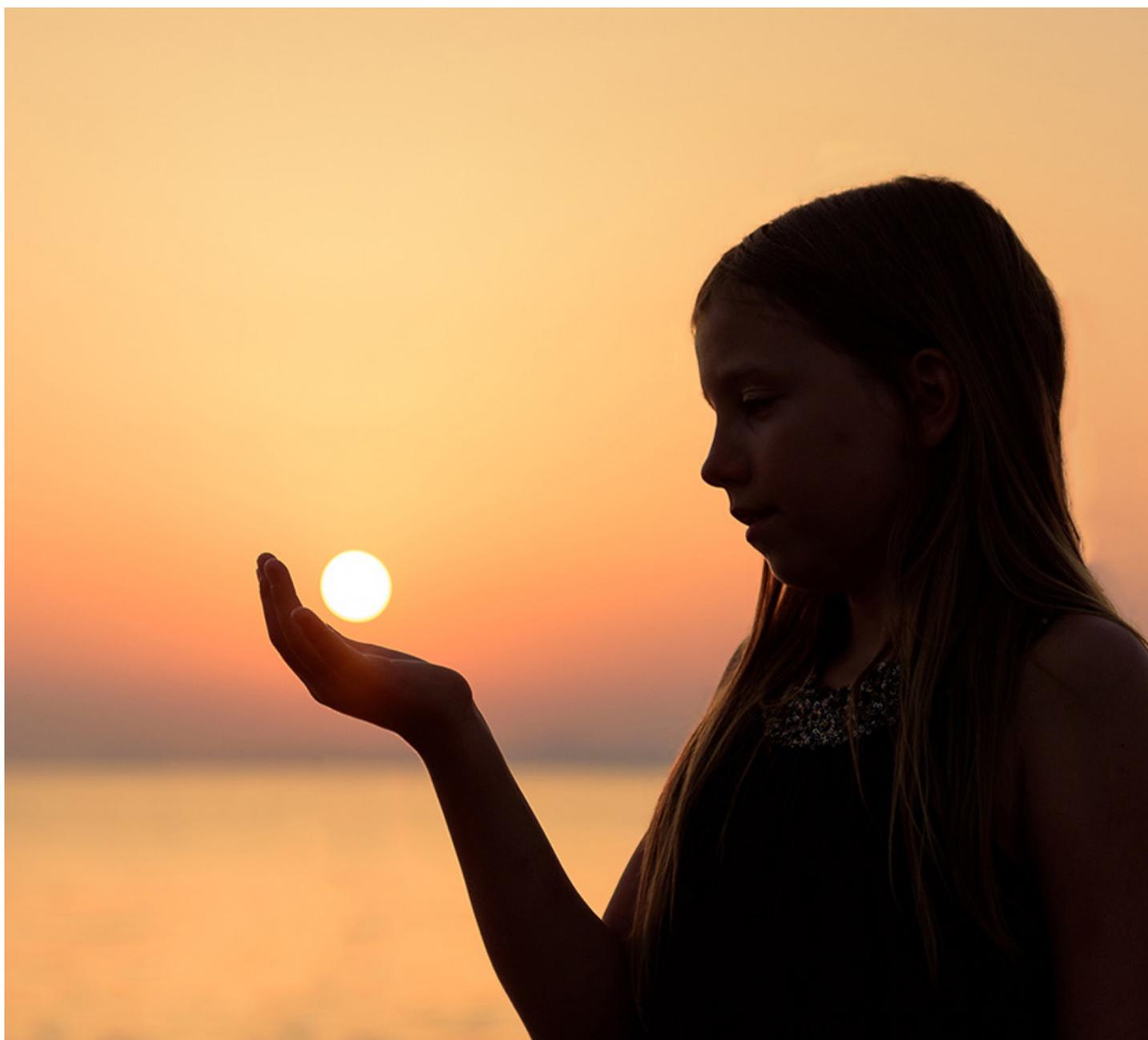


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LAW NOW

relating law to life in Canada

#MeToo Movement



Morality

Colours of the Law

Domestic Violence

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#MeToo

Movement

#MeToo is a Movement, Not a Moment

Flora Vineberg

Flora is a Toronto-based lawyer specializing in civil sexual assault and human rights litigation, and Workplace Investigations related to sexual harassment and workplace violence claims.

For those contemplating the origins of the #MeToo movement and the current climate around sexual assault and harassment, they might remember October 11, 1991. On that day, a young, black female lawyer from Oklahoma and Yale law school graduate walked into a U.S. Senate Confirmation Hearing for federal district court judge Clarence Thomas. Mr. Thomas had been nominated to succeed retiring Associate Supreme Court Justice Thurgood Marshall on the U.S. Supreme Court.

A decade previous, Ms. Hill had been attorney-adviser to Mr. Thomas while he was Assistant Secretary at the U.S. Department of Education's Office for Civil Rights. The following year, in 1982, Ms. Hill followed Mr. Thomas to the U.S. Equal Employment Opportunity Commission ("EEOC"), where she served as assistant to his Chair position before leaving the job in 1983.

Fast forward to that date in October 1991. Mr. Thomas' nomination to the court had seemed unopposed, until reports surrounding FBI interviews with Ms. Hill were leaked to the press and his good character was thrown into question. The highly publicized Hearing was called, and Ms. Hill – at that point a University of Oklahoma law professor – was subpoenaed to testify regarding her allegations of workplace sexual harassment involving Mr. Thomas while he was her boss at both the Dept. of Education and the EEOC.

By all accounts, what Ms. Hill did next was nothing short of a sheer act of bravery in the face of debasing character assassination, thinly veiled challenges to her credibility, and a barrage of disbelief from the all-male Senate Judiciary Committee headed by then-Senator Joe Biden.

With poise and grace, Ms. Hill recounted in great detail – to roughly 20 million viewers across the country – the nature, extent and impact of Mr. Thomas' sexual harassment: how he repeatedly asked her on dates while she was his assistant (to her repeated declines), how he used work situations to discuss subjects of a graphic sexual nature, and described to her his own sexual prowess while giving details of his anatomy. Among the flood of victim-blaming, the Committee asked Ms. Hill to recount Mr. Thomas' words verbatim from the previous decade, to explain why she thought Mr. Thomas was "behaving in this way," and why she followed him from one department to the next if she was truly being harassed. She answered each question coherently, explaining the gist of his words, the impact of his behaviour and how she reluctantly stayed because she needed her job, highlighting the power imbalance in such working relationships.

Mr. Thomas also received the chance to testify, flatly denying all allegations of sexual harassment, and characterizing the proceedings as a "high-tech lynching for uppity blacks." Camps became entrenched on either side, while the public watched in equal measures awe and horror. Ms. Hill's critics subjected her to vilification, misogyny, vitriol and threats. She was accused of lying by those who opposed her, yet praised for her bravery by the millions of supporters who watched it all unfold. An [article](#) from the 1992 NY Times Archives chronicles Irene Natividad, chairwoman of Working Women, explaining how in that moment, Anita Hill made sexual harassment "the great connector among women."

Ultimately, Mr. Thomas was confirmed by a narrow margin of 52-48. On October 18, 1991 he assumed office as an Associate

Justice of the U.S. Supreme Court, where he is currently the most senior and longest-serving justice in the history of the Court. To this day, Mr. Thomas' credibility and the veracity of his outright denial remain unquestioned, even in the face of corroborating witness statements from those who had opportunity to observe his harassing behaviour.

Regardless of which side one picked to support, Anita Hill's testimony catapulted the topic of workplace sexual harassment to the forefront, becoming a catalyst for national conversations around gender and the treatment of women at work. Ms. Hill's testimony helped clarify the contours of inappropriate workplace behaviour and shone a spotlight on the inherent power imbalance between employers and their female employees. It spurred analyses around discriminatory language, unwanted contact at work, and offered women across the U.S.A. a mirror against which to examine their own lived experiences with harassment in solidarity.

In contradiction to her critics (who believed that Ms. Hill's experience would forever deter women from coming forward or compel their silence), her brave testimony instead galvanized what came to be known as "The Year of the Woman" in 1983. Stemming from anger and disbelief, a passion for social justice and commitment to equal rights, women across the U.S.A. and their allies rallied, lobbied, marched and organized to effect concrete change. Their efforts [made a lasting impact on America](#):

- they created workplace reforms through the formation of anti-harassment policies;



- they informed judicial decisions regarding sexual harassment and equality predicated upon inherently believing survivors;
- Congress strengthened remedies for victims of sexual harassment at work by passing the Civil Rights Act of 1991 (which provided damages for the full range of injuries that victims might suffer, and gave the right to trial by jury);
- the number of sexual harassment claims filed with the federal EEOC more than doubled between 1991-1998 (from 6,883 to 15,618); and
- the political landscape seemingly shifted overnight as 28 women were elected to the House of Representatives and 4 new women joined the Senate.

A momentous time, it was in essence, not the birth but the extension of a movement that had initially begun in 1975, when a group of women from Cornell University

coined the phrase “sexual harassment” after the University denied employee Carnita Wood’s unemployment benefits claim. Ms. Wood had resigned after being touched inappropriately by her supervisor, and those witnessing the injustice felt compelled to name it. Subsequently, in 1979 feminist activist and legal scholar Catherine A. MacKinnon furthered the collective understanding by entrenching sexual harassment as a form of sex discrimination, thereby placing it squarely within the purview of anti-discrimination legislation under Title VII of the Civil Rights Act of 1964. Her influential work, “Sexual Harassment of Working Women,” offered more “radical” approaches to female sexual subjugation in the work context, and paved a groundbreaking legal foundation to effectively litigate [these types of cases](#).

Hard-fought battles across legal, scholarly, political and socio-cultural terrains arduously wove their way up through Ms. Hill’s legacy and into 2006, where [Tarana Burke](#) first coined the phrase “MeToo.” There were no hashtags then, but Burke – a woman of

colour and social activist who had created Just Be Inc., a non-profit organization – employed the concept as part of her work building solidarity among young black women. Burke and her counterparts knew all too well the heartbreaking prevalence of sexual harassment, and the ways in which structures of institutional power and workplace hierarchy were used to exploit the less vulnerable.

Grassroots movements at that time – prior to the dam truly breaking around sexual assault in 2017 – still fought in the trenches for justice for survivors despite widespread silence, complicity, and lack of accountability or transparency. Workplace policies existed but remained unenforced, women of colour and low-income women were forced to endure disgusting forms of sexual harassment in order to keep their jobs, and courts still allowed nearly-uninhibited challenges to the credibility of each complainant who chose to come forward. Women were speaking, but society was failing to hear them.

Immersed in today's hopefulness for positive change, many supporters of the movement are confused. Much contemporary analysis around sexual assault and workplace harassment has focused on why today's #MeToo movement was able to gain so much traction within the last 1-2 years. The advent of support for survivors of sexual assault and the dramatic "take-down" of powerful men has seemingly occurred overnight. This article points instead to the long trajectory of activism and advocacy leading to what is now being hailed as a watershed moment, a cultural reckoning, a "[revolution of refusal](#)" demanding uncomfortable self-reflection. The tweeting age allowed actress Alyssa Milano to hashtag Ms. Burke's philosophy of "MeToo"

over a decade later, using her prominence as a wealthy, attractive, white celebrity to make women's rights advocacy more palatable and instantly accessible to millions. The irony is that people noticed and began to listen.

Profound change has occurred as a result, beginning with the downfall of Bill O'Reilly at Fox News and the brutal exposé around Harvey Weinstein. Tireless journalism with rigorous vetting, combined with social media, enabled the rapid spread of viral news to reach millions in real time. Media coverage detailed the intricate web of lies, power structures and underlings who turned a blind eye to the sexual harassment they were either facilitating or covering up; that which, for decades, had enabled the misogynistic treatment of women both in the workplace and beyond and allowed powerful men to act with impunity.

The success of the current iteration of the #MeToo movement stemmed largely from the initial support of celebrities, who have used their voices to elevate the platform of women's rights through sharing their own experiences of exploitation or assault. We now better understand the dynamics of sexual harassment as an assertion of power and dominance, the ways in which these crimes affect one's mental health and ability to come forward, and there are more mechanisms for redress in courts or the workplace if allegations are brought to light. In the Canadian context, pivotal sexual assault and harassment cases including CBC's Jian Ghomeshi, York University student Mandi Gray and Soulpepper Theater Creative Director Albert Schultz have furthered conversations around the efficacy of our criminal and civil justice systems to adequately address these types of allegations. In 2017, Robin

Doolittle's revelatory piece of journalism, "[Unfounded](#)," gathered data from 870 police forces and exposed the systemic biases and institutional barriers facing women who come forward to report sexual assaults within the criminal justice system, concluding that police dismiss 1 in 5 sexual assault claims as baseless. Importantly, Doolittle's piece incorporated jaw-dropping statistics evidencing the barriers that exist, showing how far both our cultural and law reform efforts must travel to help women feel safe and believed when reporting.

The next phase of the #MeToo conversation rightly centers on where the movement goes from here. [Catharine A. MacKinnon](#) notes that this mass mobilization against sexual abuse through an unprecedented wave of speaking out in conventional and social media, "is eroding the two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims". Gloria Steinem and others have pointed out the necessity of incorporating intersectional feminism into discussions around sexual assault and workplace harassment – a paradigm predicated upon the fact that individuals are host to myriad intersecting identities and that any combination of these may impact one's vulnerability or access to privilege in society. [Ms. Steinem notes](#) how women of colour fought many of the battles to bring society to the point where even a faint hope of change was possible, and that "[t]o use (that) work without ensuring that this broken system is replaced with one inclusive of race, in addition to gender, is not partial victory, it's complete failure"

Indeed, the movement will continue to benefit from uplifting the voices of those more marginalized survivors who work in precarious circumstances beyond

Hollywood's hills, or who embody a wider variety of sexual orientations and gender identities. Incorporating LGBTQ* and other unique perspectives will help move the narrative beyond a binary analysis of men sexually harassing women. Supporting local media sources will encourage the highest standards of journalism, voting to place women in positions of power and authority, and lobbying for law reform will continue to ensure our courts and legislation are reflecting back the changing cultural tide around accountability for sexual harassment and the perception of those who come forward.◆

Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession – Book Review

Megan Siu

“That the process is likely to always be difficult for complainants does not make it any less important both to recognize the ways in which lawyers and judges contribute to the trauma of the trial, and to take whatever steps are reasonably possible to make the process more humane.”

— Elaine Craig

On ‘me too’ and #MeToo

#MeToo went viral last year when actress Alyssa Milano asked the Twitterverse to use the hashtag if they had ever been sexually assaulted or harassed in the wake of many accusations made against Hollywood producer Harvey Weinstein.

Long before Alyssa Milano's tweet, African-American civil rights activist Tarana Burke has led the original 'me too' movement for over a decade. Burke is the founder and director of [Just Be, Inc.](#) where she is committed to supporting and empowering girls and women of colour. She conducts workshops on topics including romantic relationships, the objectification of women's bodies in media and music, and sexual assault. It is important to recognize the years of work that Burke has done and continues to do in this area.

While the #MeToo hashtag has helped us demonstrate just how common sexual assault is, it places a lot of responsibility on the victim. It asks the victim to self-identify



© Alyssa Milano Twitter.com October 2017

openly as a sexual assault victim by using the hashtag and face backlash and re-traumatization. It creates opportunities for anonymous Internet trolls to use targeted online harassment against them.

Both 'me too' and #MeToo raise some questions. Can speaking out actually bring justice to victims of sexual assault? If so, who is responsible for bringing justice to them? Are there ways that victims of sexual assault can seek help without bringing further harm to themselves? I still don't have all the answers to these questions, but literature is being developed around this topic that suggest some possible ways to achieve justice for victims of sexual assault.

“*Trials are not designed to heal victims of sexual assault.*”

Putting Trials on Trial

In particular, Elaine Craig, associate professor at Dalhousie University's Schulich School of Law recently published a new book entitled, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*. In 227 grueling pages, Craig unapologetically puts the legal profession on trial, while citing uncensored excerpts of court transcripts, so that the reader can see clear examples of both humane and inhumane treatment of sexual assault victims in court. 30 pages of detailed bibliographic notes follow the final chapter, reminiscent of a lawyer's exhibit binder, and further demonstrate Craig's thorough approach to tackling this sensitive topic.

I am not a lawyer, but I am a librarian who has worked indirectly with the law and the court system. This book has taught me a lot about what goes on in the courtroom,

especially in the context of a criminal trial. I am typically a fast reader, but even so, I had to take this book in smaller doses. While I finished reading it in three days, I needed another week to really process the content.

Putting Trials on Trial is not a lighthearted novel that you can enjoy as you are getting ready to fall asleep. It comes with multiple content warnings and for good reason. In fact, you should consciously practice self-care as you work your way through the book. You need to be able to stomach the fact that certain awful things were said by lawyers and judges to complainants who were victims of sexual assault. In the book's acknowledgements, even Craig openly admits that she had difficulty going through the dialogue in the cases featured in the book. However, she has very effectively produced a book that pulls the reader in and gets them to take a hard look at the state of sexual assault trials in Canada.

There are several takeaways from Craig's book, but these are a few of the big ones:

- There are systemic problems with the way that sexual assault trials are handled in Canada.

The trial process, let alone the sexual assault trial process, was created by and for well-educated, able-bodied white people. The challenges that victims of sexual assault already face are made even worse if the victim has a lower socio-economic status, if they have a disability, or if they are non-white.

Victim-blaming culture and gender discrimination lead to problematic assumptions made in Canadian sexual assault trials. For example, when a woman accuses someone of sexual assault, it is common for her to be asked about things

like whether or not she fought back, whether or not she screamed for help, or what she was or wasn't wearing.

- Feminism and political correctness do not skew the trial process in favour of the complainant.

Most sexual assaults in Canada go unreported. This is largely because sexual assault victims do not trust the criminal justice system and feel ashamed about having been sexually assaulted. Sexual assault trials are not designed to heal victims of sexual assault. The decision to participate in a sexual assault trial means having to push through the fear of the legal process and the shame of the experience. Many sexual assault victims actually regret participating in the legal process because of the way they were treated in court, especially by the defense counsel. If a sexual assault victim is in a domestic violence situation, they can put themselves in even more danger by reporting their abuser.

“*Putting Trials on Trial is not a lighthearted novel that you can enjoy as you are getting ready to fall asleep.*”

- The law can be fair while also being sensitive to a victim of sexual assault.

Section 276 of the *Criminal Code of Canada* limits the use of a complainant's prior sexual history and requires the defense to file an application to seek the court's permission to do so. Section 276 or “rape shield law” exists to prevent the use of a complainant's other sexual activity as evidence with the intention to mislead the trial process. It therefore aims to prevent

judges and juries from being misguided by rape myths (i.e. the assumption that a complainant is lying or that the sexual activity in question was consented to). These types of assumptions and questions were permitted as evidence [as recently as 1992](#), but were changed once they were struck down by the Supreme Court of Canada as being unconstitutional.

“We Owe a Responsibility...”

Craig suggests that the legal profession fails sexual assault victims by needlessly traumatizing those who come forward and therefore causing other victims to refrain from reporting their own experiences. She believes that the legal profession shouldn't tolerate this kind of practice and should instead make changes to treat sexual assault victims more humanely. These changes can be accomplished by all key players involved in the legal process without obstructing the rights of the accused.

1. *The defense lawyer*

Criminal defense lawyers Edward Greenspan, Todd Brett White, and Marie Henein are considered to be exceptional at their craft because of their effective aggressive cross-examination tactics. However, ruthlessness does not need to be a defining characteristic of what makes a criminal defense lawyer successful. The defense lawyer can refrain from stereotyping and victim-blaming language when addressing a witness. The lawyer can frame their questions from a point of uncertainty rather than implying that the complainant is being dishonest. The lawyer can also follow due process by filing the required section 276 application before introducing a complainant's other sexual activity in a trial.

2. *The Crown*

The Crown is responsible for making sure that the criminal justice process is fair to everyone involved including the accused, the complainant, and the public. The Crown's role is first and foremost to make sure that justice is achieved fairly rather than to seek to make a conviction. The Crown can base their decision to pursue a sexual assault conviction on whether or not a complainant is willing to participate.

3. *The trial judge*

The trial judge can intervene when a lawyer introduces sexual history evidence in a trial without the proper section 276 application. The trial judge can refrain from issuing a bench warrant, if the complainant has already stated repeatedly that they are mentally and emotionally unprepared to testify. The trial judge's job is to protect the complainant and the trial process.

The Verdict

Craig cleverly uses her book as a platform to talk about sexual assault, how it is dealt with in the courts, and how the process could be improved. Craig suggests some reasonable changes to the way sexual assault law is practiced. It is clear that this book is written from the point of view of someone who understands the legal process and how the courts work. However, aside from a very brief disclaimer that the book is not aimed to overlook the presumption of innocence, there is no real acknowledgement of the fact that some complainants do lie and some defendants are wrongfully accused of a crime they did not commit. My intention is not to deny the fact that sexual assault is far more common than we'd like to think it is, but I have to question if Craig has truly given the legal

profession a fair trial without fully discussing the other side. Despite this minor point, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* is worthwhile to read for professionals who play a role in the criminal justice system, professionals who work with victims of sexual assault, and people whose lives have been impacted by sexual assault. ♦

The Morality of #metoo

Alice Woolley

The forced resignation of Patrick Brown as leader of the Ontario Conservatives raises concerns of fairness and due process – for him and for the women accusing him. Christie Blatchford has castigated the party and other public officials for abandoning the “presumption of innocence”, and has highlighted the wrong of ruining a man’s reputation based on anonymous allegations. Others agree. Conversely, the Prime Minister reportedly said that women who made allegations of misconduct “must be believed” and Ontario Premier Kathleen Wynne has said “I believe victims when they come forward.”

Both those responses strike me as fundamentally deficient. Deficient in two ways. Both require assumptions of truth or falsity with no accounting for the actual allegation made, which defies logic and human experience. My claim as a 2 year old that I had not eaten the candy at the store when my face was covered in licorice was definitely unworthy of belief. But my claim today that I know something about the legal duties of lawyers can probably be accepted. Whether a claim is believable depends on what is being claimed, the circumstances in which it is made and who is making it. Assuming truth or falsity without accounting for those things is certain to result in mistakes, and mistakes with potentially horrible consequences.

“*Make judgements cautiously.*”



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“ Whether a claim is believable depends on what is being claimed, the circumstances in which it is made and who is making it.”

Both responses also ignore entirely the point that the duty that each of us has when assessing allegations of wrongdoing depends on who we are and what our judgments mean. A judge in a criminal court can deprive me of my liberty. My employer can deprive me of my job. Judges and employers exercise power granted or constrained by law and the law imposes procedural obligations upon them. A judge or employer must exercise judgment in accordance with what the law requires and mindful of the harm that a wrongful exercise of that judgment can inflict.

That's one of law's great virtues. It creates rules. It tells us the things that we can or can't do to each other (firing people for established cause or with notice – yes; defaming people – no). It gives us processes for adjudicating truth claims, and imposes different evidentiary rules on adjudication depending on the context and consequences (in criminal law proof beyond a reasonable doubt; in civil law proof on the balance of probabilities).

But the law only goes so far (as noted by Liz Guilbault and Mark Dance). The debate here is really a moral one: when we have the power to judge, and our judgments have consequences, what do we owe one another? What is my moral responsibility to the woman who says she was sexually assaulted or harassed? What is my moral responsibility to the man accused of sexual assault or harassment? The deficiency of the arguments for an assumption of falsity or an

assumption of truth shouldn't obscure the important moral question those arguments are trying to answer. We owe duties to each other that go beyond the law, and when we ignore those duties and contribute to the infliction of harm on someone, we act wrongfully.

“ The debate here is really a moral one: when we have the power to judge, and our judgements have consequences, what do we owe one another?”

Those duties can't, I think, be reduced to quasi-evidentiary rules regarding which sort of allegations ought to be taken seriously (as suggested by Barbara Kay or, more rationally, by Andrew Coyne). They go instead to what we owe to each other as human beings. When I judge someone, and in particular when I say things about another person in public (including tweets!), I act wrongfully when I deny their humanity and dignity, when I humiliate them, treating them as someone whose perspective or experience is unworthy of consideration. In my view, a moral consideration of an allegation of sexual abuse or harassment would include the following:

Consider information fairly. Fairness precludes assumptions of truth or falsity. It requires consciousness of implicit bias and stereotyping. It means recognizing that our own experiences colour our assessments, sometimes in ways that increase accuracy but sometimes in ways that don't. It permits taking into account broader facts (such as the infrequency of false allegations of sexual assault and what false allegations tend to look like). It also permits relying on others to assess the facts who may have

better information and who appear to be viewing it carefully and rationally. However, it requires that such reliance be done thoughtfully, with awareness of issues with the people or institution relied on (e.g. – journalists like a story; companies don't like a scandal).

- Make judgments cautiously. Be aware that information is incomplete and stories are always subjective. Sometimes people can experience the same thing in different ways, without either of them being a “liar.”
- Be prepared to change your mind. What seems true today may seem less so as more information becomes available.
- Exercise care when acting. There is a difference between silent judgment and public statements. The less reliable or complete your information, the more cautious your statements ought to be.
- I am sure there are other ways these points can be made, or different obligations that could be supported. But my point is really this: exercising judgment as a citizen may not be constrained by law, but it is constrained by morality, and ethical citizenry requires compliance with one's moral obligations. ♦

This post originally appeared on Slaw and has been reproduced with permission from Ablawg.ca – The Morality of #metoo

<https://ablawg.ca/2018/02/02/the-morality-of-metoo/>

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The #MeToo Movement Hasn't Led to a Better Understanding of Consent

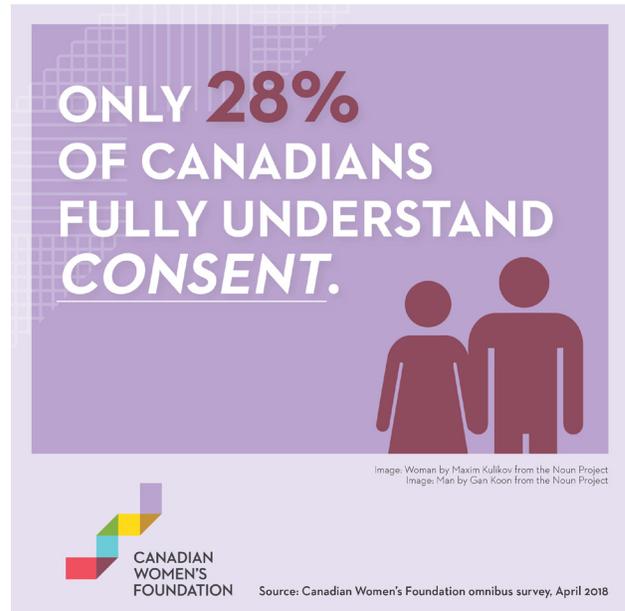
Paulette Senior

Paulette Senior is CEO and President of the Canadian Women's Foundation.

If you had to define what constitutes consent in sexual situations, what would you say? Is it something you could explain to your children?

If you're feeling awkward or hesitating, you're not alone. And even if you think you know how to define consent, our [latest survey](#) at the Canadian Women's Foundation, which was part of the Foundation's annual [Campaign to End Violence](#), will challenge your assumptions.

“The #MeToo Movement is far from over, and the important conversations it started need to evolve, for the sake of our children and future generations.”



While the #MeToo movement has prompted unprecedented conversation around the prevalence of sexual harassment and assault, this survey underlines the urgent need to focus on prevention and education.

If you had to define what constitutes consent in sexual situations, what would you say? Is it something you could explain to your children?

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While the #MeToo movement has prompted unprecedented conversation around the prevalence of sexual harassment and assault, this survey underlines the urgent need to focus on prevention and education.

The survey's question about defining consent asked respondents to choose which factors are needed to ensure sexual activity is consensual. Only 28 per cent

— shockingly 5 per cent less than a [2015 Foundation report](#) — recognized that consent should be:

- Verbal (ex: saying yes)
- Behavioural (ex: initiating sexual contact)
- Enthusiastic (ex: undressing themselves, clearly enjoying themselves, wholly participating)
- Ongoing (ex: continuing to provide positive verbal or behavioural cues during the activity)

Although the terms verbal, behavioural and ongoing are in line with [Canada's legal definition of consent](#), myths and confusion endure.

“ We need to recognize consent as a safety issue that everyone has a stake in. ”

For example, some might believe that if one partner doesn't actually say “no,” or is silent, there is consent. But sexual situations that cross the line into assault can lead to a range of verbal and non-verbal reactions. Someone who is experiencing sexual assault may involuntarily [freeze](#) in response to what they're experiencing, and not be able to communicate their refusal.

Given that sexual assault is [often committed](#) by someone a woman knows, in the moment she may feel a sense of disbelief or paralysis that someone she cares about is hurting her. Women's socialization around [“being nice”](#) when it comes to conflict may also make it more difficult to speak up.

These are just a few reasons why an ongoing two-way exchange is so important. In recent years, many sex educators have been promoting the notion of enthusiastic consent, emphasizing that rather than focusing on “No means no,” sexual partners should focus on [“Yes means yes”](#) as a more proactive way of gauging consent.

The crucial need for stronger education around consent is underlined by the fact that 50 per cent of women in Canada have felt pressured to consent to unwanted sexual activity, according to the survey. Of those women, 55 per cent of those between the age of 18 to 34 said they experienced pressure to consent.

There will be those who think we can't change our behaviour around consent; that there will always be some uncertainty in sexual situations. People will joke about needing to have legal documents on hand during dates. But we need to recognize consent as a safety issue that everyone has a stake in.

We've changed how we approach so many other safety issues: wearing seatbelts in cars, not drinking and driving, practising safe sex by using condoms. So, why not consent? Given the social and economic costs of sexual assault and other sexual offences in Canada (an estimated [\\$4.8 billion in 2009](#)), as well as the potential legal consequences of not understanding it, surely, it's worth our time and attention.

“ These programs need to be accessible to every young person across Canada. ”

The good news is that the Foundation's survey revealed that Canadians of all genders want more clarity around consent. When asked what they see as the most important next step to take in the wake of the #MeToo movement, 44 per cent of Canadians said that it's educating people about how to get and give consent.

So, how do we do that? At the Canadian Women's Foundation, it starts with youth. We fund programs across Canada that help teens understand consent, identify the warning signs of abuse and cultivate positive, healthy relationships.

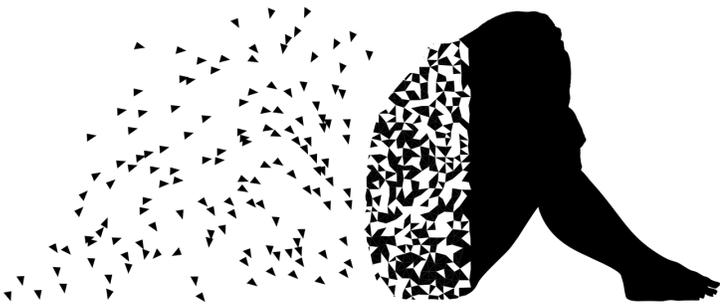
A [recent evaluation](#) of the Canadian Women's Foundation's Teen Healthy Relationships Program found that 72 per cent of teens were better able to recognize healthy relationships after being in the program, and 66 per cent were better able to say "no" to things that seemed wrong or made them uncomfortable. ♦

This article was first published on the [Canadian Women's Foundation Blog post of May 31, 2018](#) and in the [Huffington Post – The Blog](#).

This blog was also published in French on [Huffington Post Quebec](#).

The Barbra Schlifer Legal Clinic and Ontario's Independent Legal Advice Project

Deepa Matto



In the last few years, we have witnessed a revitalized global movement to challenge the status quo and demand that institutions that are perpetuating the deleterious effects of patriarchy be dismantled. We have seen a mass collective of women from Canada, the United States, Paris, Brazil, India and even Iran take to the streets demanding the end of sexual and other forms of violence and coercion against women.

What has allowed women to come forward and challenge this status quo? #MeToo and #Timesup.

This is not the first time women have publicly come forward to talk about the issue of violence, and sexual violence in particular. Much of these movements are a continuation of the feminist activities we saw in the 19th and 20th centuries.

In June 2016, Ontario's provincial government, as part of its plan called

[*It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment*](#), rolled out a pilot program to provide free, independent legal advice (ILA) to survivors of sexual assault in Toronto, Ottawa and Thunder Bay. This program offers up to four hours of free advice to survivors. Within the Greater Toronto Area, one of the organizations to provide ILA is the Barbra Schlifer Commemorative Clinic (the "Clinic") – the only clinic in Canada that offers trauma-informed, wrap-around services to women survivors of sexual assault and domestic violence. Clients who access the Clinic can take advantage of its legal, counselling and interpretation services. The Clinic's participation in the pilot has been tremendously successful. Not only has the Clinic seen a significant increase in clients since the launch of the program, but it has also supported law firms and gender-based social services in assisting survivors in sexual assault situations.

“For the past two years, ILA has empowered survivors to make important decisions about their experiences with sexual violence.”

Since its introduction, the ILA program has supported hundreds of clients understand their legal rights as survivors of sexual violence. Because of the program's success, before the Ontario government changed hands, the province-wide expansion of the program was announced. More Ontarians would benefit from the announced expansion of this program and, in a best-case scenario, more women would be able to access services in spaces similar to the Schlifer Clinic, where women feel safe. As legal professionals and advocates wait with baited breath for an update on the future of ILA, access to the program's services currently remain available for all three pilot sites through service vouchers and direct service at the Clinic.

For the past two years, ILA has empowered survivors to make important decisions about their experiences with sexual violence. It has enabled many to gain access to justice – this alone has allowed many to start healing from the traumatic effects of sexual violence. Although the ILA does not provide representation in its legal services, it is free and allows service providers to give survivors access to other accessible social and legal services. Many of these attendant services are offered through referrals to counsellors or lawyers, often for clients who have complex needs as a result of sexual violence. Many clients seek referrals to counselling and even immigration legal support. Last year, the Clinic experienced a 100 per cent increase in requests for services by survivors of sexual assault. Women who contacted the Clinic for advice represented those from across all classes, along the entire racial spectrum and with a wide variety of different abilities. The Clinic clients have come to us from community referrals, drop-in services, self-referrals, word of mouth, outreach and provincial phone line referral.

Lawyers and legal professionals participating in the ILA program have made a significant difference survivors' journey toward healing. ILA lawyers support clients by:

- explaining how the criminal and other justice processes work;
- outlining how to make an applications for compensation and human rights complaints;
- helping clients understand the pros and cons of each legal option discussed; and
- in some cases, assisting clients lodge a complaint against a professional who has committed a sexual assault.

Perhaps most importantly, ILA lawyers offer survivors options to move on and build vibrant and productive lives away from violence.

“Some women have decided never to take action after receiving legal advice because they felt that the validation of their experiences of sexual violence was enough.”

The response from women who have accessed the program is overwhelmingly favourable. Many survivors learn about the role they play while interacting with the legal or justice systems. Survivors remarked that the program helped them understand that what happened to them was wrong and that they can heal. Many commented that the program had given them back a voice they thought they had lost. Some

women have decided never to take action after receiving legal advice because they felt that the validation of their experiences of sexual violence was enough.

While no law or process can “take back” a woman's experience of violence, ILA has the potential to revolutionize the legal response to sexual assault. In an era of high profile survivor stories outlining negative experiences with legal systems, ILA along with appropriate legal reform, can help restore the public faith in the rule of law. If replicated, the Clinic's holistic model may also serve as a conduit to the legal system for sexual violence survivors everywhere.

Legal advice must go hand-in-hand with accessible counselling and social services for survivors. That is the only way women can feel empowered to begin their journey toward healing. Eventually the expansion of this program into community hubs and hospitals, through legislative and governmental support, will contribute to changing societal views. Large-scale structural and social change may not happen tomorrow or in the immediate future. However, with a strong base, institutional support and legal assistance from advocates and lawyers who work with the ILA program, we will begin to see a paradigm shift needed for survivors of violence.◆

Ms Mattoo is the Legal Director at the Barbra Schlifer Commemorative Clinic. The Clinic is specialized clinic for women experiencing violence and is located in Toronto, Ontario.

**Special
Report:
Colours
and Trade-
Marks**

Colours and Trade-Marks

Francisco Marquez-Stricker

We live in a world of colour. From the brightest shade of red to the darkest hue of violet, colours can influence your mood, evoke your emotions, and even establish certain mental connections. A bouquet of red roses may make you think of romance and Valentine's Day, while the same bouquet in a sharp white could instantly trigger thoughts of churches and weddings. The colour yellow may evoke thoughts of sunshine and spring time. And seeing a bright purple wrapper on the shelf of your local grocery store may make you think of....chocolate? Or at least that's what Cadbury, with its signature purple wrappers on its candy products, is hoping to accomplish.

Indeed, Cadbury is hardly alone in using colour as part of its branding efforts. Producers have long recognized the power of colour to create instant recognition for their products. UPS has branded all of its trucks and uniforms with a particular shade of brown. Mattel consistently uses hot pink for all of its Barbie products. Tiffany's uses its signature robin's egg blue (Pantone #1837 to be exact) in association with the majority of its products. But what, if any, protection does trade-mark law afford a producer over its signature colours? This article will provide a brief overview of the history of trade-mark law as it relates to colours, as well as the impact of proposed changes to the Canadian *Trade-marks Act*.

An Overview of Trade-marks

To begin with, it's useful to define trade-marks generally. Trade-marks are "marks" that are used to distinguish the wares or services of one provider from those of another. They generally serve the dual purpose of allowing a consumer to know where their goods or services are coming from, while allowing producers to accumulate goodwill. Put more simply, trade-marks are the words, phrases or logos that producers use to help consumers identify their goods or services.

The most famous examples of trade-marks are the names and logos which we encounter on a daily basis, such as the name "Coca-Cola", McDonald's golden arch logo, Starbucks green mermaid logo, or Google's colourful wordmark. Slogans



like “Just Do It” for Nike and “Eat Fresh” for Subway similarly qualify for trade-mark protection. Trade-mark law also protects the shape of containers in which goods are protected (i.e. a “distinguishing guise”), such as the shape of the Coca-Cola bottle.

Over the last several decades, however, trade-mark law has begun to afford protection to more obscure forms of marks, including scents and sounds. Thus, Metro Goldwyn Mayer was successful in registering a trade-mark for the sound of the lion’s roar which is heard at the outset of most MGM films. More recently, Hasbro successfully registered a US trade-mark for the smell of Play-Doh, which it describes as “a sweet, slightly musky, vanilla fragrance, with slight overtones of cherry, combined with the smell of a salted, wheat-based dough.”

Regardless of its form, a registered trade-mark affords the mark holder a variety of fundamental rights. Arguably the most important of these is the right to prevent others from offering their goods or services under a mark which is *confusingly similar*. Thus, for example, a shoe provider could

not sell shoes using a logo which is similar enough to the Nike checkmark so as to cause a potential purchaser to think that the shoes were produced by Nike.

Colour Trade-Marks

Colours can often play a significant part in a trade-mark (seeing the Facebook logo in any colour other than blue, or the Home Depot logo in green rather than orange, would immediately strike an observer as incorrect). The use of colour as a **component** of a trade-mark is not contentious. Moreover, combinations of colours that form graphics and logos also serve as valid trade-marks.

A more interesting question is whether a single colour can serve as a trade-mark **in and of itself**. In Canada, the law on this issue is unclear. The case-law does suggest that a colour applied to a particular size and shape of object, such as the colour green applied to a particular shape of pharmaceutical tablet, can serve a valid trade-mark. By contrast, a colour cannot in and of itself be registrable as a trade-

mark. Thus, while Tiffany's would be able to register its iconic blue as applied to jewelry boxes, a trade-mark for the colour itself may not be valid.

Foreign jurisdictions have tended to be more generous towards colour marks. In the United States, for example, the insulation company Owens-Corning launched a "Think Pink" campaign in the 1980's for its pink fiberglass building insulation. As part of this campaign, Owens-Corning attempted to register a trade-mark which would prevent its competitors from using the colour pink in association with insulation products. This registration was ultimately confirmed by the Federal Circuit Court of Appeals. A decade later, in 1995, the Qualitex Company registered a US trade-mark for the special green-gold colour it had used on pads for dry-cleaning presses. When Qualitex brought an action for infringement of this trade-mark against one of its competitors, this action ultimately worked its way to the top of the US court system, where Supreme Court ultimately ruled that a trade-mark that consists "purely and simply, of a color" is registrable. Similarly, in 2006, the European Court of Justice acknowledged that a single colour was potentially registrable as a trade-mark in *Libertel Groep BV v Benelux-Merkenbureau*.

More recently, in 2008, Christian Louboutin, S.A., successfully registered a US trade-mark for the colour red applied to the outsole of a shoe. Three years later, in 2011, Louboutin filed a trade-mark infringement lawsuit against Yves Saint Laurent, when the latter began selling red monochrome footwear. The 2nd U.S. Circuit Court of Appeals ultimately held that the red-sole was a sufficiently distinctive symbol that qualifies for trade-mark protection, but only when contrasted with a different color used for

the other visible portions of the shoe. Thus, Yves Saint Laurent's monochrome red shoes were found not to infringe, and Louboutin's mark was allowed to survive, albeit with a narrower scope.

Changes to the Canadian Trade-Marks Act

While the historical Canadian perspective appears quite restrictive on colour trade-marks, changes to the *Trade-marks Act* (expected to come into force in early 2019) will be expanding the definition of a "trade-mark" to include, among other things, colours. This appears to open the door to the registration of a trade-mark that consists purely of a single colour. However, registration of such marks will be subject to a pair of restrictions.

First, any colour mark will need to be *distinctive*. Since colours are not inherently distinctive (no one looks at a shade of blue and says "wow, I've never seen anything like that before!!"), an applicant will need to be able to establish that the colour has become distinctive through use. Thus, while Tiffany's will likely be able to rely on its previous use of robin's egg blue to establish the colour as distinctive, a small company would not be able to register a trade-mark for a colour they have not previously used in the marketplace

Second, a producer will not be able to register a colour if the features of the colour are primarily *functional*. Examples of this can be seen in foreign jurisprudence. For example, in the United States, registration of the colours orange and yellow for public telephones and telephone booths was rejected, because it was determined that these colours provide better visibility under any lighting condition. Similarly, the colour coral was found not to be registrable for

earplugs, because this colour makes earplugs easier to see in safety checks.

When registered, a colour will function in much the same way as any other trade-mark, preventing others from using *confusingly similar* marks. Thus, while Tiffany's may be able to preclude its competitors from using the colour of robin's egg blue in association with jewelry, they likely would not be able to preclude the use of that colour in association with automobiles.

Conclusions

The coming amendments to the *Trade-Marks Act* likely come as good news to companies who have an established history of using a particular colour in association with their or services, as they will likely be able to obtain even broader protection for these marks. Some may argue that this expansion is a positive thing, as it may serve to bring Canada more in line with international standards, and will provide further protection to ensure consumers are not deceived in the marketplace. Others may argue that increasing protection for colours comes at a cost, as it may serve to diminish the limited number of desirable colours available within an industry.

The true implications of the coming changes to Canadian Trade-Mark law will likely take some time to determine, as jurisprudence will be needed to define the scope of the new legislation. Thus, anyone wishing that trade-mark law was more black and white may soon be disappointed, as Canadian trade-mark law is about to be exposed to a whole new world of colour! ♦

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Black-Letter Law

Leela Wright

Leela Wright is a law student at the University of Alberta in Edmonton, Alberta. The article was produced during her time as a summer student with Parlee McLaw LLP.



Studying the law, exactly as it is written, is one approach to understanding it. However, this approach creates at least as many issues as it clarifies. It requires us to ask the question: how do words, removed from their factual, historical, and socio-legal context, become a body of rules that affects our lives on a daily basis?

This question is a hotly debated topic within the legal profession. On one hand, taking the law exactly as it is written, also known as a “black-letter” approach to law, provides clarity and consistency within our society. On the other hand, the black-letter study of law also encourages rigidity and forces a black-and-white approach upon situations in which there is an expansive grey area. This article will consider both the benefits and the drawbacks of a black-letter approach to law in order to examine its value in an age of increasing diversity.

What is Black-Letter Law?

Black-letter law refers to the concept that rules are generally well-known and free from doubt or dispute. Black-letter law is related to the more colloquial term, “letter-of-the-law,” which refers to a court taking a literal approach to reading the law. However, the “spirit-of-the-law” is the opposite approach. It refers to a broader reading of the law in light of policy and contextual considerations.

Black-letter law condenses the vast body of case law found within common law societies into reusable rules. Typically, these rules can be applied to any set of relevant facts to form a consistent outcome. For example, black-letter law may include the standard elements of a contract (offer, acceptance, and performance) or the technical definition

“A legal system that at least in part, on a black-letter approach diminishes the ability of citizens to predict the outcome of a trial and to know whether their actions are within the limits of legality.”

of murder (the unlawful killing of a human being with malice). Legal disciplines that tend to most rely on black-letter law include contract, tort, and property law.

A Brief History of Black-Letter Law

The concept of black-letter law arose from the practice of setting law books and writing legal precedent in Gothic black-letter type. This was a tradition that survived the switch to Roman and italic text for all other printed works. English law retained the bold, black Gothic font because it had come to symbolize the law of England itself. It was not until the mid-nineteenth century that the legal profession began to use Roman letters. This was not merely a change in fashion, but rather an attempt to improve access to the law for the average person.

“*The concept of black-letter law arose from the practice of setting law books and writing legal precedent in Gothic black-letter type.*”

Pros to the Black-Letter Approach to Law

Although there has been much scholarly criticism involving the black-letter approach to law, for the average person, it provides many benefits. For the Canadian legal system to work as effectively and efficiently as possible, there must be margins in which the law operates. A black-letter approach to law restricts an otherwise infinite number of outcomes and possibilities. This approach aligns well with a variety of values and principles promoted by Canadian law.

One example of such a value is that laws should be certain enough that their legal implications are foreseeable. While it sounds ideal, this value is difficult to attain within a common-law legal system. In certain areas of law, such as Canadian criminal law, the government has codified the laws and removed, at least for the most part, common-law crimes. Therefore, the court cannot retroactively punish a person for doing something that was not outlined in the *Criminal Code* at the time she committed the crime. However, in many other areas of law, the common law rules in creation of law alongside statute. A legal system that does not rely, at least in part, on a black-letter approach diminishes the ability of citizens to predict the outcome of a trial and to know whether their actions are within the limits of legality.

Cons to the Black-Letter Approach to Law

Proponents of alternative approaches to black-letter analysis tend to favour greater activism in legal interpretation. Judges who take this stance often decide cases in order to further a political, social or moral agenda. Here, judges take a more active role in making law instead of just mechanically applying rules to facts. These types of judgments are often extremely controversial. Many individuals believe that the law and politics are wholly separate issues.

“*A black-letter approach to law restricts an otherwise infinite number of outcomes and possibilities.*”

Nonetheless, there are also many benefits to a contextual, “spirit-of-the-law” approach to the analysis of law. First, if judges take a broad, contextual analysis, there is a stronger system of checks and balances on government. One of the most important checks and balances on government is the judiciary’s ability to strike down laws that are unconstitutional, allowing them to adapt to changing times. Changes of this nature would not be possible under a strict black-letter approach.

“*Black-letter law refers to the concept that rules are generally well-known and free from doubt or dispute.*”

Second, contextual approaches add value to judgments in ways that black-letter approaches cannot. Each case has its own unique set of facts that courts cannot always perfectly fit into a list of rules, some of which were created hundreds of years ago. In addition, it is important to address changing social conditions. In general, the common law can account for many of these changes within established rules. But there are also times in which extremely well-entrenched past laws directly conflict with society’s new values.

The Future of Black-Letter Law

Over 100 years ago, two of the most distinguished men in common-law history predicted a movement away from black-letter law. Oliver Wendell Holmes, Jr. stated, “for the rational study of the law, the black-letter man [i.e. master of the case-law as written] may be the man of the present, but the man of the future is the man of statistics.” Judge Learned Hand reaffirmed

Holmes’ claim, stating, “it is as important to a judge called upon to pass on a question of [...] law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon, and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume, and Kant, as with the books which have been specifically written on the subject.”

A century later, in an age of increasing diversity, blurred boundaries, and shifting social values, application of the black-letter approach to legal analysis is still being debated. Accurate knowledge of black-letter law is, at the very least, essential for the success of future lawyers because it provides a foundation for a much more complex and critical framework of legal analysis. ♦

The Colour of the Law

Peter Bowal and Devon Slavin



Colour is almost always contrasted with something else in law; where the 'something else' is right, and the 'colour' is blackened out as a legal non-being.

Gray, C.B., "The Colour of Law: Law is Constituted from the Colour of Right," (2008) *Les Cahiers De Droit*, 49:3 at p. 393

Law is infused with colour. Indeed, colour gives law its character. This article describes several ways colour appears in the law, namely concepts of *colour* and *colourability*, *blackmail*, *legal blacklining*, *blue-pencil severance* and *red circling*.

Colour and Colourability

Under the common law, the term *colour of law* refers to the mere semblance of a legal right. That is to say that one's action taken under the colour of law adjusts, or *colours*, the law to the circumstance although the action may technically contravene the law. To 'colour' one's actions is to characterize or bend them toward legality.

For example, for a legislature to act 'colourably' is to essentially act outside

its legal jurisdiction but to seek to paint its actions as legal. Variations of the colour and colourability theme include colour of office, colour of title, and colour of right. Technical legal propriety is in question under each of these categories. Persons assert 'colour' as an explanation or defence when the legality of their action is in issue or is on the margins.

Where a public official acts beyond her power, she may have honestly believed or was told that her actions were within her power. She acted under the pretense or *colour of office*. The merits of her official position and her belief that she was acting within her power colour her actions as legitimate within the scope of her office.

“*From legal defences and justifications in crime to drafting, revising and enforcing contracts, the foundations of law are rooted in colour.*”

Colour of title occurs where someone with an informal or tenuous claim to legal title (ownership) to land asserts ownership rights in the land. For example, a squatter on land for a long, continuous period makes a claim to the property in adverse possession. One holding mere colour of title holds the appearance or semblance of a legally enforceable right of possession or ownership. Documentation plays a critical role in land ownership. Defective or incomplete documentation usually means one enjoys only colour of title to the land.

Colour of right is the most common colour category. It is a way of saying, "I honestly thought I had the right to...." It can be used defensively as an explanation or excuse

to avoid a legal penalty. One's action, although wrongful, was due to an honest but mistaken belief that one had the right to act in that way.

The most common definition of colour of right is "an honest belief in a state of facts which, if it existed, would be a legal justification or excuse": *R v Johnson* (1904), 8 CCC 123 (Ont HCJ).

This criminal defence is based on the honest belief of the accused that, at the time the offence was committed, she had a colour of right. The test is a subjective one where the belief in the erroneous facts must be an honest belief but not necessarily a reasonable one. The accused must only prove there is an "air of reality" to her mistaken belief of facts. So it would be a valid colour of right defence if one took property from a location at the request of someone who she trusted and honestly believed to own that property.

In Canada's [Criminal Code](#), colour of right is a defence where one forcibly enters land that is in the actual and peaceable possession of another (section 72), or commits theft of property (sections 322 and 326) or fraudulently uses credit card data or a computer (sections 342 and 342.1).

Section 429(2) of the *Criminal Code* states that "no person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right." The key to the colour of right defence is that if the mistaken belief were true, the action would be legal. Note that one might be mistaken about critical **facts**, but "ignorance [or mistake] of the **law** by a person who commits an offence is not an excuse for committing that offence" (section 19).

Blacklining

In addition to transmuted what is illegal to render it legal, the colour spectrum extends to the process of revising formal legal documents. *Blacklining* is the process by which a document is revised between lawyers or parties in a negotiation. A *blackline* document or *legal blackline* uses word processing software to compare originals to revised copies of documents. All revised drafts are retained so the historical integrity of the changes, including who made them and why, can be reviewed in the future. This is where it is important to preserve original documents.

Blackmail

“*Blacklining is the process by which a document is revised between lawyers or parties in a negotiation*”

Colour also comes into play in a more sinister context: *blackmail*. In Canada, the term 'blackmail' is actually not used. Rather the crime is called extortion and it is related to theft and robbery because the crime focuses on intimidation and interference with freedom of choice. Blackmail and extortion involve issuing a threat to compel someone to act against one's will and to give up money or property. Typically blackmail involves a threat to reveal embarrassing or damaging facts about a person unless compensated in some way.

Section 346 (1) of the *Criminal Code* states:

Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or

attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

Blue Pencils

Colour is also invoked by judges who order *blue-pencil severance*. This is a common law doctrine where a court finds parts of a contract to be unenforceable, but the rest of the contract to be enforceable. The rule allows the legally-valid terms of the contract to operate despite the severance of the offending unenforceable provisions. The remaining version must represent the original meaning. For example, blue-pencil severance would never delete the word “not” to alter the contract meaning.

The doctrine was created by the English House of Lords in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535. Described in the 1920 English case of *Attwood v. Lamont*, blue-pencil severance is “effected when the part severed can be removed by running a blue pencil through it.” Bastarache J. described this form of severance in the 2004 Supreme Court of Canada decision of [Transport North American Express Inc. v New Solutions Financial Corp.](#) at para. 57:

Under the blue-pencil test, severance is only possible if the judge can strike out, by drawing a line through, the portion of the contract they want to remove, leaving the portions that are not tainted by illegality, without affecting the meaning of the part remaining.

Blue-pencil severance is reserved for rare cases where the text removed is clearly severable, trivial, and not part of the main

purpose of the contract. If the nature or core of the agreement is altered by the removal, then the illegal clause is not a candidate for severance and the entire contract is void.

“*To ‘colour’ one’s actions is to characterize or bend them towards legality*”

The blue coloured test was applied in 2009 in [Shafron v KRG Insurance Brokers](#) where the question was whether the court should sever text in a restrictive covenant to resolve ambiguity around the precise meaning and boundaries of the “Metropolitan City of Vancouver.” The Court concluded that blue-pencil severance could not be applied to change the ambiguous wording because it was not a mere trivial part of the covenant agreed upon by the two parties. There also was doubt the parties would have agreed to change the wording without varying any other terms of the contract or otherwise “changing the bargain.”

The law has never explained the doctrine’s emphasis on the colour blue. And the test is blue-pencil, not necessarily blue line. Non-photo (non-repro) blue is a common tool used in the graphic design and print industry. It is a particular shade of blue that cannot be detected by cameras or copiers. Artists lay down sketch lines without the need to erase them after inking. Likewise, judges use the blue-pencil test to rectify or alter contracts without substantive detection.

Red Circles

In contrast to blue-pencil severance, *red circling* is not a legal term. It refers to a human resource practice of pay

conservation. Salaries of employees compensated more than a colleague doing equivalent work are circled and frozen until the colleague's pay catches up.

Red circling can arise during mergers and acquisitions when employees are transferred in to a new employer. The new employer cannot reduce the salaries of these recently acquired employees to bring them into line with their peers. Red circling can freeze status and promotion as well.

Conclusion

Colour and the law may seem to be completely unconnected paradigms. However, while it may not be the full palette, there is colour in the law. From legal defences and justifications in crimes to drafting, revising and enforcing contracts, the foundations of law are rooted in colour.

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Judges are Human Too

This case involved sexual interference by the defendant against a young person. The offender had pled guilty to sexual interference of an 8 year old girl, and the mother presented an emotional and moving victim impact statement. The defendant's lawyer applied to request that the Judge, the Honourable M.F. McParland, to recuse or remove herself from the sentencing hearing, for reasons including allegedly crying while being presented with the victim impact statement.

In the decision, the Judge noted that she did not cry, but had "briefly dabbed a tear from her eye with a tissue". The Judge also disagreed with defence counsel who alleged that she had scoffed or laughed at the defence's position. The Judge denied several other allegations made by defence.

The judge refused to recuse herself from the case. In doing so, the Judge discussed the test established by the Supreme Court of Canada which requires the applicant, the defence in this case, to prove that there was a reasonable apprehension of bias on the part of the judge. In this test, an informed person, viewing the matter realistically and practically, and having thought through the matter, would have to conclude that the judge would not be able to decide fairly. In her decision, the judge stated: "[t]here is therefore nothing wrong with the Court showing emotion. Just because a judge demonstrates human compassion, it does not amount to judicial bias."

R. v. Carlson, 2018 BCPC 209

<http://canlii.ca/t/htkq3>

Healthcare Privacy Protected by the Supreme Court of Canada

The province of British Columbia has an ongoing claim against Philip Morris International and other tobacco

manufacturers. Tobacco manufacturers are being sued to recover the cost of health care benefits related to treating disease caused or contributed to by exposure to a tobacco product. In this case, Philip Morris requested that it be given access to health care databases with information that the province intends to use to prove its case.

At trial, the judge found that the databases should be provided to Philip Morris because the information could be anonymized. According to the trial judge, if the data could be anonymized, it did not have to follow provisions in the [Tobacco Damages and Health Care Costs Recovery Act](#) which prevent health care information from being released, where the Government pursues a claim against a manufacturer. The Province of British Columbia appealed, but the British Columbia Court of Appeal agreed with the trial judge and dismissed the appeal.

The Supreme Court of Canada, however, reversed the decision of the lower courts and found that the Province of British Columbia does not have to provide Philip Morris access to the databases. Regardless of anonymization or how relevant the records are to the case, the legislation did not allow the records to be released.

British Columbia v. Philip Morris International, Inc., 2018 SCC 36
<http://canlii.ca/t/hszqj>

Manitoba Farmers Unhappy with Canadian Wheat Board Deal

Farmers from Manitoba recently won a case to continue their class action against the former Canadian Wheat Board and the Attorney General of Canada.

The Canadian Wheat Board was a crown corporation that, at one time, was [one of the world's largest exporters](#) of wheat,

durum and barley. Canadian farmers could only sell these products through the Canadian Wheat Board through various "pools" and had grain handling companies to act as agents to supply the grain.

In 2011, the Government of Canada, under former Prime Minister Stephen Harper, [sold the Canadian Wheat Board](#) (CWB) to foreign entities.

In this [deal](#), CWB gave a majority stake (50.1%) of its shares to G3 Global Group Limited (G3). G3 is owned by Bunge Limited ([legal domicile is Bermuda](#)) and the Saudi Agricultural and Livestock Investment Company.

The remainder 49.9% of the shares went to CWB Farmers Equity Trust (Farmers), shares of which G3 has a right to purchase after 7 years.

In this case, the plaintiff Farmers take issue with how the contingency fund in the CWB was treated. The contingency fund amounted to \$145,248,000. The Farmers allege that this fund should have been paid to them on account of grain sold, other debts in the pool, and costs to privatize transition costs.

Instead, the Government of Canada passed temporary regulations/laws to increase the amount that could be put into contingency funds and then diverted funds from the pool account to the contingency fund. These contingency fund amounts were never paid to the Farmers. The Farmers argue that these funds were given to the buyers.

The Farmers claim that the Government passed these regulations in bad faith which amounted to "misfeasance in public office." If so, the Government of Canada would never have had authority to make

these changes. The Farmers argue that the Government of Canada took these steps for an improper or unauthorized purpose:

- To make the CWB a more attractive asset to potential private purchases; and
- The Government of Canada flowed funds into the contingency funds to serve as “seed money” for the purchaser.

Should the Farmers win the class action, there may be a chance that the foreign buyers may be at least partially liable for the damages.

Dennis v Canada (A.G.) et al, 2018 MBQB 88

<http://canlii.ca/t/hsqt7> ◆

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Enemy of the State? Why You Should Treat the Defence and Crown as Equals



Melody Izadi

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Many perceive defence counsel as snaky, tricky, tactical used car salesman-like villains in courtrooms all across our countries. It's easy to blame us— we defend *criminals*, right? The Crown Attorney on the other hand, is often championed as justice fighters— putting the bad guys in jail where they belong, virtuous and pure.

The #MeToo and #believethetvictims movements are obviously focused on the rights of complainants in sexual assaults, but the movement also seeks to villainize defence counsel who asks questions in cross-examination and passionately advocate for their client. It is these very moments in the courtroom that are glorified as shining examples of the slimy business of defending accused persons and the myth that defence counsel are pulling a fast one over the eyes of lady justice. Because there's no risk of wrongful convictions, or the Crown acting improper, right? Let's just do away with defence counsel all together since apparently we don't further the goals of justice.

But yet, amidst the fictitious fog, the Ontario Court of Appeal reminds us all of the parameters of the Crown Attorney, because they too, can cause a miscarriage of justice because of their conduct in the courtroom. In *R. v. J.S.*, [2018] O.J. No. 576, on appeal from a judge and jury trial held in the Superior Court of Justice, the Court of Appeal drew bright fluorescent lines around the Crown Attorney's permissible conduct when they are presenting a weak case. In *J.S.*, the accuser did not see her alleged attacker and only saw a shadow. The accused was known to her but she never identified him as her attacker. She testified that 98% of what happened she doesn't remember. Before the trial, she told

“There is no room for improper tactics from either side, otherwise justice will not prevail.”

friends that it could have all just been a bad dream. There was some male DNA found on the complainant's underwear, but the forensic expert could not determine who deposited the fluid, or what the fluid was, or even when it was deposited. The complainant had a boyfriend at the time.

The accused and his girlfriend testified that they were in bed together when they heard cries from the complainant's room. The accused entered the room with his girlfriend and they helped her calm down until police arrived. The accused remembered helping the complainant find her underwear at her request; the girlfriend remembered watching that take place. The complainant was taken to hospital and swabs were taken to complete a traditional "rape kit." There was no semen detected on any of the tested swabs.

“ *As Moldaver, J put it in his reasons in Groia, “trials are not... tea parties.”* ”

The Crown in this trial implored the jury to find the accused guilty beyond a reasonable doubt. She told the jury that the lack of detail in what the accused told the police on arrival was detrimental to his credibility, putting aside completely his right to silence enshrined by our *Charter of Rights and Freedoms* the Court of Appeal held. She told the jury that the fluid the complainant's underwear was the accused's saliva. Having no conclusive forensic evidence to back up this ferociously exaggerated claim, the Court of Appeal held that that the Crown was misleading the jury and misappropriating the evidence.

However, at trial, the jury convicted the accused. Assumingly, they largely were influenced by the Crown Attorney's closing

address to them. The Judge, Justice Robert F. Scott, did not intervene and provide an instruction to the jury to correct the Crown's improper comments in her address. The accused was sentenced to 18 months in jail.

Thankfully, the accused appealed his sentence and The Court of Appeal ordered a new trial in the circumstances. The Court of Appeal held there was a miscarriage of justice and the accused did not have a fair trial.

The Supreme Court of Canada has also echoed a similar tempo in *Groia v. The Law Society of Upper Canada 2018 SCC 27* where a defence counsel had his licence suspended for incivility in the courtroom. The majority held that the decision by the Law Society of Upper Canada was unreasonable. Importantly, the Court did not waiver from pointing out that despite the allegations against Mr. Groia, the Prosecutor in that case also said unfavourable things in court and both sides acted in a way that was less than ideal. But the poor conduct of the Crown Attorney had been completely lost in the decisions by the Law Society and in the surrounding media coverage. The majority of our country's highest Court did not forget, and made a point of mentioning it in their reasons for an important reason.

As Moldaver, J put it in his reasons in *Groia*, “trials are not...tea parties.” Nor are the defence or crown attorney's enemies. Both are important members of the adversarial system: equal contributors and advocates of justice. And if both parties do the best job they possibly can, then the system is working. There is no room for improper tactics from either side, otherwise justice will not prevail.

Too Over-qualified for the Job?



Peter Bowal and John Jamieson

Introduction

Employers usually promise job seekers that they are looking for the most qualified workers. It is in their interests to do so. But occasionally they do not wish to hire the most qualified applicants.

What if a slow economy produces many clearly over-qualified applicants and the employer is suspicious that they will not be challenged by entry level positions. The employer already may be experiencing high turnover and will seek to avoid short-termers who are desperately seeking any employment but who are not necessarily serious about the position advertised. Over-qualified employees can be a challenge to manage when they are working at well below their experience and skill level, as well as their earning potential.

As with mismatches where the employee is decidedly under-qualified for the job, can an employer choose not to hire the over-qualified applicant?

Employer Prerogative

Applicants have no particular right to demand that any employer hire them or to be granted any job in particular. Freedom of contract and employer prerogative are the underlying theories in play. Subject to the laws against unjust discrimination, the employer is free to hire anyone it chooses, including lesser qualified applicants who might better suit the role.

The Sangha Case

Dr. Gian Singh Sangha was 51 years old when he immigrated to Canada from India in 1996. He was well educated and experienced in his field of environmental science. However, he was not able, for the first five years after arriving in Canada, to obtain a job at his level of qualification. Then he applied for one of four entry-level positions open at a Northwest Territories regulatory agency called the Mackenzie Valley Land and Water Board.

“Applicants have no particular right to demand that any employer hire them or to be granted any job in particular.”

The employer, Mackenzie, screened Sangha out in the recruitment process on the ground that he was over-qualified for the job. The agency had suffered high turnover and it assumed Sangha was more momentarily keen on the job than motivated and committed to it. After all, why would someone want to work and be paid well below their qualifications?

Since Mackenzie was a federally-regulated employer, the [Canadian Human Rights Act](#) applied. Sangha focused upon his immigrant and ethnic status in the denial of the job opportunity. The Canadian Human Rights Tribunal, in *Sangha v Mackenzie Valley Land and Water Board*, surprisingly concluded on the basis of expert evidence that “the experience of applying for a job for which one is overqualified, or working in such a job, is disproportionately an immigrant experience.”

It ruled that employers “should not rely upon impressionistic markers that the overqualified are ill-suited for the job because they will become bored/unmotivated or cause morale problems or quit prematurely.” Accordingly, the Tribunal determined that Sangha was discriminated against on the basis of national and ethnic origin, even though Mackenzie’s hiring process was completely neutral on its face.

Sangha was awarded \$9,500 for pain and suffering because the Tribunal was convinced that if the discrimination was removed, it remained only a “mere possibility” that he would be hired. Still, Sangha was not satisfied. He demanded compensation for three years of lost earnings (it took some five years to get the Tribunal’s decision) at the rate of \$55,000 per year, and that an order issue for Mackenzie to hire him. He appealed the Tribunal’s decision to the Federal Court.

Some nineteen months after the Tribunal’s decision, a Federal Court judge agreed with Sangha that the Canadian Human Rights Tribunal made an error when it found he probably would not have obtained the job anyway. The appellate judge was of the view that Sangha had a “serious possibility” of getting the job and he sent the case back to the Tribunal for final remedy. That follow-up decision is not publicly reported.

Conclusion

The *Sangha* decision is the only law in Canada on the issue of over-qualification, and it is not the strongest precedent. It turned on the questionable finding and generalization, that refusing to hire over-qualified applicants – despite valid business reasons for doing so – was tantamount to discrimination on the basis of national and ethnic origin.

Assessing and integrating the qualifications of foreign trained workers has long been a challenge. The *Sangha* decision does *not* stand for the proposition that employers must privilege foreign educated and experienced workers. Litigating one’s way into a job is a dubious strategy for several reasons. Judges should be reluctant to over-ride employer prerogative to hire employees of their choosing, absent palpable discriminatory intent and effect. Especially in times of sturdy economic decline, many over-qualified individuals compete for lower level jobs and the ethnic argument is much less compelling. ♦

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Domestic Violence and Family Law Disputes



John-Paul Boyd

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Domestic violence – or *family violence* or *intimate partner violence*, call it what you will – is a serious problem in both intact and separated families. According to a 2013 report from Statistics Canada, there are 252.9 victims of domestic violence per 100,000 population, and domestic violence makes up more 26 per cent of all violent crime in Canada. Although children who are victims of domestic violence make up 243.5 people per 100,000 of the under-18 population, spousal violence is the most common form of domestic violence, and 68 per cent of all victims of domestic violence identify as female.

Domestic violence can be an issue in child welfare proceedings, as the abuse of a spouse is significantly predictive of child abuse and domestic violence has important direct and indirect impacts on children even if they are not abused themselves. It can also be a factor in family law proceedings in a number of ways, including:

- the need to protect a family member from violence;
- the impact of violence on children's optimal parenting arrangements; and,
- the various claims in tort that can potentially be brought against abusers.

Domestic violence was first accepted as a consideration in judicial parenting decisions in the late 1980s, however by the end of the 20th Century, the domestic relations legislation of only one Canadian jurisdiction, Newfoundland, explicitly identified domestic violence as a factor to be taken into account in the court's assessment of parenting capacity. However, as time as passed the legislation of more provinces have been amended to include references to family violence, either in terms of the protection of victims or the assessment of children's best interests.

Section 18 of Alberta's 2003 *Family Law Act*, for example, required the court to consider "any family violence, including its impact on the safety of the child and other family and household members, the child's general well-being, the ability of the person engaged in the family violence to care for an meet the needs of the child, and the appropriateness of making an order that would require the guardians to cooperate on issues affecting the child." Section 37 of British Columbia's *Family Law Act*, passed eight years after the Alberta legislation, went a bit further. The parties and the court are required to consider

- (a) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (b) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

in determining what is in the best interests of a child. If domestic violence is a factor, section 38 provides a list of additional factors for the court to consider in assessing the impact of the violence. The federal legislation on domestic relations, however, the *Divorce Act* of 1985, remained silent on the issue of domestic violence.

On 22 May 2018, the federal government tabled [Bill C-78](#) in the House of Commons. The bill proposes sweeping, much-needed changes to the *Divorce Act*, the first significant changes since the introduction of the Child Support Guidelines in 1997. Many of the amendments contained in the bill will have a significant impact on the practice of family law in Canada, such as the repeal of the terms "custody" and "access" and their

replacement with child-centered concepts such as "decision-making responsibility" and "parenting time." In addition, the amendments will introduce a legal test to help the court determine applications when a spouse wishes to move away from another spouse, with or without a child. The bill will also overhaul how the best interests of children are assessed by introducing a lengthy list of factors for the court to consider, including domestic violence, adopting an approach very similar to that taken in British Columbia.

“ According to a 2013 report from Statistics Canada, there are 252.9 victims of domestic violence per 100,000 population, and domestic violence makes up more than 26 percent of all violent crimes in Canada. ”

Under the amended section 16, the court will be required to take only the best interests of children into consideration when making parenting orders and orders about the child's time with persons other than spouses. The court will be required to give "primary consideration to the child's physical, emotional and psychological safety, security and well-being" in assessing a non-exhaustive list of factors set out at section 16(3). Among those factors are:

- (a) any family violence and its impact on, among other things,
 - i. the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

ii. the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(b) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Where domestic violence is present, the court will also be required to assess, under section 16(4), the impact of a number of additional factors:

- (a) the nature, seriousness and frequency of the family violence and when it occurred;
- (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
- (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
- (d) the physical, emotional and psychological harm or risk of harm to the child;
- (e) any compromise to the safety of the child or other family member;
- (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
- (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and

(h) any other relevant factor.

If the bill become law, the factors set out in section 16 will allow the court to take a careful, more thoughtful approach to domestic violence when determining children's parenting arrangements. The factors set out in section 16(4) should help the court differentiate between situational violence (the sort of abuse that occurs at moments of crisis but is not characteristic of the spouses' overall relationship), episodic battering (a recurring pattern of abuse within the relationship that can escalate after separation) and coercive controlling violence (in which the abuse is part of a pattern of authoritarian control), and result in more appropriate decisions on parenting after separation.

The bill will not, of course, end domestic violence. It will, I hope, result in more nuanced decisions on children's parenting arrangements that better promote and support the best interests and general well-being of children. ♦

If domestic violence is an issue for you or someone you know, visit the Public Health Agency's Stop Family Violence website. The site is an excellent source of information about domestic violence and provides links to supports and services, including help lines, by province and territory.



The Law of Safe Injection Drug Sites

Peter Bowal and Brent Rein

Introduction

Vancouver, British Columbia consistently ranks as one of the most livable cities in the world. However, its Downtown Eastside (DTES) community of approximately 18,000 crammed into a few square blocks of social housing units, derelict buildings and temporary shelters – all in the shadow of an affluent downtown – is a glaring exception to livability.

Some 260 different agencies in the DTES offer programs and services. One such agency is the Portland Hotel Society (PHS) which manages social housing units for the provincial government. PHS also manages Insite, North America's first legal supervised injection site for illegal drugs.

“The Supreme Court of Canada clearly preferred the injection site once it had been launched as an experiment.”

Insite was established in 2003 as an experimental pilot project by health authorities to contain the spread of HIV and Hepatitis C, which had been an epidemic in the DTES throughout the 1990's. Insite became the flagship component of a comprehensive harm reduction strategy to tackle addictions.

Harm reduction is controversial. It provides clean needles to reduce harm from illegal drug use. Harm reduction strives to engage with drug addicts, keep them alive, offer treatment options when they confront their addiction and reduce the spread of disease. The federal government exempted Insite from the application of the *Controlled Drugs and Substances Act*. Staff and users of Insite were not subject to trafficking and possession laws.

By 2008, the Conservative government, elected on a law and order mandate, no longer supported harm reduction. When the exemption came up for renewal, the federal government decided not to continue with the experiment.

A court battle ensued between PHS, the provincial government and social advocates on one side and the federal government on the other side. It ended in 2011 at the Supreme Court of Canada in [Canada v PHS Community Services Society](#). Could the federal government shut down

the supervised drug injection, a health care facility, on constitutional grounds?

Federal or Provincial Authority?

The federal government has constitutional authority to create crimes around dangerous drugs, but the province also claimed authority over delivery of health care services. Under the doctrine of Inter-jurisdictional Immunity, the federal government was held to be immune from provincial health laws which interfered with the ability of the federal government to enact and enforce drug crimes.

Charter of Rights and Freedoms

PHS argued that drug addicts had a *Charter* right to the safe injection site, namely under the section 7 “right to life, liberty and security of the person” which can be denied only “in accordance with the principles of fundamental justice.”

PHS said that drug trafficking and possession laws block access to medical treatment. Clients are forced to break the law in order to receive the medical services of Insite. This violates the *Charter*, section 7.

The Supreme Court of Canada, after a convoluted analysis, determined the application of federal drug laws at Insite to be a violation of “life, liberty and security of the person.” However, the *Controlled Drugs and Substances Act* which prohibits the possession of illegal drugs, also allows the Minister of Health to exempt application of those laws if an exemption is necessary for medical or scientific purposes.

The courts should not lightly interfere with Ministerial discretion. Judges should show deference to Ministerial discretion where there is greater expertise and appreciation for the impact of such decisions within the

broader context area of their governance responsibilities.

“Harm reduction strives to engage with drug addicts, keep them alive, offer treatment options when they confront their addiction and reduce the spread of disease.”

In practice, however, Ministerial discretion is not entirely immune from judicial review and as with any government decision, it must be made in accordance with law and, in particular, section 7 of the *Charter*. The Supreme Court said the Minister of Health denial of the exemption was contrary to the principles of fundamental justice. The Court concluded the Minister really did not have any discretion at all.

In a highly unusual and controversial stroke, the Supreme Court of Canada ordered the Minister of Health to renew the exemption. It is not clear what principles bind the Court but restraint is not foremost among them.

Conclusion

In the end, the Supreme Court of Canada did not rule on the constitutionality of harm reduction programs, trafficking and possession laws, or supervised drug injection sites. The Court ruled the Minister of Health violated section 7 of the *Charter*, by failing to renew the Insite *Controlled Drugs and Substances Act* exemption. Evidence at the time showed that Insite was saving lives and its operations did not have a negative impact on public safety. The facility was doing more good than harm.

Each exemption is temporary. The Minister can exercise her discretion again by balancing public health and public safety – until the Court disagrees.

Critics argue that the *PHS* decision comprised less a legal solution than a second-guessing of executive government policy making. The Supreme Court of Canada clearly preferred the injection site once it had been launched as an experiment. The decision demonstrates how difficult it can be for governments to enact policy and implement policy changes in the face of the *Charter*.

Policies for the treatment of addictions are among the major challenges of our day. The current federal government has extended these exemptions across many Canadian cities. Time will tell whether the policy of accommodating addictions will ultimately reduce them and their harm. ♦

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Over-Representation of Indigenous (and other Racialized) Children in the Child Welfare System: Human Rights Aspects



Linda McKay-Panos

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For the past few decades, there has been growing publicity about the over-representation of Indigenous and other minority children in our child welfare systems across Canada. The 2015 [findings of the Truth and Reconciliation Commission](#) confirmed that the over-representation of Indigenous children in Canadian child welfare systems has reached a crisis level. Even the [United Nations Committee on the Rights of the Child in 2012](#) noted that Canada needed to take urgent measures to address the “discriminatory over-representation” of Indigenous children who were in “out-of-home” care. The Ontario Human Rights Commission recently released a report called [Interrupted Childhoods: Over-representation of Indigenous and Black children in Ontario child welfare](#) (February 2018) and this report confirms what others have been saying.

The challenge in identifying the causes of over-representation in the child welfare system related to human rights abuses is that discrimination is often systemic and proven through circumstantial evidence. The Ontario Human Rights Commission (OHRC) notes that systemic discrimination may be diagnosed by looking at numerical data, policies, practices and decision-making processes and organizational culture. Discrimination plays a role in policy formation and decision-making about placement in out-of-home care and funding of child welfare initiatives.

The OHRC analyzes the factors that result in discrimination in the context of child welfare decision-making. In summarizing the existing research across Canada, the OHRC notes that neglect (as opposed to active child abuse) is the main reason that Indigenous children enter the child welfare system. The OHRC also summarizes the causes of neglect in this community as “chronic family concerns, such as poverty, poor and unsafe housing, substance use, mental health issues and social isolation”. The causes of the chronic family concerns in Indigenous communities may be traced to decades of oppression and discrimination that have resulted in “multiple negative social and economic disadvantages”. Some of the most systemically discriminatory policies pertained to residential schools, which resulted in Indigenous children being taken from their families and removed from loving parents, parental role models, and thus losing their cultures and their identities.

With respect to Black and racialized minority children, the number of children over-represented in child welfare has not been well researched. However, existing studies indicate that children from families who are Black and from other visible minority groups, including those who are new Canadians, experience higher percentages of referrals for investigation, over-monitoring and higher numbers of decisions resulting in out-of-home placements. The OHRC indicates that causes of over-representation of children from these communities in the system include poverty resulting from historic and ongoing systemic and direct discrimination.

The systemic discrimination in child welfare systems is the result of a complex set of historical and current practices, policies, and biases. Research in the United States (supported by some Canadian research) indicates that medical and school

professionals tend to over-report racialized families to child welfare authorities. The OHRC noted that authorities sometimes confuse poverty or misinterpret cultural differences as neglect, and thus refer racialized families to child welfare more often. In addition, policies and practices, such as risk assessment tools that reflect White, Western, Christian notions of child rearing, coupled with unconscious racial biases, may result in incorrect assumptions about the level of risk to which children are exposed. [Research from the University of Calgary](#) shows that a lack of knowledge by the child welfare staff about other cultures can also result in overrepresentation of new Canadian children in out-of-home care.

Funding discrepancies also indicate that discrimination exists in the child welfare system. In 2016, the [Canadian Human Rights Tribunal ruled](#) that the federal government discriminates against children on reserves by failing to provide the same level of funding to child welfare services that exist elsewhere. The evidence suggested that on-reserve child welfare systems received 38% less funding than elsewhere.

There have been some efforts to address concerns about discrimination in the child welfare system. For example, in some jurisdictions, child welfare legislation has been amended to require notification to/ consultation with First Nations officials when a child from their community is being placed into care or an adoption plan is being made for the child (See, for example [Child, Youth and Family Enhancement Act](#), RSA 2000 c C-12, s 67). These provisions, however, have not succeeded in eliminating the difficulties with overrepresentation, according to [Dr. Cynthia Wesley-Esquimaux](#) at Indigenous and Northern Affairs Canada.

The OHRC arrived at 25 recommendations to assist in addressing the issue of over-representation. The following recommendations have a direct link to human rights and would serve as a valuable reference for all governments and agencies across Canada.

Recommendations to the government of Ontario:

1. The government of Ontario (government) should develop a provincial strategy to identify and address how families' social and economic conditions [citations omitted] are linked to racial disparities and disproportionality in the child welfare system. This strategy should contain measurable commitments to address these inequalities, including increasing the availability of funding, housing, services and supports to help families meet their needs and safely keep their children. The government should report on these commitments on an annual basis.

2. The government should commit to fully implementing the United Nations *Declaration on the Rights of Indigenous Peoples* and the Truth and Reconciliation Commission of Canada's Calls to Action.

...

4. The government should require by law that all [Children's Aid Societies (CASs)] – both mainstream and Indigenous – collect human rights-based data, including race-based data, and poverty-related information.

5. The government should amend

the *Human Rights Code* to add "social condition" as a protected ground of discrimination. In doing so, discrimination against people experiencing social and economic disadvantage would be prohibited in services, housing, employment and other areas.

...

7. The government should monitor and ensure CASs' compliance with any legislation, regulations and policy directives pertaining to human rights-based data collection, with the aim of increasing the accuracy of the data collected and reducing the amount of missing or unknown data to zero.

8. The Ministry of Children and Youth Services (MCYS) should create a dedicated unit to advance equity for Indigenous, racialized and other *Human Rights Code*-identified groups in child welfare. Staff should have expertise in anti-racism, including anti-Indigenous and anti-Black racism. The unit would be responsible for building knowledge and resource capacity across CASs to collect and analyze data, identify potential sources of discrimination, develop training, and address systemic barriers and discrimination faced by Indigenous and racialized families and children. Liability for preventing and responding to discrimination would remain with individual CASs. ...

...

Recommendations to mainstream and Indigenous Children's Aid Societies (CASs):

14. CASs should commit to fully

implementing the relevant Truth and Reconciliation Commission of Canada (TRC)'s Calls to Action.

15. CASs should comply with government requirements to collect, tabulate and report human rights-based data. In the absence of government requirements, CASs should voluntarily collect, tabulate and report such data.
16. CASs should reach out to and be guided by First Nations, Métis and Inuit communities on data collection standards, training, approaches, analysis and reporting that will respond to the specific context of Indigenous communities.
17. CASs should collect and tabulate human rights-based data, including race-based data, in a standardized way within and across agencies, across services decisions. This includes referrals, investigations, verifications of abuse allegations, referrals to ongoing services, admissions into care, apprehensions from First Nations reserves and Indigenous children off reserve, type of care, days in care and referrals to drug and alcohol testing, *etc.* Data categories should be compatible with Statistics Canada categories and should be commonly defined.
18. In addition to any requirements to report data to the Ministry of Children and Youth Services (MCYS), all CASs should report publicly [*sic*] on disaggregated human rights-based data and data on poverty, on an annual basis. CASs should engage with affected racialized and Indigenous groups in their

communities, and the [Ontario Association of Children's Aid Societies], to decide the most meaningful data and comparisons to report (e.g. Indigenous or racialized identity and sex, Indigenous or racialized identity and poverty, *etc.*). Any public reporting must adhere to legislated privacy requirements.

19. Race-based data should be cross-tabulated with relevant provincial performance measures for the child welfare system.

...

21. New and incumbent child protection workers and managers should be required to undergo training on how to collect human rights-based data. Such training should be standardized across the province and should emphasize the importance of outcomes connected to data collection.
22. New and incumbent child protection workers and managers should be required to undergo training on anti-racism and providing culturally competent services to Indigenous, Black and other racialized families. Such training should be done in partnership with people from affected communities and incorporate a focus on:
 - (a) Anti-Indigenous racism
 - (b) Indigenous cultural competency training:
 - The history, impacts and intergenerational effects of the residential schools

- The foundational differences between Indigenous and western world views regarding relationships between individuals, including children, and the community
- Trauma-informed practices in an Indigenous context
- The effects of ongoing colonialism

(c) Anti-Black racism

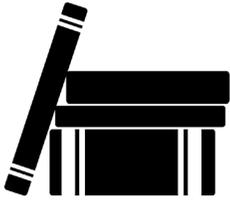
(d) The “child-welfare-to-prison pipeline.”

...

25. Where an agency finds elements consistent with systemic racial discrimination, they must take steps to respond. These include:

- Demonstrating strong leadership that shows that racial discrimination will not be tolerated
- Establishing stable and long-term resources within the agency dedicated to human rights and equity activity
- Removing any bias or adverse impacts that exist in the agency’s rules, standards, formal and informal policies, procedures, decision-making practices and organizational culture
- Investigating any alleged discriminatory conduct and taking corrective action where it is substantiated, up to and including dismissal

- Providing further anti-racism and cultural competency training to staff and management. See Recommendation 22
- Developing special programs to address the specific needs of Indigenous and/or racialized clients and increase hiring of Indigenous and racialized staff
- Creating anti-discrimination and harassment policies that explicitly define racial discrimination as a type of discrimination that is illegal and provide relevant examples
- Creating accountability mechanisms, such as complaints and disciplinary procedures
- Building dialogue and relationships with racialized and Indigenous groups in the community
- Undertaking comprehensive organizational development projects that incorporate the elements above
- Publicly [*sic*] reporting on measures to address any issues identified.◆



Lawyers in Revolutionary Times: Doctor Zhivago

Rob Normey

A remarkable manuscript was bundled out of the Soviet Union in the late spring of 1956. An Italian Communist journalist named Sergio d'Angelo had visited Boris Pasternak to discuss possible publication of his latest work. Pasternak was the famed Russian poet and survivor of the various purges and show trials of the Great Terror that had gripped Russia since the 1930s, to discuss possible publication of his latest work. The novel was *Doctor Zhivago* (the new translation by Richard Peavear and Larissa Volokhonsky is recommended). Pasternak's long-time project would finally be submitted for approval by the state publisher in the fall. The result would be biting criticism, followed by ongoing hostile attacks on Pasternak as a counter-revolutionary, decadent and ungrateful author, who had dared to challenge the dominant narrative of a glorious revolution that continued to achieve great things on behalf of the proletariat.

Earlier in the year Pasternak had obviously anticipated difficulties with publication in his native land. When he handed over a copy of the manuscript to d'Angelo, as agent for the Milanese publisher Feltrinelli, he stated in a resigned voice that: "you are hereby invited to watch me face the firing squad." Nonetheless, courageously Pasternak assented to foreign publication and the world was able to read one of Russia's great epic tales, a work that harkens back to the great nineteenth century tradition introduced by Tolstoy and Dostoevsky.

Doctor Zhivago is well known to lovers of world literature, as is its film adaptation, the romantic epic directed by David Lean in 1962. The film stars Omar Sharif as Yuri Zhivago, Julie Christie as Lara, Tom Courtenay as Lara's husband –to –be turned revolutionary commander operating as "Strelnikov" and Rod Steiger, as the decadent lawyer and dandy, Victor Ippolitovich Komarovskiy.

Rather than offer a review of the novel as a whole, I want to concentrate on key scenes where lawyer Komarovskiy plays

a critical role, as well as scenes where quite different lawyers are described. It is rather inspiring to consider the prominent role that Pasternak assigns in the early chapters to progressive lawyers, who are quite willing to engage in what we would today refer to as human rights work, including taking on contentious labour cases on behalf of vulnerable workers. For instance, the hero Yuri (or Yura) travels in the opening section with his Uncle Nikolai Nikolaevich by carriage to visit a friend at his estate. A recurring theme is introduced – that there are characters who can act as a force for good and who share a hopeful idealism, no matter how bleak events may get. We learn that Yuri’s uncle is an important writer and that the two are travelling by carriage over lush wheat fields during the feast of the Kazan Mother of God. The year is 1903. Their destination is the estate of the wealthy silk merchant, Kologivov, patron of the arts in a fertile period, and financial supporter of various human rights and other enlightened causes. Nikolai will present his manuscript on land reform to assist the poor. The man is a committed “Tolstoyan” who is committed to revolution and nonviolent social transformation. He advocates a compassionate Christianity, with a desire to resist the corruption of the narrow-minded authorities who represent stagnation and a failed society.

“Lara, determined to break with the aging sensualist, tucks a revolver into her coat and trudges over to the party, debating in her mind as to how best to deal with her pent-up anger and fear.”

An important aspect of the Kologivov circle of idealists and activists is the belief that the rule of law and the commitment to seeking justice in the courts will spear head the needed breakthrough in social relations, overcoming the shocking inequality of the times. The Christian humanist ideals of this group have much in common with the liberal ideals of the 19th century writers and thinkers like Tolstoy and Alexander Herzen, but find new relevance in the 20th century as the society senses the prospects for a successful revolution. Accordingly, we learn of the financial support they offer to lawyers who defend the accused in political trials and who represent workers who have been exploited and injured. The narrator explains to us that Kologivov hates the “moribund order” and has vowed to bring about reform or revolution, hides fugitives from the law, funds humanitarian projects and cooperates with and pays for lawyers in what are anticipated to be landmark trials.

Some of these details about the philanthropist and activist are provided to us as the narrator describes how Lara is taken as a teenager to stay with the Kologivov family as a tutor. She had been desperate to break away from her mother’s home, given that the Lawyer Komarovsky had abused his position as friend and advisor to commence an affair with the high school student. The relationship between Lara and Komarovsky is recounted with greater depth and subtlety in the novel than is the case in the film, where it is played out in a rather melodramatic fashion.

Lara is depicted as maturing during her time with the Kologivovs and acquiring a keenly attuned social conscience. She hears the jokes about the merchant’s efforts as involving an attempt to “overthrow himself” by subsidizing revolution and organizing strikes at his own factory. In his presence

she recognizes the superficiality of the upper classes, as most clearly exemplified by Victor Komarovsky. As a young woman she gradually learns to recognize the true worth of Pasha, an idealist prepared to dedicate his life to the fight for freedom and equality. A memorable scene in the novel is the Christmas Party at a wealthy socialite's house. Lara, determined to break with the aging sensualist, tucks a revolver into her coat and trudges over to the party, debating in her mind as to how best to deal with her pent-up anger and fear. We witness the various guests at the party, as they play cards and waltz in the large ballroom. The scene's conclusion reveals much about the essential character of those thirsting for a better world.

Doctor Zhivago follows the trials and tribulations, but also the loves and acts of kindness of the main characters during the turbulent years of the Russian Civil War, which pitted the Reds – the Bolsheviks, against the White Army, which was loyal to the previous regime and its values.

Late in the novel Yuri has found his way to the isolated estate of Varykino and spends time with the valiant, hard-working Lara. She has been raising her daughter Katya alone. Viktor visits them at what will turn out to be the end of their idyll, with news that they must leave the place as the Soviet police will soon arrive to arrest and quite likely execute her. The lawyer has somehow landed on his feet and survived the turbulent times to be appointed Minister of Justice of a far-off Eastern republic. He does in fact rescue Lara and her daughter, revealing that there are mysteries in the human heart and even a rogue like Komarovsky possesses unexpected depths and is capable of moral action.

It occurs to me in considering Pasternak's

contrasting of the initial days of the Russian Revolution and its promise of a better future – the February Revolution with the later, October Revolution in which the Bolsheviks seize power with the help of various militias and irregular armed groups, one might focus on the leader of the Provisional Government. Alexander Kerensky, had he been able to assert control and lead the revolution in a democratic manner, respecting the fundamental rights of citizens, may well have been able to help fulfill the aspirations of Yuri Zhivago and the many romantic dreamers. These are individuals who would see their hopes crushed by the relentless drive of Lenin and his Bolsheviks to root out all dissent, deny freedom of thought and speech and other rights, and commence the descent into the utter darkness of Communist Russia. Kerensky was an extremely talented lawyer, who participated in a number of significant trials on behalf of the vulnerable and persecuted in the waning days of the old regime and as parliamentarian championing important legal reforms, such as abolishing the death penalty and restoring free speech and building a basis for democratic rights. Alas, he was to be pushed into exile, his days numbered had he remained in Russia like others in the Provisional government who would meet a sad fate in the new society, lacking all semblance of the rule of law. ♦

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Registered Charities and the Charter

Peter Broder



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Over the past twenty-five years or so, commentators have lamented the sometimes inordinate influence of tax policy considerations in the administration and adjudication of the federal registered charities regime.

There is no doubt fiscal implications ought to be taken into account in structuring the legislative regime to ensure timely and appropriate use of the preferentially-treated resources available to registered charities under the *Income Tax Act (ITA)*. Indeed, to supplement the common law (a body of judicial decisions), which establishes the meaning of charity in Canada, there are specific statutory measures designed to promote tax policy goals. Included among these are the disbursement quota provisions, measures to restrict self-dealing, and a requirement for revoked charities to pass their remaining property on to an “eligible donee.”

But that is not the end of the story. Unhappily, in interpreting many routine aspects of the federal charity rules, judicial and administrative decision-makers are apt to overlook or downplay well-established charity jurisprudence in deference to fiscal concerns.

An example of this is the application of direction and control requirements. These are the obligations placed on a Canadian registered charity when it carries out its work through another entity that is not a registered charity. Such obligations are typically triggered when the collaboration is with an overseas partner, but can also occur when working domestically, for example, in conjunction with a non-profit.

It is a longstanding tenet of charity law that groups can operate abroad and serve foreign beneficiaries. Canadian rules acknowledge that this country’s charities can operate outside the country, but hamstringing this work by placing onerous oversight and reporting requirements on such initiatives. The tax policy rationale at play here is ensuring government-subsidized resources are not diverted from

charitable purposes. But examples of leakage of resources are few and far between. Research has shown that our rules in this area are stricter than those of other jurisdictions.

“Government actors are subject to the Charter, private sector bodies (i.e., entities such as corporations, trusts, and associations) are not.”

Whether looking at this from the perspective of the sector as a whole – which gets less than 10 percent of its revenues from tax-receipted donations – or that of individual charities, many of which receive only a small portion of their funding from philanthropy, it appears such an approach is backward.

Now, according to a recent case, along with tax policy, *Charter* protections are another legal imperative that must be grappled with as part of the federal charity regime. Previously, the Courts held that registered charity status was a tax privilege, and not a right. Therefore, those seeking such status were not entitled to the full range of protections found in the *Charter*.

In a July 16, 2018 Ontario Superior Court decision, however, Justice Ed Morgan ruled that the *Income Tax Act* provision governing the non-partisan political activities of charitable organizations was unconstitutional. The case, *Canada Without Poverty vs. Attorney-General of Canada*, left the legislative prohibition on partisan political activities in place, but declared s. 149.1(6.2)(a) and (b) of the *ITA* “of no force and effect.” The analysis stated that the provision was contrary to the *Canadian*

Charter of Rights and Freedoms (Charter) freedom of expression protections and couldn't be saved under the s. 1 reasonable and justified limitation criteria.

Two other recent cases, both before the Supreme Court of Canada (SCC), also raised concern over the potential application of the *Charter* for federal regulation of charities, even though the cases did not focus on eligibility for charitable status. The two cases, *Trinity Western University v. Law Society of Upper Canada* and *Law Society of British Columbia v. Trinity Western University*, were related and dealt with refusals of Law Societies in two provinces to grant accreditation to a proposed law school at an evangelical Christian postsecondary institution owing to its impugned compulsory behavioural code for students.

Government actors are subject to the *Charter*; private sector bodies (i.e., entities such as corporations, trusts and associations) are not. So what's at issue is how the CRA administers the registered charity regulatory regime, and whether it needs to take the *Charter* into account in granting or revoking status to groups, rather than direct application to the *Charter* to the groups themselves.

“It is a longstanding tenet of charity law that groups can operate abroad and serve foreign beneficiaries.”

In mid-August the federal government announced it would appeal the Ontario decision, and that it would also move this fall to amend the *ITA* registered charity political activities provisions to “allow charities to pursue their charitable purposes

by engaging in non-partisan political activities and in the development of public policy.”

But, even once the outcome of the appeal is known and the reformed provisions are enacted, the issue of reconciling protecting *Charter* rights with administering the *ITA* registered charity regime seems unlikely to be put to rest. In the SCC cases, although in the end the judgements did not address the matter, it was apparent from oral argument questions that at least some members of the Court were concerned with whether groups not operating in accordance with the *Charter* ought still to be afforded registered charity status. In that context alone, it can be assumed there will be numerous future *Charter* challenges to federal charity regulation.

The good news is that this could spur further legislative reform. Ideally such reform would take a hard look at the different considerations that ought to be taken into account in a revamped system, and how those considerations ought to be balanced, in a 21st century context. If that were to happen, an updated regime could be put in place, driven by the principles of charity law that have evolved over the centuries, taking appropriate but circumscribed account of tax policy concerns, and also being mindful of the *Charter* and its implications for how charities are regulated.

The alternative seems likely to be a piecemeal regime – based on a *Charter* decision here, a tax policy decision there, and a decision relying on charity law precedent somewhere else – that is difficult to administer and plagued by uncertainty. ♦

New Resources at CPLEA

The following resources were funded by Alberta [Human Rights Education and Multiculturalism Fund \(HREMF\)](#).

LawNow has created a Department called New Resources at CPLEA, which is now a permanent addition to each issue. Each post will highlight what's new, updated/revised or popular at CPLEA. All resources are free and available for download. We hope that this will raise awareness of the many resources that CPLEA produces to further our commitment to public legal education in Alberta. For a listing of all CPLEA resources go to: www.cplea.ca/publications

Seven new publications have been added to CPLEA's Your rights when renting: Human Rights in Alberta series

Housing for seniors: Nursing homes (NEW)

A nursing home is a place to live for seniors with complex medical needs, where they have 24-hour access to an on-site Registered Nurse. The *Nursing Homes Act* tells you the rules for nursing homes that operate in Alberta. This tipsheet provides information on what you should know about the *Nursing Homes Act*, what documents must be provided when you apply and what appeal processes are available to you if you have a problem with your tenancy.

English <https://www.cplea.ca/wp-content/uploads/NursingHomesE.pdf>
Somali <https://www.cplea.ca/wp-content/uploads/NursingHomesS.pdf>
Arabic <https://www.cplea.ca/wp-content/uploads/NursingHomesA.pdf>

Housing for seniors: Living in a rental property (NEW)

The *Residential Tenancies Act* applies to seniors who rent their own home, apartment, or condominium. Seniors who rent a place to live have the same rights and responsibilities as other renters. Under the *Residential Tenancies Act*, renters are called tenants. This tipsheet looks at what you should know about the *Act* and the rights and responsibilities of landlords and tenants in Alberta.

English <https://www.cplea.ca/wp-content/uploads/LivingInARentalPropertyE.pdf>
Somali <https://www.cplea.ca/wp-content/uploads/LivingInARentalPropertyS.pdf>
Arabic <https://www.cplea.ca/wp-content/uploads/LivingInARentalPropertyA.pdf>

Housing for seniors: Affordable housing (NEW)

The *Alberta Housing Act* creates the opportunity for some seniors to live in housing they can afford. This kind of housing is provided through the Alberta Ministry of Seniors and Housing. It is available to individuals who require assistance in obtaining and maintaining housing due to social and financial reasons. This information sheet discusses what you should know about the three housing programs governed by the *Act*: Community Housing Program, Seniors Self-Contained Housing Program, and the Seniors Lodge Program.

English <https://www.cplea.ca/wp-content/uploads/AffordableHousingE.pdf>
Somali <https://www.cplea.ca/wp-content/uploads/AffordableHousingS.pdf>
Arabic <https://www.cplea.ca/wp-content/uploads/AffordableHousingA.pdf>

New Resources at CPLEA

The following resources were funded by Alberta [Human Rights Education and Multiculturalism Fund \(HREMF\)](#).

Did you know? The Alberta Human Rights Act now prevents discrimination based on age. (NEW)

Recently, the Alberta government agreed to add protection for age discrimination in the *Alberta Human Rights Act (AHRA)* in two areas—tenancy and services, goods and accommodation customarily available to the public. As of January 1, 2018, Albertans cannot be discriminated against based on their age. This tipsheet provides an overview of the changes to the *Alberta Human Rights Act*.

English <https://www.cplea.ca/wp-content/uploads/AgeDiscriminationE.pdf>
Somali <https://www.cplea.ca/wp-content/uploads/AgeDiscriminationS.pdf>
Arabic <https://www.cplea.ca/wp-content/uploads/AgeDiscriminationA.pdf>

Questions you should not be asked when looking for a place to live (NEW)

There are some questions that a landlord should NOT be asking you. This tipsheet provides an overview of what information you cannot be asked for and what you can do if the landlord asks discriminatory questions.

English <https://www.cplea.ca/wp-content/uploads/QuestionsNotAllowedE.pdf>
Somali <https://www.cplea.ca/wp-content/uploads/QuestionsNotAllowedS.pdf>
Arabic <https://www.cplea.ca/wp-content/uploads/QuestionsNotAllowedA.pdf>

When rental advertisements discriminate: What you need to know (NEW)

Sometimes, rental advertisements can be discriminatory. The *Alberta Human Rights Act* helps to protect you from discrimination when you are renting a place to live.

English <https://www.cplea.ca/wp-content/uploads/DiscriminationInRentalAdsE.pdf>
Somali <https://www.cplea.ca/wp-content/uploads/DiscriminationInRentalAdsS.pdf>
Arabic <https://www.cplea.ca/wp-content/uploads/DiscriminationInRentalAdsA.pdf>

What does discrimination look like in a housing situation? (NEW)

Discrimination is an action or a decision that treats a person or a group badly for reasons such as their race, age, or disability. This tipsheet looks at the different forms discrimination can take in a rental situation.

English <https://www.cplea.ca/wp-content/uploads/WhatsDiscriminationE.pdf>
Somali <https://www.cplea.ca/wp-content/uploads/WhatsDiscriminationS.pdf>
Arabic <https://www.cplea.ca/wp-content/uploads/WhatsDiscriminationA.pdf>

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