, by finding any aspects of the action and of his client's background that might be remembered for mitigation on the day a future prisoner exchange occurs, he will more than likely assist him or her. While that eventuality will be years down the road, it is the best that can be hoped for.

Early scenes with a book club prepare the development of one of two main plot lines in Second Person Singular. The Lawyer's wife asks him if he has read Tolstoy's Kreutzer Sonata. He soon tracks down the novella in a used book store and on his way home, spies a note inserted in the book that seems to indicate that his wife has been addressed by an apparent lover. This triggers intense jealousy and a psychic melt-down, as the carefully constructed progressive persona he has built up disintegrates. He regresses to a conservative, irrational man whose ingrained habits from his village upbringing pour out.

A parallel plot involved a young man who has also arrived in Jerusalem, Amir, from the village of Jamilla, who has just completed his graduate work in social studies. Amir also finds it necessary for various emotional and practical reasons to construct a persona and to slip out of his "Arab skin" and takes extreme action to become accepted within Israeli society. At one point, Amir states that he wants to be like them – "without loyalty tests, without admission exams, without a fear of suspicious looks…without feeling that I am committing a crime." I won't give away the plot other than to indicate that it develops in surprising ways once Amir becomes a helper for a young Jewish Israeli who is suffering from paralysis. Kashua eventually links the two plots in a rather ingenious fashion. In the process, he tells us much about the struggles of middle class Palestinian Israelis who attempt to find a true home and sense of belonging in a truly precarious or risky atmosphere. This novel brings to life tough issues that might otherwise remain abstract ideas.

Rob Normey is a lawyer who has practiced in Edmonton for many years and is a long-standing member of several human rights organizations.

NOT-FOR-PROFIT

Senate Study Offers Opportunity for Fresh Look at Charity Issues

By Peter Broder

Canada, through the federal government and its provincial counterparts, offers preferential tax treatment to charities and certain other public benefit entities that is among the most generous of any country in the industrialized world. That advantageous treatment comes in the form of tax credits for individuals and tax deductions for corporations that make contributions to these groups. As well, governments forego taxes on much of the income generated by charities and bodies similar to charities, known as qualified donees. Goods and Services Tax and Provincial Sales Tax are also typically not applied or applied at a reduced rate.

Many jurisdictions that historically, like Canada, relied on recognition of new charitable purposes by the courts - i.e., defining charity through the common law - have modified that approach.

To qualify for this special treatment, however, most of these entities must register with the federal government, and are subject to various constraints on how they are constituted and operate.

Not surprisingly, given the favourable tax treatment they get, Canadian authorities have been quite restrictive as to who is entitled to be a "registered charity" or other "qualified donee". This restrictive approach has been adopted both by the courts, in litigation concerning eligibility and conduct, and by the Canada Revenue Agency ("CRA"), the arm of the federal government charged with administering the provisions of the *Income Tax Act* ("*ITA*"), in its rules.

The restrictive approach has led to Canada falling behind in the breadth of legal meaning given to the concept of charity here, and to a regulatory environment that is stricter than that of many other countries. This situation was most recently highlighted by the controversy over the amount and type of non-partisan political activity that registered charities are permitted to engage in. In the wake of this controversy, and other frustrations with the current regime, there have been widespread calls for reform.

Potential ideas for changes to the existing system will have a chance to be aired (and perhaps move a step closer to being adopted) with the approval of a Senate Motion in late January. This is a Motion to strike a Special Committee on the Charitable Sector "to examine the impact of federal and provincial laws and policies governing charities, non-profit organizations, foundations, and other similar groups; and to examine the impact of the voluntary sector in Canada". The Committee will have nine members and is expected to submit its final report by December 31, 2018.

Although the precise terms of reference and membership of the Committee were not available at the time of writing, one hopes that the Committee's mandate will explore matters well beyond the tax measures affecting charities and like groups. Notably, the Motion references "non-profit organizations" and the "voluntary sector". Non-profit groups (whether their work benefits their members or the public more widely) that are not registered charities are largely unregulated in Canada, even though most of their income is not subject to tax.

With politicians and policy-makers increasingly alert to the significance of tax expenditures and with the growing use of hybrid structures as vehicles for activity that mixes public and private benefit – including, but not limited to, social enterprise – there is an obvious imperative to consider the need for oversight of tax-exempt entities other than registered charities.

Other areas also warrant attention. Many jurisdictions that historically, like Canada, relied on recognition of new charitable purposes by the courts – i.e., defining charity through the common law – have modified that approach. They use a statutorily-empowered body, such as a Commission, to determine what qualifies as a charity and/or expand the definition of charity through legislation. Given that Canadian courts have developed the meaning of charity very slowly (typically deferring to Parliament on all but the most incremental change), and the CRA has been reluctant to go beyond positions that have clearly been sanctioned by the courts, thought should be given to whether there is a better approach. New consideration should also be given here about what role transparency, as opposed to hands-on regulation, ought to play in controlling conduct.

Non-profit groups (whether their work benefits their members or the public more widely) that are not registered charaties are largely unregulated in Canada, even though most of their income is not subject to tax.

Another concern is regulation of activities. There are *ITA* measures that in practice regulate the character and/or the amount of political, international, and business activities that

charities and similar groups conduct. These are all areas where there may be legitimate concern over use of tax-supported resources that might not be adequately constrained by the common law.

However, at least some of these measures appear to have been applied in ways that aren't in keeping with the original intention when they were enacted or have taken additional unforeseen directions in how they have been used. In certain areas, this has resulted in a significant gap between the common law and the statute. Additionally, the current categories of registered charity, which seek to distinguish between doers and funders (through provisions framed around activities), may be outdated.

As noted above, reliance on a mix of the common law and a series of *ITA* measures, administered by a branch of the CRA and adjudicated largely through the Federal Court of Appeal, to define and regulate registered charities and similar groups has not allowed Canada to keep pace with other jurisdictions in the 21st century. So the Senate study might also consider matters like the appropriate appeal mechanism for charitable registration or revocation, whether the *ITA* is the best place for the statutory provisions in this area, how to facilitate better federal-provincial coordination of voluntary sector oversight, and the need for a Charity Commission-style body in Canada.

More broadly, consideration could be given to the value of additional research on the nature and scope of the voluntary sector, and re-visiting the principled basis for the relationship between the government and the sector originally contemplated as part of the 2000-2005 Voluntary Sector Initiative, which has since fallen into disuse.

This is a long list to ask for in a study expected to last just under a year. But if we are committed to getting the best "bang for our buck", we need to look beyond just the dollars and cents.

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

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Check out CPLEA's new FAQs on:

- Employment Law – Updated January 2018
- Occupational Health and Safety – Updated January 2018
- Alberta *Fair Trading Act*

Visit: Canadian Legal FAQs for a full listing of Alberta and National frequently asked questions.

Centre for Public cplea Legal Education Alberta FAMILIES & THE LAW **CHILD WELFARE SERIES**

- Becoming a Private Guardian
- I Do Not Agree with a Decision Made by Children's Services
- I Have Been Contacted by Children's Service
- My Child is Abusing Drugs… What Can I Do?
- Someone is Trying to Become a Guardian of my Child
- Court Seating Chart – Tips for CYFEA Hearings
- What Happens if a Child is Apprehended?
- Parent or Guardian?

There are too many people and organizations to name, but this was truly a community effort. Thank you to all for your valuable input.

For a listing of all CPLEA family law publications see: www.cplea.ca/publications/family-law