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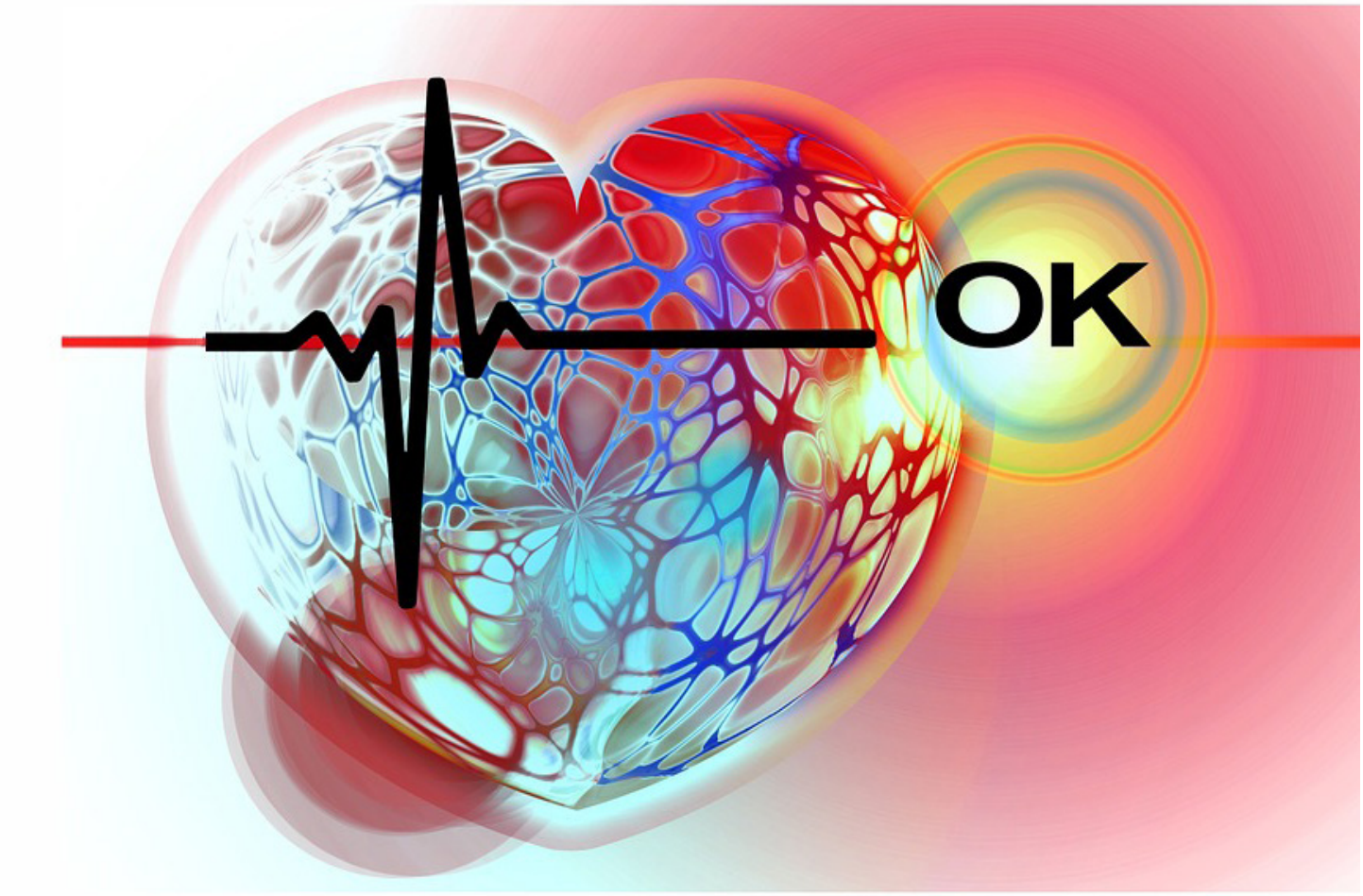
Pulse on Health Law



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Contents

In This Issue

Emerging technologies and societal concerns create new challenges for healthcare. This issue highlights some current health law topics.

Departments

6 Featured

Health Law

Feature:

Health Law

AI in healthcare is coming, and we need to be ready

Blake Murdoch

From the alarming forecasts of tech moguls to vigorous debates on online forums, there's a growing public discussion about the risks and benefits of artificial intelligence (AI) and how to manage its development. People often talk about AI by evoking grandiose prophecies about the future. While one day we may be apathetically wiped out by a rogue AI, or instead, become immortal cyborgs worshipping a god-like algorithm, important developments are happening today. And healthcare is a domain in which AI is already having a significant impact. However, these advancements give rise to various policy challenges that will need to be carefully addressed.

Emerging AI in healthcare

Many medical tasks have already been performed very well by new AI. In radiology, for example, there is a growing body of fascinating new research. Recently, scientists in the UK used almost half a million chest X-rays to develop an AI that could reliably identify abnormal images, creating the potential for software to help triage the large backlog of X-rays in many healthcare systems. But AI can do more than just sort images. Researchers at Stanford have produced an algorithm to interpret chest X-rays for 14 distinct pathologies simultaneously within a few seconds. And another recent Finnish study showed that machine learning had overtaken humans at predicting, from imaging data, certain types of heart attack and death. Similar developments are happening with imaging for other diseases.

> *"The question of who is liable for AI error is not fully answered in many jurisdictions, including Canada."*

AI will initially be implemented alongside human expertise rather than in place of it. However, some experts predict that radiologists could eventually be displaced by AI, relegating humans to the role of quality control reviewers. But with multiple factors contributing to increased strain on health professionals, a potential human resource crisis in healthcare could mean we need AI just to get by. And the shift toward AI could come quicker than you think. In April of 2018, the U.S. Food and Drug Administration (FDA) approved the first AI medical device, which analyzes images to detect a form of eye disease caused by diabetes.

Organ donation and transplantation have also benefited greatly from new AI. Kidney donation pairing programs in Canada and United States now use complex algorithms to optimize and match registered donors with transplant candidates based on a multitude of factors. Since potential living donors will only donate a kidney to a stranger if their loved one receives one in return, there is a recurring need to recalculate all the possible chains of donation. AI can perform this task very well. The results speak for themselves: Canadian Blood Services recently reported that, as of May 1, 2019, 392 of the 663 kidney transplants completed under the paired donation program were done through "domino exchanges" facilitated by their software algorithm. Moreover, AI is also being developed to efficiently and "fairly" allocate organs from deceased donors in accordance with programmed criteria for utility and equity.

New uses for AI in healthcare are emerging rapidly. Yet, as is always the case with new technology, ethics, law and policy are playing catch up. And unlike some other technologies, we won't always know or control how AI could evolve over time.

Risks and policy challenges

The use of AI in healthcare is not without risks. There will certainly be less human oversight for tasks performed by AI, taking human hands "off the wheel." Though benefits can sometimes be overstated, the idea is that AI makes fewer errors anyway, so there should be a net benefit. But in the same way existing "semi-autonomous" driving systems in cars can sometimes make errors of interpretation with disastrous results, healthcare AI is prone to specific types of errors that could cause harm.

> *"The potential risks of AI raise the question of whether patients should have the choice to have their medical care administered by a human instead."*

Notably, AI often have difficulty properly recognizing variables outside what they were designed to interpret. For example, a ring or other object mistakenly present in a diagnostic image could be misinterpreted. AI can also be prone to "overfitting". This happens when AI perform well using the data set from which they are built but become inaccurate or generate unexpected results when applied to other data. If overfitting happens after we've already put an AI to work, it could quickly cause widespread harm in a way that a single human error cannot.

Another concern is that AI could lead to overdiagnosis. There is already an established scientific and public movement against increased testing called "Choosing Wisely". This is based on recent research showing that imaging and testing can sometimes do more harm than good, for example, by increasing unnecessary surgeries for anomalies that would never have become harmful.

As noted, AI could eventually become the dominant method of interpreting diagnostic images like X-rays and MRIs. If learning algorithms can increase diagnostic precision, they will be even more likely to find anomalies or patterns in images – some of which may not be central to patient health. It is also possible that routine screening could be performed more often if less human labour were required. These changes could lead to more diagnoses and treatments that are unnecessary and ultimately detrimental to patients and the healthcare system.

Policymakers will need to grapple with the possible overuse of AI, and experts developing rules about how to implement AI will have to account for the possible consequence of overdiagnosis. We may need to set new standards for frequency of testing, and certainly will need to think more about how to best deal with patients who may have unhealthy amounts of information about their bodies.

The potential risks of AI raise the question of whether patients should have the choice to have their medical care administered by a human instead. In the context of organ allocation, for example, both a potential donor and a recipient could strongly prefer to have humans allocate their organ. In Canada, there is no clear legal right to human-administered healthcare, but it is possible that public pressures could necessitate an option for human care. For example, living and deceased donors, whose contributions are essential to the entire functioning of the organ and tissue transplantation system, need to feel comfortable and confident consenting to donation. Otherwise, the entire system stops working. As such, if donors are reluctant to place their organs in the "hands" of an AI, this could override its usefulness. Other public pressures in different areas of healthcare could create similar reasons to maintain the option of human-based care, potentially at great financial cost.

Finally, there is the challenge of applying law to the interpretation of AI decision-making. Learning AI presents a "black box" problem, meaning it is often very difficult to understand how an AI reaches the conclusions it does. The question of who is liable for AI error is not fully answered in many jurisdictions, including Canada.

> *"... AI could eventually become the dominant method of interpreting diagnostic images like X-rays and MRIs."*

Depending on the circumstances, one option would be to hold a presiding physician accountable for final recommendations. However, this could encourage excessive or unnecessary human oversight of AI. It also might not reflect the reality that a doctor has to trust

an AI because he or she cannot actually comprehend its process. If human hands are truly to be taken "off the wheel", a system in which corporations and institutions who develop and maintain AI are liable for errors could be preferred. From a regulatory perspective, the FDA is taking a "pre-certified" approach to implementing learning AI, meaning that they will focus on certification of the institution developing and maintaining an AI instead of the AI itself. This makes some sense given that many AI will be continually changing as they learn. Notably, understanding how errors occur and who is responsible will also be important for insurance firms creating systems of coverage for healthcare decisions facilitated by AI.

There are, of course, other policy challenges with healthcare AI beyond what is discussed above. For example, developing a policy framework for autonomous robotic surgery is a figurative minefield due to the difficulty of assigning accountability and liability. Ultimately though, creating public acceptance and trust may be the biggest policy challenge facing the real world application of healthcare AI. A 2019 survey of Americans found that 22% somewhat or strongly opposed the development of AI, and 82% believed AI should be "carefully managed". Technological improvements in AI performance and adaptability could alleviate but will not eliminate the public's concerns.

We need policy

Health Canada has stated that it is engaging with stakeholders to determine how best to implement AI in healthcare, and recently established a new internal division for "digital health technologies". But more concrete guidance is needed. For example, what programming fail safes and other malfunction contingency planning will be required? We must focus on creating policy to govern how AI will be safely used and how they will be managed when things go wrong. Otherwise, we risk missing out on the many potential benefits of these technologies.◆

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Legal Response in Canada to the Opioid Crisis

Ryley Schmidt

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Over the past few years, there has been a profound increase in the number of deaths associated with problematic opioid use in Canada. From the beginning of 2016 to mid-2018, there have been over 10,300 opioid-related deaths. And according to Statistics Canada, the national life expectancy at birth did not increase from 2016 to 2017 for either males or females. This is the first plateau in over four decades, and the government largely attributes the opioid crisis. Although this phenomenon is concentrated in Western Canada, with British Columbia declaring a health emergency over the matter, problematic opioid use and deaths resulting from such use is a nation-wide problem.

The background behind this current crisis is a complex, multi-faceted topic. However, one significant contributor to the alarming increase of opioid-related overdoses is illegally produced fentanyl and fentanyl analogues, which are highly toxic and mixed into other illegal drugs – often unknowingly to would-be purchasers. (Government of Canada, "Government of Canada Actions on Opioids: 2016 and 2017".)

> *"Parliament's second major legal response to the opioid crisis is the Good Samaritan Drug Overdose Act, which it passed in May 2017."*

In 2016, in an effort to better combat the opioid crisis, the Government of Canada replaced the National Anti-Drug Strategy. Its approach to problematic opioid use relied heavily on enforcement measures. The new Canadian Drugs and Substances Strategy, which takes an evidence-based public health approach to addiction and problematic substance use, replaced it. This new government strategy is grounded in cooperation between stakeholders

and is premised on four pillars: prevention, treatment, harm reduction, and enforcement.

Parliament's legal response to the opioid crisis, keeping these pillars in mind, is found in two key pieces of legislative action:

1. Bill C-37, which amended the *Controlled Drugs and Substances Act (CDSA)*; and
2. the *Good Samaritan Drug Overdose Act*.

Bill C-37

One of the most notable amendments to the *CDSA* through Bill C-37 was to allow for, and streamline, the establishment of supervised consumption sites (section 56.1(1) of the *CDSA*). Supervised consumption sites are a part of the government's Canadian Drugs and Substances Strategy to provide an entry point to treatment and social services for users looking to address substance usage. These locations provide a safe, sterile environment to consume these substances and emergency care in the event of an overdose. They also provide personnel who are able to educate users on the harms of drug use and safer consumption practices, and provide information on health and social services, such as mental health treatment and social welfare programs. One goal in establishing supervised consumption sites is to prevent overdose deaths. Another goal is to facilitate entry into drug treatment services by providing counselling, withdrawal management, and access to detoxification. (Government of Canada, "Supervised consumption sites explained" (last modified 13 August 2018).)

> *"Now, border officials can open small packages they suspect contain illegal substances, such as opioids, where there are reasonable grounds to suspect the package contains them."*

In addition to making it easier to establish supervised consumption sites, Bill C-37 introduced a variety of other important amendments to the *CDSA*. Section 60.1 of the *CDSA* now allows the Minister of Health to control new and dangerous substances that are not subject to the *CDSA* for a temporary period of one year if there are reasonable grounds to believe that the substance poses, or may pose, a significant risk to public health or safety. During this period, the substance is thoroughly reviewed and can be made permanently subject to the *CDSA*. This revision allows Parliament to respond promptly to emergent substances that pose substantial risk to public health compared to the traditional process of regulation-making (in section 60 of the *CDSA*).

Bill C-37 also repealed sections of the *Customs Act* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. These Acts prohibited officers from opening imported or exported mail that weighed 30 grams or less unless they obtained the consent of the sender or the individual addressed on the package. Now, border officials can open small packages they suspect contain illegal substances, such as opioids, where there are reasonable grounds to suspect the package contains them. Additionally, Bill C-37 amended the *CDSA* to

prohibit the importation of devices such as tablet presses and encapsulators unless these devices are registered. By doing so, Parliament is attempting to make it more difficult for illegal drug manufacturers to produce opioids which may contain fentanyl.

Good Samaritan Drug Overdose Act

Parliament's second major legal response to the opioid crisis is the *Good Samaritan Drug Overdose Act*, which it passed in May 2017. This Act amends the *CDSA* to offer protection to individuals experiencing or witnessing an overdose. It exempts those who seek emergency medical or law enforcement assistance from charges of possession or charges relating to the violation of certain conditions or orders. The purpose behind the legislation is to prevent fatalities by encouraging those at the scene of an overdose, or those experiencing an overdose, to seek emergency assistance without fear of legal consequence. However, reports indicate that many people are still afraid to phone emergency services. This is because the law does not protect them from charges relating to outstanding warrants, drug production and trafficking, and it does not protect against police harassment and questioning.

> *"... problematic opioid use and deaths resulting from such use is a nation-wide problem."*

While much needs to be done in order to effectively combat problematic opioid usage, it is promising to see legislative action focused on providing treatment and preventing overdoses by encouraging individuals to reach out for emergency help. ◆

Seniors – Health, Homes, and Help from the Taxman

Joseph Devaney and Caitlin Butler

As individuals age and medical conditions become more prevalent and significant, the need for assistance in daily activities increases. As a result, many consider moving to nursing homes, retirement homes, or smaller apartments or condos. Alternatively, some may choose to remain in their home but engage others for assistance or make structural modifications to improve accessibility or safety. Several tax benefits may be available to assist with these potentially costly transitions. This article focuses on benefits within the federal tax system though many other supports may be available (e.g. provincial programs and subsidies).

Many of these tax benefits are available through the **medical tax credit (METC)**. The METC reduces taxes where medical expenses are greater than the lesser of the following amounts:

- 3% of the payer's net income; or
- $2,352 (in 2019; indexed annually for inflation).

Expenses in excess of the threshold generate a credit at the lowest personal tax rate (15%). A similar process determines the provincial METC (10% rate in Alberta). In other words, taxes are reduced by 25% of eligible expenses.

Eligibility for the METC depends on a number of factors, including the type of expenditure (eg. fees paid to a nursing home, renovations to one's home) and the specific medical condition or impairment.

Some claims require the individual be eligible for the **disability tax credit (DTC)**. To be eligible, Form T2201 must be certified by a

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qualified medical practitioner and submitted to the Canada Revenue Agency (CRA). There are several ways to qualify for the DTC but generally the individual must have an impairment which results in a marked restriction in an activity of daily living.

Nursing Homes

A nursing home is a facility which provides full-time care (including 24-hour nursing care) to those that cannot care for themselves. A location may be considered a nursing home even if it is not publicly described as one, as long as it meets this description.

> *"The home accessibility tax credit (HATC) may provide tax relief of 15% on up to $10,000 of eligible expenses per year."*

Generally, the full amount paid for full-time care at a nursing home is eligible to claim as a METC. This would include fees paid for food, accommodation, nursing care, administration, maintenance, social programming and activities. Other personal expenses (such as hairdresser fees) are generally ineligible.

In order to claim these amounts, the individual must either:

- be eligible for the DTC; or
- receive certification from a medical practitioner that they will be dependent on others for personal needs and care into the foreseeable future because of a lack of normal mental capacity.

Individuals eligible for the DTC are faced with a potentially complex decision. They can either:

- claim the nursing home fees in their entirety (and not claim the DTC); or
- claim the DTC along with up to $10,000 in attendant care ($20,000 for the year of death) as a METC. Some of the nursing home fees for salaries could be reclassified as attendant care (described in the Retirement Homes section).

In these cases, an analysis should be completed to determine the most advantageous option.

Schools, Institutions or Other Facilities

Similar to care provided at a nursing home, a wide range of costs are eligible for the METC where care, or training and care, is provided at a school, institution or other facility. Unlike nursing homes though, full claims related to these facilities can be made even if the DTC is also claimed.

> *"In some cases, these tax credits may be claimed by a supporting relative ..."*

There is often a fine line between these facilities and nursing homes. The key difference is that these facilities provide equipment, facilities, or specialized staff which a medical practitioner or head of the institution determines are needed. Such facilities may be open to individuals of all ages, whereas a nursing home generally focuses on individuals of advanced age. They generally provide a greater level of specialized

medical support than a typical nursing home, however, nursing homes with specialized equipment may also qualify.

Retirement Homes

For the purpose of this article, retirement homes are those where some, but not full-time, care or assistance is provided. If the individual is eligible for the DTC, the salaries and wages paid for "attendant care" are eligible for a METC. Eligible attendant care services include food preparation, housekeeping of personal living space, laundry, health care, activities, transportation, security, and salon services (if included in the monthly fee). Note that it is only wages paid which qualify and not the materials or supplies (like food, detergent, and cleaning supplies) used in the provision of the service. Like nursing home costs, claiming attendant care costs in excess of $10,000 can prevent claiming the DTC.

Staying at Home or Moving to a Smaller Apartment or Condo

In situations where there are no organized care services for residents, individuals are still able to engage assistants on their own. This may be the case where the individual chooses to remain at home. If full-time assistance is required because of a physical or mental impairment, the cost would be eligible as a METC if the individual:

- is eligible for the DTC; or
- has certification from a medical practitioner that the dependency is ongoing.

The METC claim is capped at $10,000 if the individual also wishes to claim the DTC.

Home Renovations

If staying at home, an individual may need to make modifications to assist with their medical condition. The **home accessibility tax credit (HATC)** may provide tax relief of 15% on up to $10,000 of eligible expenses per year. Eligible expenditures include renovations to a qualified dwelling to enhance mobility or reduce risk of harm for a qualifying person. The qualifying person must reside, or intend to reside in the location. Such renovations must be enduring in nature and integral to the dwelling.

A qualifying person is:

- an individual aged 65 years or older at the end of the year; or
- an individual eligible for the DTC.

The $10,000 limit applies to each home regardless of whether there is one or more qualifying persons residing there. If the qualifying person resides in more than one dwelling, a maximum of $10,000 in total can be claimed. Similar provincial credits are available in some provinces such as British Columbia, but not Alberta.

The costs of renovations may also be eligible as a METC. A full METC may be claimed – it is not reduced by the HATC. The amount eligible for METC would be reduced for any government subsidization of these costs but the amount eligible for HATC is not subject to a similar reduction.

> *Where CRA assessors deny a claim, it is possible to file a Notice of Objection to obtain a review by a more senior CRA representative.*

To be eligible for the HATC, the renovation must provide greater mobility or functioning within the home for someone with a severe mobility impairment or who lacks normal physical development. Those eligible for the HATC based on age may be ineligible for the METC. The expenditures must also be reasonable, not normally expected to increase the value of the home, and not normally incurred by those without medical or developmental impairment. Although they may be prescribed by a medical practitioner, costs of installing amenities such as hot tubs may be restricted by these criteria.

Supporting Documentation

As the claims discussed above can generate significant income tax benefits, they are commonly reviewed by CRA. Receipts, invoices, and letters from medical practitioners are frequently requested. If claiming attendant care costs, the related salaries and descriptions must be clearly described. This is of particular importance for those in retirement or nursing homes where the relevant salaries form only a portion of the monthly payment.

In respect of renovations claimed for the HATC or METC, it is helpful if the receipt or invoice states that the work or product is intended to specifically enhance mobility or reduce risk of harm. Where CRA assessors deny a claim, it is possible to file a Notice of Objection to obtain a review by a more senior CRA representative.

Moving Out

Moving out of one's house to a retirement or nursing home may trigger a tax liability or disclosure requirements. This is typically the case when an individual sells or gifts their home, or begins renting it out. A detailed discussion of these issues is beyond the scope of this article. The direct costs of moving to a new residence for health reasons do not generate any tax relief.

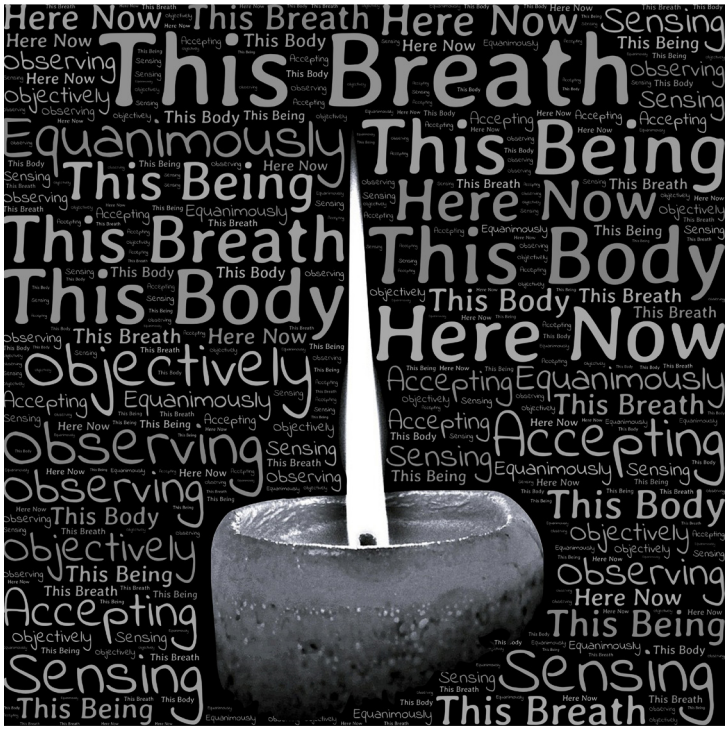
Conclusion

While the cost of assistance with daily tasks and medical care for those of advanced age can be quite significant, a number of tax benefits may be available. A wide variety of expenses may qualify, such as renovating one's home, or engaging the assistance of an individual for day-to-day tasks.

In some cases, these tax credits may be claimed by a supporting relative, which is beneficial where the individual is not taxable, perhaps due to low income. Such claims seem to attract even more CRA scrutiny.

Unfortunately, the rules for accessing these claims can be quite complex, often requiring detailed analysis to determine the most beneficial option. Considerable information on these claims is available on the CRA website. Professional advice may also merit consideration. Finally, care should be afforded to retaining proper documentation to support the claims.◆

Medical Assistance in Dying and its Enforceability in a Personal Directive



Daniella Lyman

The Supreme Court of Canada upheld a blanket prohibition on assisted dying in its 1993 decision *Rodriguez v. British Columbia (AG)*, in which the Court stated that aiding or abetting a person to commit suicide was considered a criminal offence. Many argued that this left individuals with an unfair choice between killing themselves while still physically capable, or allowing nature to run its course in sometimes a very painful manner, in which the individual can suffer a tremendous loss of dignity and personal autonomy. The importance of autonomy in addressing one's death and the issue of whether medical assistance in dying ("MAID") infringed an individual's rights under the *Canadian Charter of Rights and Freedoms*, was ultimately settled in *Carter v. Canada*.

This decision involved the Applicant, Gloria Taylor, who was diagnosed with a fatal neurodegenerative disease, amyotrophic lateral sclerosis ("ALS"), which causes progressive muscle weakness; loss of the ability to use hands and feet, then the ability to walk, chew, swallow, speak and eventually breathe. Ms. Taylor's condition had deteriorated to the point she required a wheelchair at all times, was suffering immense pain from deterioration of the muscles, and required home support for assistance with the daily tasks of living.

In a unanimous decision, the Court struck down the relevant provision in the *Criminal Code* of Canada, thereby giving Canadian adults who are mentally competent and suffering intolerably the right to medical assistance in dying. This ruling overturned the Supreme Court's 1993 ruling in *Rodriguez*.

In response, on June 17, 2016, the federal government enacted Bill C-14 which amended the *Criminal Code* and outlined a detailed set of guidelines for medical assistance in dying. Under Bill C-14, two independent health care professionals need to evaluate an individual in order to determine whether they qualify for MAID. To qualify for MAID, a person must have a grievous and irremediable medical condition which means:

1. The patient has a serious and incurable illness, disease or disability;
2. The patient is in an advanced state of irreversible decline in capabilities;
3. The patient is enduring physical or psychological suffering, caused by the medical condition or the state of decline, that is intolerable to the person; and
4. The patient's natural death has become reasonably foreseeable.

Unfortunately, legislation with respect to MAID is not perfect and complex issues remain outstanding with respect to mature minors under the age of 18 requesting MAID; advance requests for people who have capacity-eroding conditions and people whose sole underlying medical condition is mental illness.

As far as loss of capacity and the use of Personal Directives go, the legislation fails to adequately address this issue and at present, your agent in a Personal Directive is not permitted to request MAID on your behalf. The legislation stipulates that you must be capable of making decisions with respect to your health at the time of receiving MAID. If you are no longer mentally competent and your Personal Directive takes effect, your agent is making decisions on your behalf. At this time, a MAID provision inserted into a Personal Directive would likely be unenforceable in the eyes of the Court, however, because the law is constantly evolving, it is best practice to insert a proviso into a Personal Directive, directing that *if it is lawful at the time the Personal Directive comes into effect* (and it is in fact your desire), you wish to undergo physician assisted dying if you are suffering from a grievous and irremediable medical condition including an illness, disease or disability that causes enduring suffering that is intolerable to you in the circumstances of your condition. ◆

This article first appeared on the website of McLennan Ross LLP on November 13, 2018 and is reprinted with permission.

Daniella Lyman was an associate at McLennan Ross LLP. For further information with respect to Personal Directives, please contact any member of the firm's Wills and Estates Practice Group.

A little nudge goes a long way in increasing organ donor registrations

Photo from Pexels

Nicole Robitaille

Each year, hundreds of Canadians die waiting for organ transplants. At the end of 2017, for example, 4,333 people were waiting for transplants; 242 of them died.

Many of these deaths could be prevented if people signed their organ donor registration cards. And even though the vast majority of Canadians support organ donation, less than 23 per cent have made plans to donate.

With one organ donor having the potential to benefit more than 75 people and save up to eight lives, is there a way to encourage more people to sign an organ donor card? Our research reveals there is.

Behavioural science tells us that there are some key psychological barriers that prevent people from becoming organ donors, including what's known as the status quo bias — meaning we tend to stick with the status quo, or current state of affairs, even when making a change would better align with our personal beliefs and goals.

Developing interventions to overcome these barriers has the potential to close the gap between the 81 per cent of Canadians who indicate they're willing to donate their organs after death and the mere 23 per cent who are registered.

In fact, during an eight-week trial conducted with the Ontario government at one Service Ontario centre, such interventions led to a dramatic increase in organ donor registrations.

Nudging people into action

Those who haven't given the idea much thought are sometimes caught off guard by the question of whether they want to donate their organs after death. And when people are asked to make a decision that they don't feel they've put adequate time and effort into considering, they choose not to decide. They put it off.

In many jurisdictions, the decision to donate organs happens most often when people renew their driver's licences or health cards. In Ontario, for example, 85 per cent of organ donor registrations occur at Service Ontario centres via a prompted-consent system. Customer service representatives ask if people are willing to register to be an organ donor.

To improve the process at Service Ontario centres and avoid surprising people with the question, a number of interventions were tested, from simplifying the organ donor registration form to providing the form earlier in the process and giving key information at optimal points in time.

Another change: At the top of each consent form, several statements in bold text were tested: "If you needed a transplant, would you have one?" And: "How would you feel if you or someone you loved needed a transplant and couldn't get one?"

Such "nudge" statements are designed to motivate people to take action while maintaining their freedom of choice. These nudge statements helped people imagine themselves in the position of someone needing a transplant.

The most successful changes from this Ontario pilot project led to a 143 per cent increase in organ donor registrations. If rates were to rise similarly across the province, the Ontario government estimates it could increase organ donor registrants by more than 450,000 a year — up from the current number of approximately 200,000.

The drawbacks of presumed consent

Additional methods of increasing organ donor registrations have also been investigated in some jurisdictions. Presumed consent is one example — a system whereby individuals are automatically registered as donors unless they explicitly opt out.

In April, Nova Scotia became the first jurisdiction in North America to adopt presumed consent for organ donations.

While there's been some indication that countries with presumed consent have 60 per cent more of the population registered, there is also evidence that it may be ineffective. Chile saw a decrease in organ donations when it implemented the system, as did France and Brazil.

Part of the reason for the decline is that families have the last word. When you make the decision to become an organ donor, often your family is aware of your intent. But when the government assumes you want to donate your organs without your explicit consent, your family may overturn the decision after your death.

For these reasons it will be interesting to see the impact of Nova Scotia's decision.

Meanwhile in Ontario, many of the insights uncovered by the pilot project conducted with Ontario's Behavioural Insights Unit —including the nudge statements — are now used on Ontario's organ and tissue donor registration consent form, and data is being collected to determine how things have improved.

It's a great example of how the government is using evidence-based decision-making to better serve its citizens, and how research into consumer behaviour can benefit society.

This article first appeared in The Conversation on May 1, 2019 and is reprinted with permission. ◆

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Special Report: Freedom of Speech

Evolution of our Freedom of Expression

Charles Davison

Museu de la Impremta i de les Arts Gràfiques, sala Gutenberg

We tend to take for granted that in Canada we are generally free to express, and to publish or broadcast, our views and opinions about almost any subject imaginable. However, it was not always this way. In early times, those who espoused views which were not in keeping with the majority, or with the powerful, stood to suffer various forms of penalty and repercussion. The growth of our freedom of speech – intertwined with our freedoms of opinion and of the press – has been a long and sometimes painful process.

As with so many other aspects of modern Canadian law, our history of freedom of speech is rooted in that of England and the United Kingdom. In common with most other unelected kings, queens, emperors and dictators, those who ruled medieval England were not usually open to criticism and complaint. Public debate of political or other ideas threatened the authority of the Crown and undermined the theory that kings (and the occasional queen) governed through direct links to God. To question the wisdom of a decision or action of the sovereign was to suggest fallibility, and this treasonous suggestion offended accepted wisdom in the realm.

However, with the invention of the printing press, suppression of the expression of ideas became more and more difficult. New political ideas and philosophies began to circulate among the population. The government at first tried to stifle such debate, partly through licensing printing presses, and thus controlling who could use this means of spreading ideas. Nevertheless, society gradually became more open to the circulation of novel opinions and suggestions. First, the king lost the power to license printing presses to parliament, and ultimately, even parliament realized it could no longer control speech and the dissemination of ideas and opinions. Parliament allowed the final press licensing laws to expire in 1695.

> *“The Supreme Court of Canada defined the freedom of expression broadly, so as to cover virtually any activity intended to convey ‘expressive meaning’ and content to others.”*

Around the same time as Canada was being colonized by Europeans (and ultimately occupied by the British), there was at least a theoretical "freedom of speech", although that freedom continued to be subject to many limitations. Most of these amounted to the continuation of old ideas: the offences of treason and sedition were still defined quite broadly, as were concepts of obscenity and blasphemy. In other words, there remained a somewhat low tolerance for critical political comment against the sovereign.

And sometimes, where the powerful could not use the law, they resorted to somewhat more direct and brutal methods to attempt to suppress free speech. In Upper Canada (present day Ontario), the families of the rich and politically influential, known as the Family Compact, were often targets for withering criticism by reformers such as William Lyon Mackenzie (the grandfather of Prime Minister Mackenzie King). In 1826, after Mackenzie had gone to the United States to avoid creditors, members of the Family Compact broke into his newspaper offices, destroyed his printing press and dumped his prints into Lake Ontario. The local judiciary and law enforcement – members or allies of the powerful clique – knew the identities of the culprits but refused to prosecute them for their crimes.

We often think of the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 as being the advent of our modern rights and freedoms. In fact, many had been recognized, if imperfectly protected, even before that date. In 1938, for example, the Supreme Court of Canada struck down an Alberta law which would have required newspapers to publish the provincial government's views and opinions. In doing so, the chief justice of the Court confirmed that Canadians enjoyed freedom of speech by virtue of our *Constitution* which was "similar in principle to that of the United Kingdom". British citizens had long enjoyed the rights of free public debate and discussion of ideas, and Canadians should be entitled to the same.

> *"... with the invention of the printing press, suppression of the expression of ideas became more and more difficult."*

In 1957, three judges of the Supreme Court of Canada cited our freedoms of speech and opinion in striking down a Quebec law permitting the provincial government to close houses used to disseminate communist information and opinions. (The majority of the court struck down the law as being an improper provincial intrusion into the federal power over the criminal law.)

With the advent of the *Charter*, allowing Canadians to seek a remedy where their rights or freedoms were violated meant court proceedings to enforce our freedom of speech (now referred to as the "freedom of expression", combined with the related freedoms of belief, thought, opinion and the press) became more common. The courts reviewed challenges of the traditional restrictions upon this freedom to determine whether the prescribed limits could be justified in a democracy like Canada. The Supreme Court of Canada defined the freedom of expression broadly, so as to cover virtually

any activity intended to convey "expressive meaning" and content to others. When the law placed a limit upon this freedom, it could only be upheld in carefully defined situations. The Court upheld the restriction when it furthered an important societal objective, and where it was carefully defined so as not to restrict the freedom any more than necessary.

Examples where the Court struck down legislative limits upon the freedom of expression under the *Charter* include:

1. The criminal prohibition on "false news". When the law was enacted in 1275, it was intended to protect "the Great Men of the Realm" from ridicule and criticism. The Supreme Court of Canada held that the scope of this prohibition was simply too broad and its purpose was too ill-defined to amount to a justifiable limit upon our modern day freedom of speech.

2. Quebec's language laws which required French-only signs and public advertising. The Court held that the language in which one chooses to express oneself was an essential aspect to our freedom of expression, and government efforts to deny Quebeckers' rights to use a language other than French could not be upheld as a justifiable limit on that freedom.

3. The laws which prohibited public servants from engaging in political activity. These were struck down as unconstitutional violations of the freedoms of expression and opinion which public employees share along with all other Canadians (though limits on where they could exercise their freedoms of expression were upheld to some extent).

There has been a direct impact on the courts themselves by the enshrinement of Canadians' freedom of expression. Traditional definitions of contempt of court, which shielded judges from harsh critical comment and review of their decisions, have been discarded as being contrary to this freedom. The test and procedure for obtaining a publication ban on court proceedings has been reformulated in order to ensure that such restrictive measures are ordered only where necessary, and only to the extent necessary, to protect some other important interest.

However, the Supreme Court of Canada has upheld most of the traditional limits on freedom of speech and expression, in whole or in part. The Court has based its decisions on the importance of the government objectives achieved by the restrictions. Accordingly, the Supreme Court has upheld:

- laws against the "communication for the purpose of prostitution" as a justifiable attempt to discourage and combat the public nuisances of sex trade transactions carried on in our communities;
- laws preventing the dissemination of "hard core pornography", in which sexual activities are shown in conjunction with violence, cruelty and crime, as an acceptable limit on the freedom of expression because the intent of the law was to combat violence against, and degradation of, women;

- laws against advertising aimed directly at children as a legitimate effort to protect a most vulnerable group from the results of commercial manipulation; and
- laws against the dissemination of hate propaganda as being a justifiable limit intended to promote harmony and peaceful relations between the various racial, ethnic, religious and cultural groups in Canadian society.

On the other hand, the Supreme Court of Canada has struck down laws intended to prevent "ridicule" and "belittling" between groups on the basis that, where only "hurt feelings" or emotional upset are at stake, our freedom of expression must prevail. (Seeking to promote and support actual hatred between groups was a very different – and far more serious – concern.) Also, the Court dismissed a challenge by Stephen Harper, before he became Prime Minister, to the laws which limit third-party political and elections advertising. It held that such limits were a justified step towards ensuring that Canadian elections were conducted as fairly as possible and without the influence of wealthy outside interest groups and others.

"... our history of freedom of speech is rooted in that of England and the United Kingdom."

It is not possible in this short article to expand fully on the detailed history of the development of our freedom of speech and expression. Lengthy scholarly texts have been written about this history in the detail it deserves. Hopefully, this short summary demonstrates at least the evolution of our freedom of expression. Going forward, new issues will continue to present themselves as Canadians continue to grapple with modern technologies, such as the Internet and the many social media platforms used by individuals and groups to circulate their views and opinions as widely as possible. ◆

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When Can the Right to Freedom of Expression be Curtailed?

Myrna El Fakhry Tuttle

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The right to express our opinions is a crucial element of a democracy. Freedom of expression is a basic characteristic of personal development. It gives us the right to dissent and the right to be heard. We can make our own choices about our basic beliefs by being exposed to different thoughts and opinions (see: Fundamental Freedoms: Freedom of Expression). Freedom of expression has been recognized as essential in international and national laws.

Article 19 of the *Universal Declaration of Human Rights* states that:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)* has similar terms on freedom of expression.

Freedom of expression is also protected in article 10 of the *European Convention on Human Rights (ECHR),* article 13 of the *American Convention on Human Rights* and article 9 of the *African Charter on Human and Peoples' Rights*.

Under international law, Canada is compelled to protect the freedom of expression of its citizens. Section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". Freedom of speech is also stated as a human right and fundamental freedom in the *Canadian Bill of Rights*, sections 1(d) and (f).

However, article 19(3) of the *ICCPR* allows certain restrictions on freedom of expression:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> > (a) For respect of the rights or reputations of others;
> >
> > (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In addition, article 20(2) of the *ICCPR* requires states to prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". Thus, many countries – including Canada – have enacted laws that limit certain types of expression, including speech that incites violence and hatred:

> In Canada, freedom of expression is fundamental but not absolute, particularly when there are legitimate pressing and substantial concerns that may justify its inhibition. The meaning of a right or freedom guaranteed by the *Charter* must be understood in the light of the interests it was meant to protect. When words intend to inflict harm to others, especially those belonging to minority groups, it is obvious that hate speech is incompatible to the purposive spirit of the *Charter*. (See: Pyeng Hwa Kang, Constitutional Treatment of Hate Speech and Freedom of Expression: a Canada – U.S. perspective at para 13.)

"The freedoms mentioned in the Charter guarantee that Canadians are free to hold their own opinions, discuss them and communicate them to other people. These activities are essential principles of individual liberty."

The freedoms mentioned in the *Charter* guarantee that Canadians are free to hold their own opinions, discuss them and communicate them to other people. These activities are essential principles of individual liberty. They are also crucial to the success of a democratic

society where people can freely discuss matters of public policy, can criticize governments and can express opinions on how to deal with social problems. However, governments can sometimes restrict these freedoms despite their importance. For example, freedom of expression may be limited by laws against hate propaganda or child pornography because they prevent harm to individuals and groups.

The Supreme Court of Canada has acknowledged that:

> [T]he *Charter*'s guarantee of freedom of expression is not absolute. It has upheld restrictions on forms of expression that it has deemed to run contrary to the spirit of the *Charter*, such as hate speech, given that the purpose of such expression is to prevent the free exercise of another group's rights. (See: Julian Walker, Hate Speech and Freedom of Expression: Legal Boundaries in Canada at p 3 [Julian Walker].)

In fact, section 1 of the *Charter* provides that the rights and freedoms guaranteed by the *Charter* are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Therefore, if a violation – by the government or other institution – of the *Charter* takes place, the courts have to decide whether this violation has a rationale. In order to do so, the courts have to look into the objectives and actions of the government or other institution against the interests of the individual who is claiming the violation. Under section 52 of the *Constitution*, a law may be found to be unconstitutional and declared invalid, or may be found to be constitutional, and a person's *Charter* right may therefore be restricted by it (Julian Walker at p 3).

> *"'In Canada, freedom of expression is fundamental but not absolute, particularly when there are legitimate pressing and substantial concerns that may justify its inhibition.'"*

The incorporation of section 1 in the *Charter* proves that freedom of expression, which is a basic right, may be limited when its exercise causes harm to the public interest or the rights of others.

Freedom of expression has been restricted by anti-hate laws in order to prevent hate propaganda. Their purpose is to regulate the publication and public expression of messages aspired to encourage hatred towards members of particular groups. Sections 318 and 319 of the *Criminal Code* deal with hate in Canada and impose criminal sanctions against anyone who wilfully promotes genocide or incites hatred in public.

Section 320(8) of the *Criminal Code* defines hate propaganda as: "any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319." Richard Moon notes:

> [Sections 318 and 319 prohibit] the advocacy or promotion of genocide, the incitement of hatred against an identifiable group, when this incitement is likely to lead to a breach of the peace, and the wilful promotion of hatred against an identifiable group. Investigations into allegations of hate speech under the *Criminal Code* are conducted by the police. If an individual is charged with one of these offences, his or her trial will be conducted in a court of law. To be convicted under any of these offences, the accused must be shown to have committed the relevant act and to have done so either intentionally or with knowledge or awareness of the nature of her/his actions. If found by the court to have committed the offence, he or she may be sentenced to a fine or a term of imprisonment. … [Section 320(1)] enables a court to order the seizure … of material that the court determines to be "hate propaganda." (See: Richard Moon, Report to the Canadian Human Rights Commission Concerning Section 13 of the *Canadian Human Rights Act* and the Regulation of Hate Speech on the Internet at p 3.)

In addition, section 319 demands the approval of the Attorney General in order to lay charges, something that very few other sections require. That shows that freedom of expression is a crucial part of any free and democratic society.

The Supreme Court of Canada has found that many anti-hate propaganda laws infringe the right to free expression, but according to the Court, they were justifiable under section 1 of the *Charter*. The Court has found that "the harm caused by hate propaganda is not in keeping with the aspirations to freedom of expression or the values of equality and multiculturalism contained in sections 15 and 27 of the *Charter*" (Julian Walker at p 2).

> *"Section 2(b) of the Canadian Charter of Rights and Freedoms (the Charter) protects 'freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.'"*

Currently every human rights law in Canada, with the exception of Yukon's *Human Rights Act*, contains provisions that prohibit in some form the publication of messages that intend to discriminate, or that incite others to discriminate, based on certain prohibited grounds.

These laws indicate that freedom of expression cannot be absolute—even in countries such as the United States, where freedom of speech is most widely protected. Communicating opinions and thoughts is managed by law in order to have a balance between free speech and the protection of minority and vulnerable groups. Abusing freedom of expression in order to humiliate these groups is rejected in Canada and other free and democratic societies. ◆

In Canada and elsewhere, freedom of speech is on the endangered list

John Cooper

Freedom of speech. Freedom of the press. These phrases may conjure up Hollywood-style images of noble activists and principled reporters butting heads with those in power – and winning. However, the reality is often far different: surveillance, gag orders, expensive and oppressive lawsuits, and activists and journalists being arrested, imprisoned – and in extreme cases, even dying – for their convictions.

For a long time, the issue of press freedom focused largely on the journalistic coverage of criminal trials. W. H. Kesterton, in his 1976 book *The Law and the Press in Canada*, said that in Canada and Great Britain, "the considerations of a fair trial prevail over considerations of a free press … the press is restrained in most cases where unfairness in a trial seems likely to result." By contrast, U.S. press freedoms are covered under that country's first amendment, giving the impression of a "freer" press.

> *"The heavy-handedness of defamatory libel and its use in curbing freedom of expression is an ongoing problem, said Professors David Pritchard (University of Wisconsin-Milwaukee) and Lisa Taylor (Ryerson University) ..."*

But the advent of social media platforms and the rapid dissemination of information – both real and fake – has generated a hot debate. Issues range from the balancing act of regulated-versus-open use (especially in cases where there are questions of accuracy) to the U.S. government engaging the 1917 *Espionage Act* to prosecute WikiLeaks founder Julian Assange for the 2010 dissemination of secret documents (seen as subversive by some and as free speech by others). As well, the rights of American individuals were threatened with a May 2019 U.S. Supreme Court decision supporting the right of police officers to not be sued for arresting anyone on the basis of "probable cause". This means an officer can make an arrest for anything considered to be

"wrongful behaviour," from protesting outside a consulate to using a cellphone under what could subjectively be deemed "suspicious" circumstances.

It all speaks to a tighter rein on personal and press freedoms. The *Canadian Charter of Rights and Freedoms* provides a guarantee of freedom of expression and press freedom, with some provisos and grey areas. While free speech may be legally restricted as a means of ending discrimination and promoting gender equality and social harmony, the definition of the punishable crime of hate speech remains vague. Though the *Charter* promises "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication," much has changed in the 40-plus years since Kesterton's book.

Denis Rancourt, a researcher with the Ontario Civil Liberties Association (OCLA), said via email that the press freedoms that once existed in post-World War II Canada and the U.S. have dissolved over time. This dissolution is due to the introduction of heightened government oversight, greater corporate mergers and globalization, such that "the overriding threat to press freedom for corporate journalists is near-absolute absence of professional independence."

> *"... journalistic freedoms are threatened and reporters can face imprisonment just for covering protests. These anti-journalism efforts are driven largely by governments."*

Human Rights Watch, an independent organization focusing on the protection of individual rights, acknowledges that access to information is on the rise, thanks to the growth of the Internet. At the same time, it notes that "efforts to control speech and information are also accelerating, by both governments and private actors in the form of censorship, restrictions on access, and violent acts directed against those whose views or queries are

seen as somehow dangerous or wrong." This profoundly affects journalists, who must often put themselves in conflict with governments in order to obtain – and disseminate – information. Such was the case in Burma for *Reuters'* journalists Wa Lone and Kyam Soe Oo. The pair were detained after covering the 2017 massacre of Rohingya villagers by the Burmese military. Their May 2019 release from prison was a bright light in a place where press freedoms are often otherwise dim.

Closer to home, Reporters Without Borders monitors international press freedom through its World Press Freedom Index. Canada's ranking has gone through some ups and downs in the past few years, from eighth in 2015 to a low of 22nd place in 2016 before rebounding slightly to 18th in the following two years. That improved standing is at least partially due to the 2017 enactment of the *Journalistic Sources Protection Act*. According to the federal government, the *Act* "allows journalists to not disclose information or a document that identifies or is likely to identify a journalistic source unless the information or document cannot be obtained by any other reasonable means and the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source."

> *"... the press freedoms that once existed in post-World War II Canada and the U.S. have dissolved over time."*

J-Source, representing media organizations and journalism schools, lauds Canada's top-20 position (by contrast, the U.S. standing is 48th). It also warns on its website of troubling situations where journalistic freedoms are threatened and reporters can face imprisonment just for covering protests. These anti-journalism efforts are driven largely by governments.

Canadian Journalists for Free Expression (CJFE) said a worrying sign was the 2018 proposal by Privacy Commissioner Daniel Therrien for a social media "right to be forgotten" regulation. This proposal would allow individuals to delete information – and this may involve removing information that is essential to journalists in their investigations. CJFE has called on the government to conduct a review of the proposed law. As well, CJFE's interactive Censorship Tracker currently has "over 50 reports of restrictions on free expression … with reports covering a wide range of issues, including the silencing of federal scientists, civil injunctions against protesters, and a number of defamation suits … [I]ndividuals from all walks of life are affected by attempts to curb free expression in Canada."

The heavy-handedness of defamatory libel and its use in curbing freedom of expression is an ongoing problem, said Professors David Pritchard (University of Wisconsin-Milwaukee) and Lisa Taylor (Ryerson University), in a 2018 *Globe and Mail* article. A study they conducted found that police services used the threat of criminal libel as a punitive measure against those who would disagree with or disrespect them. And criminal libel allegations were considered just cause for police harassment, which could include the search and seizure of

personal technology such as computers and cellphones. As such, even in the face of zero libel charges (or charges being withdrawn later on), the singular process of just being investigated for libel becomes a significant punishment.

One organization fighting for free speech, human rights, and civil liberties is the Canadian Civil Liberties Association (CCLA). Formed in 1964, its website states:

> It isn't always easy to speak up for free expression. It is often those with unpopular or radical views that are silenced or have their freedom of expression threatened … freedom of expression is so core to our democracy that we have even stood up to defend the rights of individuals whose opinions we abhor.

According to Cara Zwibel, a lawyer and director of CCLA's Fundamental Freedoms Program, the media landscape has changed dramatically in the past five or six years. People need to have a better understanding of what freedom of expression means. She states: "Because people have a chance to be exposed to so much information, their understanding of what the law covers and what it doesn't is not clear." Many ambiguous areas exist, added Zwibel. For instance, the live-streaming of a terror attack in New Zealand in March 2019 was seen by millions. This was considered to be a horrifying example of extremists using social media to deliver their messages.

But putting controls on such technology could also be problematic. "What about when people use that kind of technology to show police misconduct?" Zwibel asks. As well, the borderless nature of online technology means that "even if the (Canadian) courts said something needs to come down (from social media), the courts' reach doesn't extend beyond Canada."

> *"... Reporters Without Borders monitors international press freedom through its World Press Freedom Index. Canada's ranking has gone through some ups and downs in the past few years, from eighth in 2015 to a low of 22nd place in 2016 before rebounding slightly to 18th in the following two years."*

Balancing a journalist's right to do his or her job against the demands of the justice system and government can be challenging. A case in point was the 2018 Supreme Court of Canada decision ordering Vice Media reporter Ben Makuch to turn over records of his interaction with an alleged ISIS member to police. Many saw the decision as profound interference in a situation that was all about "a reporter's right to work unhindered," said Zwibel. CCLA had a keen interest in the case because it involved "a journalist doing his job and protecting his sources."

The OCLA's Rancourt said the Supreme Court of Canada has failed in being "progressive in its freedom of expression decisions." Rancourt added, with respect to the Court:

> It likes to distinguish 'useful expression in a democracy' from 'expression not worthy of protection.' It condones the common law of defamation, which violates universal standards of protection of freedom of expression, and it regularly makes regressive applications of the *Canadian Charter of Rights and Freedoms* loopholes that are sections 1 [reasonable limits on freedom under the law] and 32 [the scope of the *Charter*].

Elsewhere in the world, the scrutiny under which activists and journalists operate may be even more heightened. For example, in Hong Kong, journalists must walk a fine political line. Not surprising, given China's ranking of 177th on the World Press Freedom Index. Reporters will avoid stories that might appear "anti-Chinese government", and they have trouble even getting people to speak on the record.

A Canadian journalist, currently working in Hong Kong for a major media outlet and requesting anonymity, said via email that, since 1997 when governance of Hong Kong was handed back to China, "many news outlets (particularly those owned by companies with business interests in China) began self-censoring themselves, or were not too critical of the Chinese government. This practice still continues."

In 2018, the Chinese government decided not to renew the journalist visa of Financial Times' Victor Mallet, then vice-president of the Hong Kong Foreign Correspondents' Club. Mallet came under fire for chairing "a controversial talk, where independence activist Andy Chan of the Hong Kong National Party was given an opportunity to speak at the club," the Canadian journalist said. "The Hong Kong government had already put pressure on Chan's party, banning them on the grounds of national security and public safety."

Mallet was later reassigned to the *Financial Times*' Paris bureau. And while no Hong Kong journalist has been arrested, a potential extradition law may see "journalists who are critical of the Chinese government … arrested on trumped-up charges and extradited to the mainland to be tried for subversion," said the Canadian journalist. They added that since Xi Jinping became president of China in 2012, "he has clamped down on the media in China, and this cold spell has spread down to Hong Kong. It will be harder to do good journalism in Hong Kong as it takes a lot of courage to report on politically-charged stories if the news outlet you are reporting for has a certain political leaning."

As the Hollywood stereotype of David-vs-Goliath "wins for the underdog" fades out, freedom of speech will demand, more than ever, keener resolve, greater vigilance and absolute determination on the part of its advocates.◆

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The Key Provisions and Case Law Which Define Hate Speech

Ryley Schmidt

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Within Canadian society, hate speech and the promotion of hatred is addressed at both the federal and provincial level. At the federal level, the key piece of legislation addressing this issue is the *Criminal Code*. Section 319(2) makes it an offence to publicly communicate statements that wilfully promote hatred against identifiable groups. The term 'identifiable groups' refers to any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability – as defined in section 318(4) of the *Criminal Code*. Section 13 of the *Canadian Human Rights Act* was an additional tool at the federal level which prohibited certain communications which could expose a person or persons to hatred; however, this provision was repealed in 2013.

Despite section 13 of the *Canadian Human Rights Act* having been repealed, laws in Alberta, British Columbia, Saskatchewan and the Northwest Territories still prohibit the promotion of hatred and contempt. Moreover, all provinces and territories, with the exception of Yukon, contain provisions in their respective human rights legislation that prohibit forms of display that discriminate or incite discrimination.

However, anti-hate legislation has not gone without challenge. As the cases below will highlight, section 319(2) of the *Criminal Code* and human rights legislation (both federal and provincial) prohibiting the promotion of hatred and contempt have been challenged under section 2(b) of the *Canadian Charter of Rights and Freedoms* – freedom of thought, belief, opinion, and expression. Despite these challenges, the Supreme Court of Canada has continued to hold that limits on expression are justified and in the process have continued to flesh out what is meant by terms such as "hatred".

> *"Hate speech provisions in provincial human rights legislation are to be applied objectively by using the standard of 'a reasonable person'."*

R. v. Keegstra, [1990] 3 SCR 697

In *R. v. Keegstra*, the Supreme Court of Canada grappled with the constitutionality of section 319(2) of the *Criminal Code* (then section 281.2(2)) as a restriction on freedom of expression. Mr. Keegstra, a high school teacher in Alberta, was charged under the provision for communicating anti-Semitic comments to his students. The Court held that, although section 319(2) of the *Criminal Code* infringed on the guarantee of freedom of expression, it was a justified limit on that freedom. The Court recognized that hate propaganda and hate speech are pressing concerns for Canadian society. They have the potential to not only threaten the self-dignity of those targeted but might also result in more organized forms of discrimination or violence against minority groups.

When defining the phrase "promotes hatred against any identifiable group", the Court determined that "promotes" requires more than simple encouragement – the accused must intend or foresee "as substantially certain a direct and active simulation of hatred against an identifiable group". The word "hatred", in the context of section 319(2), is an intense emotion that is associated with emotions of "vilification" and "detestation". When "hatred" is exercised against individuals of identifiable groups, it implies that those individuals are less-than and are to be treated as such.

Canada (Human Rights Commission) v. Taylor, [1990] 3 SCR 892

In *Canada (Human Rights Commission) v. Taylor*, Mr. Taylor was charged under section 13(1) of the *Canadian Human Rights Act*. This now-repealed provision made it a discriminatory practice to use telecommunication in such a manner that is likely to expose a person or persons to hatred or contempt on the basis of a prohibited ground of discrimination. Mr. Taylor distributed cards to the public which contained a phone number that, when dialed, lead to pre-recorded anti-Semitic messages.

Although section 13(1) of the *Canadian Human Rights Act* was found to infringe the guarantee of freedom of expression in the *Canadian Charter of Rights and Freedoms*, the provision was upheld as a justified limit. The Court found that, when the phrase "hatred or contempt" is being interpreted in a manner consistent with parliament's objective to reduce forms of expression that cause harm or violence toward individuals, there is no conflict between a meaningful interpretation of section 13(1) and freedom of expression. In determining this, the Court affirmed the Human Rights Tribunal's reading of section 13(1) in *Nealy v. Johnston* which stated that section 13(1) refers to "unusually strong and deep-felt emotions of detestation, calumny and vilification".

> *"... all provinces and territories, with the exception of Yukon, contain provisions in their respective human rights legislation that prohibit forms of display that discriminate or incite discrimination."*

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11

In *Saskatchewan (Human Rights Commission) v. Whatcott*, the accused distributed anti-gay flyers in Regina and Saskatoon. He was charged under section 14(1) of *The Saskatchewan Human Rights Code*, which prohibited the publication or display of any representation that "exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground". The Supreme Court of Canada held that the wording "ridicules, belittles or otherwise affronts the dignity" was constitutionally invalid. However, the Court found the prohibition on any representation "that exposes or tends to expose to hatred" was a reasonable limit on the freedom of expression and demonstrably justified in a free and democratic society.

> *"The word 'hatred', in the context of section 319(2), is an intense emotion that is associated with emotions of 'vilification' and 'detestation'."*

In reaching this decision, the Court unanimously modified the definition of hatred as it had previously defined it in *Canada (Human Rights Commission) v. Taylor*. As it stands, the test for determining what constitutes "hatred", in the context of a prohibition of expression in human rights legislation, is determined objectively by asking "whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination".

There are three important features of this revised, more stringent definition of hatred:

1. Hate speech provisions in provincial human rights legislation are to be applied objectively by using the standard of "a reasonable person".
2. Hate speech provisions only apply to expressions that rise to the high level of "detestation" or "vilification" as previously described in *R. v. Keegstra* and *Canada (Human Rights Commission) v. Taylor*. Therefore, these provisions do not capture offensive expressions that fail to arise to "detestation" or "vilification".
3. Similar to section 319(2) of the *Criminal Code*, the expression must be likely to expose a person or persons to hatred. (See para. 56 – 58.)

Conclusion

Broadly speaking, hate speech, as it stands now, under both section 319(2) of the *Criminal Code* and provincial human rights legislation, are expressions of "detestation" or "vilification" made publicly that expose a person or persons to hatred, or are likely or substantially certain to expose a person or persons to hatred. Through these important decisions, the Supreme Court of Canada has established that provisions prohibiting hate speech are justified limits on freedom of expression so long as terms such as "hatred" are carefully defined to avoid vagueness and subjectivity. ◆

Compelled Expression

Peter Bowal

> The core values which free expression promotes include self-fulfilment, participation in social and political decision-making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political and economic environment.
>
> *RWDSU v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 at para 32

Introduction

When Canadians think of freedom of expression, they normally think of the *right* to say something. What about the state imposing a *duty* upon us to say certain things? If we have free expression, should we not be able to refuse to express what the state commands? Or, viewed another way, does the constitutional right to expression include the right *from* expression?

There are numerous examples of these 'compelled speech' scenarios. Human rights legislation across the country now makes it a regulatory offence to discriminate against others on the basis of "gender identity" or "gender expression". Human Rights Commissions have signaled that they will consider it unlawful discrimination for an employer, landlord or business person to use historical pronouns when referring to a transgender individual. To escape legal sanction, these private parties must adopt and voice certain prescribed pronouns.

> *"If words convey a meaning of some kind, it follows that the refusal to express them also conveys meaning."*

Last year, the federal government peculiarly required applicants for a job grant program to endorse their unqualified devotion to a controversial social, religious and political perspective. The Law Society of Ontario proposed to oblige its members in the same way

and dictate their words and conscience. (To be clear, this is not the same as requiring persons to follow the law in effect.)

The governing body of physicians in Ontario compels – under pain of professional discipline or de-certification – their members who have a religious or conscientious objection to birth control, abortion or medically-assisted suicide to effectively refer patients to another physician who has no similar objections. This case, which will be ultimately decided by the Supreme Court of Canada, was argued on the *Charter* grounds of conscience and religion, but freedom of expression concerns also arise.

Public sector employees, regardless of their views on the issue, may be instructed by their managers to utter indigenous acknowledgements in public gatherings. Likewise, whistleblowing policies may compel reporting of wrongdoing.

The various forms of this compelled speech may not be *Charter* compliant.

To Express is to Convey Meaning

The courts have developed a large and liberal interpretation of this important right set out in section 2(b) of the *Charter*. The right to free expression promotes individual self-fulfilment and human flourishing. Indeed, the *Irwin Toy* decision called expression a "democratic commitment" because:

> seeking and attaining truth is an inherently good activity, participation in social and political decision-making is to be fostered and encouraged and diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

Protected in the constitutional freedom of expression is activity that conveys or attempts to convey a meaning, to have a communicative purpose. Apart from violent expression, the courts are content neutral in the sense that they do not judge the truth or value of the expression. If words convey a meaning of some kind, it follows that the refusal to express them also conveys meaning.

> *"The right to free expression promotes individual self-fulfilment and human flourishing."*

Tobacco Packaging and Other Compelled Expression

In the Supreme Court of Canada decision of *RJR-MacDonald v Canada* from 1995, federal legislation required the packaging of cigarettes and other tobacco products to present prescribed warnings of health risks. Since the warnings were unattributed, one might think they were the manufacturers' beliefs and statements when instead they were authored by the federal government. The tobacco manufacturer could place none of its advertising on its own packages it produced for commercial sale. The Court tossed out this law as unconstitutional on the basis that "the

freedom of expression necessarily entails the right to say nothing or the right not to say certain things."

An order by government or an arbitrator to an employer to write and deliver a letter of reference with stipulated terms was held to violate the right to free expression. However, since the stipulated terms were "only objective facts that are not in dispute", the Court found that it was justified as a minimal intrusion under section 1 of the *Charter* (see *Slaight Communications v Davidson*).

In *Lavigne v Ontario Public Service Employees Union*, an employee objected to being forced to join a union or to pay union dues spent by the union to support causes the worker did not want to benefit. The Supreme Court of Canada said the forced collection of union dues was not expressive activity. Even if this was expressive activity, forced unionization and dues did not necessarily imply support for the union's views or prevent the dissenting worker from expressing his own contrary views.

Some permanent residents challenged the oath of allegiance on the basis that it referred to the Queen. In 2014, the Ontario Court of Appeal in *McAteer v Canada* reasoned that these dissidents misunderstood the true nature of Canada's constitutional monarchy so the extant oath of allegiance did not infringe their freedom of expression.

> *"... does the constitutional right to expression include the right from expression?"*

Conclusion

Compelled expression has not yet seen the range and volume of challenges under section 2(b) of the *Charter* compared to the permissive side of this right. Nevertheless, the compelled perspective continues to be alive with increasing government constraints in realms of activity as wide-ranging as official languages, disclosure of journalists' sources, and mandatory self-reporting of regulatory non-compliance. The legal principles that illuminate the right to free expression ought to equally govern the right from expression. ◆

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Jessica Steingard

1. Federal Court Translates Decision into Cree and Dene

The Federal Court of Canada made history recently when it issued a judgment in the Cree and Dene languages. The case involved Councillor Whalen and the Fort McMurray No. 468 First Nation (FMFN).

On January 10, 2019, a Band Council Resolution (BCR) was signed by Chief Kreutzer and Councillor Kreutzer which purported to suspend Councillor Whalen with pay pending a further hearing on January 25, 2019. The suspension was in response to rising tensions between Councillor Whalen and Chief and Councillor Kreutzer. The matter came to a head with a blockade of the FMFN premises from January 7 to 9, 2019. Chief and Councillor Kreutzer allege that Councillor Whalen organized and supported the blockade while Councillor Whalen says she only acted as a mediator between the blockaders and Council.

Councillor Whalen brought an application before the Federal Court for judicial review of the January 10th decision to suspend her. The Court found that "FMFN's Council [had] no power, under its Election Regulations, to suspend a councillor except in limited circumstances, which do not apply to this case" (at para 1). The Court quashed FMFN's January 10, 2019 decision, effectively reinstating Councillor Whalen.

The Court's unprecedented decision to translate the judgment into Cree and Dene is a significant step towards making court proceedings more accessible to impacted individuals who do not speak French or English, especially indigenous communities. Councillor Whalen celebrated this departure from tradition, saying that many of the elders in her community will now be able to understand the outcome of the proceedings.

Whalen v Fort McMurray No. 468 First Nation, 2019 FC 732
http://canlii.ca/t/j0fr2

2. Director Liable for Workplace Injuries

The Alberta Court of Appeal held that a director of a corporation could be held personally liable for injuries suffered by workers when a temporary staircase, installed by the director, broke. The *Workers' Compensation Board (WCB)* was bringing a subrogated action for monies paid to the injured appellants.

The respondent, Stewart, was an employee and director of DWS Construction Ltd. The injured workers were employed by another company. The Court acknowledged that the injured workers could not sue DWS Construction Ltd. for damages because of the WCB scheme. However, the Court found that Stewart could be held liable because of ss. 15 and 16 of the *Workers' Compensation Act*.

Section 15 of the Act reads that, subject to s. 16, a director is not a worker for the purpose of the Act "unless they apply to the Board … to have the Act apply to them as workers and the Board approves the application." Section 16(1)(c) reads that an individual is deemed to be a worker except when the individual "is a director of a corporation and is performing the work as part of the business of the corporation, whether by way of manual labour or otherwise…" The respondent had not applied for insurance under s. 15 of the Act.

The Court noted that "[w]hile the claimants would have anticipated receiving compensation from the Board for any injuries they suffered, that does not negate the Board's expectation that it could pursue subrogated claims against tortfeasors outside the system."

The Court also noted that the deciding factor was that the nature of the damage was personal injury: "There are strong public policy reasons to ensure that physically injured plaintiffs are compensated. Claims for pure economic loss raise different issues."

It remains to be determined if the respondent actually did act negligently.

> *Hall v Stewart,* 2019 ABCA 98 (CanLII)
> http://canlii.ca/t/hz4m5

3. *Habeas corpus* Remedy for Detained Refugee

Mr. Chhina arrived in Canada in 2006 and was ordered deported in 2012 for lying on his refugee application and committing crimes. Prior to his deportation, Mr. Chhina was held at a maximum security institution and kept on lockdown for all but 90 minutes each day. Mr. Chhina challenged the length, uncertain duration and conditions of his detention.

The Supreme Court of Canada found that the review procedure in the *Immigration and Refugee Protection Act (IRPA)* was not as broad and advantageous as *habeas corpus*. *Habeas corpus* is a "fundamental and historic remedy which allows individuals to seek a determination as to the legality of their detention."

The Court listed three reasons for its decision:

1. In a detention review under *IRPA*, the Minister makes a *prima facie* case for continued detention and then the onus shifts to the detainee. In a *habeas corpus* application, the onus is on the Minister.

2. On judicial review, the Federal Courts do not conduct fresh reviews of each detention period and have limited remedies (usually an order for redetermination). In a *habeas corpus* application, the Court considers all of the relevant evidence and can order the detainee released if the detention is not justified.
3. A judicial review application under *IRPA* requires leave and "perfecting an application for leave on judicial review can take up to 85 days." Given that detention hearings are held every 30 days, it is very unlikely for a judicial review to happen within that period. *Habeas corpus*, on the other hand, is a "swift and imperative remedy".

This case is moot because Mr. Chhina was deported in September of 2017, before the case was heard by the Court. The Court heard the matter anyway because of the importance of "clearly delineating the exceptions to *habeas corpus*."

> *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 (CanLII)
> http://canlii.ca/t/j075t

4. Unequal Division of Post-Separation Debt

An Alberta couple separated after 26 years of marriage. They were debt-free at the time of separation and for three years afterwards. Their finances remained interconnected due to business assets. After six years of separation, they went to trial only on the division of personal assets and debts. The trial dealt with three issues, one being the division of the husband's post-separation debt.

After the separation, the husband accumulated $115,699 in credit card debt and a line of credit. The wife had $1489 in credit card debt. Under the *Matrimonial Property Act (MPA)*, property is divided as of the date of trial. The trial judge "concluded that this debt would be divided equally between the parties, stating it was impossible for her to determine whether the debts that arose related to matrimonial assets or their preservation." The wife argued that the husband alone should be responsible for the debt because he did not provide reasons for the debt and because his income allowed him to support himself.

The Court of Appeal noted that an analysis under s. 8 of the *MPA* is a "discretionary function" and that the delineated factors "empower a court to divide specific property or debt proportionately, to achieve a just and equitable result." The Court concluded at para 34:

> We agree [with the wife's arguments]. The onus is on the party incurring debt after separation to demonstrate that the debt was used for the benefit of the family unit and not solely for the debtor's own purposes. If that cannot be established, s 8 of the *MPA* permits unequal distribution of the debt, including sole responsibility for the debt falling to the party that incurred it …

Stuve v Stuve, 2019 ABCA 142 (CanLII)
http://canlii.ca/t/hzv8l ◆

Columns

VIP Access to Justice: Why state-funded counsel is crucial to our democratic identity

Melody Izadi

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Access to justice is always a live issue, no matter how developed a country may be. Luckily, in Canada, our justice system rivals some of the best in the world. However, there is still concern for those who represent themselves in the criminal justice system. After all, criminal matters have a unique way of affecting one's life with grave consequences if convicted: jail sentences, loss of employment, social stigmas or an inability to travel, just to name a few.

It comes as no surprise that, when up against the power of the state (Crown attorneys, police forces, expert witnesses), an accused person's best chance at ensuring a fair trial, resolution agreement, or sentence happens with competent counsel on their side. However, even with the most generous of discounts, retaining counsel can be an impossible financial burden to bear for many people. And so, the concept behind state-funded legal representation is born.

> *"... the reality is that, when a person is self-represented, the result is often more litigation, more court matters, and more appeals. This in turn costs tax-payers more money."*

But there's a catch: one has to qualify for state-funded legal representation before one can get it. While that may appear sound in theory – not everyone should qualify for legal aid – the practical reality is that the cut-off for qualifying for legal aid can be frighteningly low.

Legal Aid Ontario boasts two main qualifications for a person to obtain state-funded counsel:

1. the Crown attorney needs to be seeking a jail sentence; and
2. the combined income of the person and their family members must be below a set threshold.

If a single person with no spouse or children makes more than $17,731 gross per year, they will not qualify for legal aid for a non-domestic abuse matter. If a person lives with someone, their combined salaries must be below $31,917 in order for the person to qualify for legal aid.

It is not hard to imagine the obvious gap created here: thousands of people who have a low annual income must either hire a lawyer they cannot afford, or they are forced to represent themselves. What's even more troublesome is that the Ontario government announced a $164 million dollar cut in Legal Aid Ontario's budget earlier this year. The result is that Legal Aid Ontario must reduce the number of certificates for state-funded counsel as well as funding for transcripts of proceedings, expert witnesses, or psychological testing.

The problems that can arise with a self-represented accused were clearly at issue and highlighted in the case of *R v Sabir*. A trial judge has a heavy duty to protect the rights of a self-represented accused. The Ontario Court of Appeal held that the trial judge did not do so in this case. Specifically, at issue in this case were the following grounds:

> (1) the trial judge failed to conduct a voluntariness voir dire in relation to the statements made by the appellant to Sgt. Gilmore following his arrest; (2) the judge failed to inquire into potential *Charter* breaches; and (3) the judge misinformed the appellant concerning his right to testify. (At para 18.)

On the voluntariness of the accused's statements, the Ontario Court of Appeal held:

> In the circumstances of this case, the record does not suggest that the appellant understood the purpose and consequences of a voluntariness voir dire, and made an informed decision to waive his right to a voir dire. Nor can it be said that, had the trial judge raised the issue of voluntariness with the appellant, the appellant would have proceeded in the same manner. (At para 26.)

> *"Without a sound justice system, our sense of social justice and democracy is threatened, and our constitutional rights are challenged and infringed."*

The Ontario Court of Appeal also held that the trial judge failed to inquire or turn her mind to the potential section 8 and 10 breaches of the *Canadian Charter of Rights and Freedoms*. The trial judge did not invite submissions on or enter into an inquiry of these issues. The Court held that the self-represented accused was not properly advised or informed of his legal rights. As a result, the Court ordered a new trial on almost all of the charges against the accused and reduced the accused's custodial sentence from 18 months to 6.

It is unclear from this ruling whether or not Mr. Sabir qualified for legal aid. However, the reality is that, when a person is self-represented, the result is often more litigation, more court matters and more appeals. This in turn costs tax-payers more money. Not to mention, at issue in this case were trial fairness and the accused's *Charter* rights, two of the most paramount pillars of our justice system.

Access to justice is an integral part of any well-functioning justice system and Ontario should be no exception. The $146 million dollar budget cut imposed on Legal Aid Ontario affects each and every person involved in the justice system, and leaves our community with an imbalance of power between the people and the state. Without a sound justice system, our sense of social justice and democracy is threatened, and our constitutional rights are challenged and infringed. Access to justice must be made a government priority, as it affects the very foundation of our justice system. ◆

Bad Behaviour 4.0: Employees getting away with…

Peter Bowal and James Ragan

> If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.
>
> *Port Arthur Shipbuilding Co. v. Arthurs* (Ont CA, 1967)

"Today, the 'McKinley principle' says that wrongdoing at work will be judged in the context of each case."

Introduction

We scoured records across the country and found more random instances of egregious employee behaviour that Canadian courts and arbitrators have excused. In these cases, the employer had fired the employee, but the judge or arbitrator disagreed and ordered the employer to pay damages for wrongful dismissal and court costs.

On reading these, one asks: "What was that judge (or arbitrator) thinking?"

The Accountant Who Failed to Fully Disclose

McKinley v BC Tel is almost the poster child case for excusing bad behaviour in Canada. The law says that employers must be able to prove "just cause" to fire an employee without notice or severance. Grounds for summary dismissal include absenteeism, insolence, insubordination, neglect of duty, workplace conflicts, and breach of fiduciary duties. There is no exhaustive list of what kind of misconduct is "just cause".

McKinley was an accountant at BC Tel who suffered from high blood pressure. He had taken a leave of absence from work and told BC Tel that he could return to work if they found him a less stressful position. BC Tel did not find him a different position; they terminated his employment instead. After the incident, BC Tel learned that McKinley had withheld an email from his doctor stating he could go back to work if he took an additional medication. McKinley took the position that he had been wrongfully dismissed.

BC Tel's defence was that McKinley's dishonesty justified his dismissal for cause. The Supreme Court of Canada agreed with McKinley, saying at para 57:

> … [it favours] an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

McKinley walked away with more than two years of pay and benefits ($116,000) and reimbursement of his costs at all three levels of court. Today, the "McKinley principle" says that wrongdoing at work will be judged in the context of each case. For example, was the employee's behaviour provoked? Did the employee have a good service record prior to the incident? Was the employee under unusual stress? Overall, is dismissal warranted or will other progressive forms of discipline, short of firing, suffice?

The Italian Wine Smuggler

Genesio Pagliaroli, an Italian immigrant to Canada, began work at Rite-Pak in 1982 at the age of 32. He worked his way through the organization and held different positions, including President, CEO and directorships of various companies in the Rite-Pak group. While working at Rite-Pak, Pagliaroli oversaw the illegal importation of wine from Italy to Canada.

The wine was packed into containers of other products imported by Rite-Pak, shipped without records, and paid for outside of Rite-Pak's normal accounting system. Pagliaroli inherited this system from his predecessor but continued it after he took control of the department. After a falling-out with Rite-Pak's principal shareholder, Rite-Pak significantly diminished Pagliaroli's role at the company but did allow him to continue working. Pagliaroli found this role change unacceptable and claimed Rite-Pak had constructively dismissed him without cause. Rite-Pak argued that the wine smuggling constituted just cause to fire him.

> *"Grounds for summary dismissal include absenteeism, insolence, insubordination, neglect of duty, workplace conflicts, and breach of fiduciary duties."*

The Ontario Supreme Court agreed with the arbitrator that Pagliaroli's demotion was tantamount to a dismissal without cause. Rite-Pak had condoned or forgiven Pagliaroli's actions because it did not dismiss him when it first became aware of the wine smuggling. Pagliaroli also breached his fiduciary duty to Rite-Pak, which could have been grounds for firing. However, Rite-Pak had prior knowledge of his actions and had not disciplined him at that time. The Court again found Rite-Pak had condoned Pagliaroli's actions. Rite-Pak could not use these reasons to later justify his dismissal.

The Court awarded Pagliaroli $1.1 million for 20 months of salary, $25,000 in aggravated damages and $185,000 in costs.

The Angry Ice Cream Server

Sharon Rodrigues began work at the Dairy Queen in Castlegar, B.C. in 1993. She worked her way up to become the store manager. She had worked at the restaurant for 16 years when Tim Kenna bought the franchise in 2007. Rodrigues had a strong personality and did not attempt to hide her mood. When she disapproved of other employees' performances, she used foul language and mocked them, even in front of customers. She disciplined employees by scheduling them for undesirable shifts. Her co-workers – and even owner Kenna – were afraid to confront her, especially if she was in a foul mood.

Eventually Kenna gave Rodrigues a letter stating that her "swearing, rudeness, insubordination and disrespect, anger, tardiness and retaliation" were unacceptable and she would be dismissed if her performance did not approve.

Upon receiving the letter, Rodrigues became very upset. She discussed the letter with many co-workers and customers and referred to Kenna as an idiot and a moron. She refused to perform some of her duties, and gave some employees the silent treatment. The situation became so awkward that one of the other employees left work and refused to return until the staffing situation was resolved. At this point, Kenna fired her.

The Supreme Court of British Columbia decided that, "although she was performing inadequately in her position as manager", Rodrigues was wrongfully dismissed because there was no serious misconduct warranting immediate dismissal. Even if the bad behaviour was obvious to everyone else, she had to be told that her general bad behaviour could get her fired. She should have been given time to improve her behaviour after being formally warned.

The Court awarded her 16 months of pay and bonuses. ◆

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Alternatives to Court: Parenting Coordination

John-Paul Boyd

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This is the last column in LawNow's series on resolving family law disputes out of court. The other columns in this series include Sarah Dargatz's articles on collaborative negotiation and mediation, and my article on arbitration. In this column, I'm going to talk about parenting coordination. This is a child-centred process that combines elements of both mediation and arbitration and is used to resolve disagreements between separated parents about their children.

Parenting coordination was developed in California in the 1980s in response to certain family law cases that seemed to be in court all the time, even after they had gone through trial. The people involved in these cases were making applications to adjust the parenting arrangements for their children several times each year, at a huge expense to them and a huge expense to the court. A number of people working in the justice system came up with the idea of taking these conflicts out of the court system and having them resolved privately by a lawyer or a mental health professional, like a social worker or a psychologist, working directly with the parents.

The idea turned out to be a success, and parenting coordination began to spread through the United States and Canada. Today, parenting coordination is very well established in this country. Groups of professionals providing parenting coordination services exist in British Columbia, Alberta, Ontario and Nova Scotia.

Parenting coordination is for people who already have a parenting plan in place, whether the parenting plan is in the form of a separation agreement or a court order. The parenting coordinator's basic job is to help people implement their parenting plan and resolve disagreements about their parenting plan as they come up.

> *"One of the key goals of parenting coordination is to help parents get a final resolution to parenting problems as they come up, and save the time, expense and anxiety involved in going back to court."*

Parenting coordination does not help people with temporary, or "interim," parenting plans because of the potential for the work of the parenting coordinator to interfere with the decisions the court may make, and for the decisions of the court to interfere with the work of the parenting coordinator. Parenting coordination is independent of court processes and helps with final parenting plans only.

Parenting coordinators can be lawyers who have special training in certain aspects of psychology, including communication skills, childhood developmental psychology and high-conflict personalities. They can also be mental health professionals who have special training in certain aspects of the law, including family law, mediation and arbitration. The type of professional who will work best for a family depends on the sort of disagreements the parents usually have, and the reasons behind those disagreements.

A parenting coordinator can be hired as a result of an agreement between the parents or because of a court order that the parents agree to, called a consent order. In British Columbia, the court can order people to hire a parenting coordinator whether they agree to use the parenting coordinator or not.

The parenting coordinator will prepare a participation agreement that outlines:

- the parenting coordinator's rates;
- the responsibilities of the parents;
- the responsibilities of the parenting coordinator; and
- the parenting coordination process.

Most importantly, the agreement describes the scope of the parenting coordinator's authority. Parenting coordinators are *not* able to help with issues about child support, spousal support or the division of property and debt. They also *cannot* make fundamental changes to children's living arrangements, like changing the home where the child usually lives or making permanent changes in children's parenting schedules.

Parenting coordinators *can* help with common issues like:

- deciding where the children go to school;
- deciding in which activities the children will participate;
- making temporary adjustments to parenting schedules;
- addressing communication problems between the parents or between a parent and a child;
- dealing with problems about the children's health care; and
- dealing with problems about the exchange of the children between the parents and parents who are late for or miss their time with the children.

After the parents and the parenting coordinator sign the participation agreement, either parent can bring a problem to the parenting coordinator. The parenting coordinator will first work with the parents to try to solve the problem with their agreement, using a process that's a lot like mediation. If the parents can't reach agreement, however, the parenting coordinator has the authority to make a decision resolving the problem, using a process that's a lot like arbitration. Parenting coordinators usually also have the authority to make decisions when a problem is urgent and there isn't the time to work with the parents to find a solution to the problem by agreement.

> *"Parenting coordination is for people who already have a parenting plan in place, whether the parenting plan is in the form of a separation agreement or a court order."*

Parenting coordinators' ability to make decisions is especially important. If a parenting coordinator doesn't have the authority to make a decision when the parents cannot agree, the process isn't parenting coordination. One of the key goals of parenting coordination is to help parents get a final resolution to parenting problems as they come up, and save the time, expense and anxiety involved in going back to court. If the parents can't reach an agreement and the professional helping the parents resolve disagreements about their parenting plan can't or won't make decisions, then the professional is a mediator, not a parenting coordinator.

Although parents have to pay for their parenting coordinator's services, parenting coordination done right is almost always cheaper than making applications to court. It also resolves disagreements a lot more quickly than is normally possible in court, which can be very important when critical parenting decisions need to be made on short deadlines.

Parenting coordinators do more than just help people implement their parenting plan and resolve disagreements about their parenting plan. They also work with each parent to improve their communication skills, learn to put the best interests of their children first, and develop the necessary skills to resolve disagreements on their own. As a parenting coordinator, I always see my job as helping people to learn to work together so that they no longer need me! Yes, I resolve parenting problems, but what I really want to do is to get my clients to the point where they can manage future problems without my help.

To learn more about parenting coordination, visit the website of the Association of Family and Conciliation Courts, an international organization based in the United States that has been at the forefront of developing parenting coordination. You can also read some of the research on parenting coordination practice in Canada conducted by the Canadian Research Institute for Law and the Family. ◆

Whiten v Pilot Insurance

Peter Bowal, Carl Walter and Danny Li

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> Insurance contracts … are sold by the insurance industry and purchased by members of the public for peace of mind. The more devastating the loss, the more the insured may be at the financial mercy of the insurer, and the more difficult it may be to challenge a wrongful refusal to pay the claim. Deterrence is required. The obligation of good faith dealing means that the appellant's peace of mind should have been Pilot's objective, and her vulnerability ought not to have been aggravated as a negotiating tactic. It is this relationship of reliance and vulnerability that was outrageously exploited by Pilot in this case. The jury, it appears, decided a powerful message of retribution, deterrence and denunciation had to be sent to the respondent and they sent it.
>
> *Whiten v Pilot Insurance Co.*, 2002 SCC 18 at para 129

Introduction

Keith and Daphne Whiten met in England in the 1970s where they both worked as nurses. They relocated to Canada after their marriage. They bought a modest home in Haliburton County, Ontario in 1985. Keith started a locksmith business but it failed in 1993.

> *"… the jury ordered $1,000,000 in punitive damages against Pilot for breaching their duty of good faith to the Whitens."*

Both Whitens were unemployed in the early hours of January 18, 1994 when they discovered a fire in their house. They fled in their bedclothes, along with their young daughter, Louise, to the street outside in the -18C winter night. Keith froze the bottom of his feet – having given his footwear to his daughter so she could summon assistance – as they watched their home, three cats and everything they owned go up in flames.

Their house insurer, Pilot Insurance Co., founded in 1927, provided property and automobile insurance exclusively in the Ontario market. It paid only $5,000 to the Whitens and covered a few

months of rent on the cottage the family rented nearby while Pilot processed the Whitens' claim.

The fire chief thought a malfunctioning kerosene heater caused the fire. An independent adjustor and Pilot's own expert engineer found no evidence of arson. Nevertheless, Pilot denied the Whitens' insurance claim.

Thus began the case that would rock the insurance industry in Canada for decades and set an enhanced standard for handling insurance claims.

Duty of Good Faith and Fair Dealing in Handling Insurance Claims

In *Carter v Boehm* (1766), English common law first recognized that an insurance contract is clothed in the duty of good faith ("*uberrimae fidei*"), including throughout the claims handling process. Claimants are bound to provide the insurer with all relevant information to assess the risk at hand. And insurers must process claims quickly, competently and fairly in communication with claimants.

In November 1995, the Whitens took their insurance company, Pilot, to an eight-week jury trial. The jury thought Pilot had denied the Whitens' claim only because both were unemployed and experiencing financial challenges at the time of the fire. Even the Supreme Court of Canada later commented on how it was unlikely the Whitens could have profited from torching their own home. They held only $10,000 equity in their home and simply selling the home would have had the same financial benefit for them as collecting insurance proceeds. The Court said it "[defied] common sense to think they would have risked so much – including their daughter's safety, all of their possessions and their cats – for so little".

The jury found Pilot had acted in bad faith toward the Whitens. Bad faith is hard to fully define. According to the court in *Macmillan Bloedel Ltd v Galiano Island Trust Committee*:

> [b]ad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable … [it has] also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose.

One knows bad faith when one sees it, and the jury saw it in the *Whiten* case. Pilot's intentional and deceitful actions were designed to force a financially vulnerable family to settle for far less than what they were fairly entitled to.

> *"… an insurance contract is clothed in the duty of good faith ('uberrimae fidei'), including throughout the claims handling process."*

As a result, the jury awarded the Whitens punitive damages against Pilot. Punitive damages in contract cases are exceptional. The court imposes them only if there has been highly reprehensible or arbitrary misconduct that departs to a marked degree from standards of decent behaviour. The court in *Hill v Church of Scientology of Toronto* described punitive damages as being for "malicious, oppressive

and high-handed" misconduct that "offends the court's sense of decency". The amount of punitive damages is reasonably proportionate to factors such as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant.

The jury awarded the Whitens $318,252 in compensatory damages – the value of their house and contents – and their full legal bill of $317,659. The highest *punitive* damages award prior to this time was $50,000, but the jury ordered $1,000,000 in punitive damages against Pilot for breaching their duty of good faith to the Whitens.

In February 2002, the Supreme Court of Canada upheld this decision. Justice Binnie wrote:

> The jury's award of punitive damages, though high, was within rational limits. The respondent insurer's conduct towards the appellant was exceptionally reprehensible. It forced her to put at risk her only remaining asset (the $345,000 insurance claim) plus $320,000 in costs that she did not have. The denial of the claim was designed to force her to make an unfair settlement for less than she was entitled to. The conduct was planned and deliberate and continued for over two years, while the financial situation of the appellant grew increasingly desperate. The jury believed that the respondent knew from the outset that its arson defence was contrived and unsustainable.

Conclusion

Purchasing insurance should mean buying peace of mind. The *Whiten* case underscored the insurer's legal duty of good faith to be fair and timely in handling loss claims. On the other hand, insurance is a competitive industry. Many insurance claims have fraudulent elements, which insurers cannot afford to ignore. They must investigate and properly reject claims which evince an evidentiary basis for fraud.

When this unprecedented $1 million punitive damage award was announced, some people said this would "Americanize" the Canadian justice system because judges might too readily see bad faith, leading to punitive damages (and insurance premiums) spiraling out of control. This has not happened although *Whiten* remains the leading case on the insurer's duty to act in good faith and on the determination of punitive damages.

Whatever Happened to These Parties?

A year after this case, in 2003, Pilot was purchased by General Accident, which changed its name to CGU and then later to Aviva Insurance of Canada.

After the Supreme Court of Canada's decision, the Whitens bought the 19th-century home of their dreams. However, Keith Whiten passed away from cancer only seven months after the case ended. Some thought the extreme personal stress of the litigation exacerbated his condition. Shortly after, Daphne put the house on the market. Ironically, she could not find a company willing to sell her house insurance. ◆

Freedom of Expression at Canadian Universities: A difficult compromise?

Linda McKay-Panos

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

Recently, Ontario's Premier Doug Ford passed a new policy that Ontario universities should adopt free-speech policies, or face receiving less money from the Government. The policies must meet "a minimum standard prescribed by government." This means that "while members of the university/college are free to criticize and contest views expressed on campus, they may not obstruct or interfere with the freedom of others to express their views". Universities must report on their progress in implementing the policy to the Higher Education Quality Council of Ontario. In addition to threatened funding cuts, students who do not comply with the policy will be subject to university discipline policies.

Other provinces, such as Alberta, have indicated they will consider whether the "Chicago Principles" should be applied to university campuses. Conservative Leader Andrew Scheer also indicated in his campaign that his government would include a similar free speech proposal.

The Chicago Principles are intended to "reflect the long-standing and distinctive values of the University of Chicago and [affirm] the importance of maintaining and, indeed, celebrating those values for the future". Universities are encouraged not to suppress "offensive, unwise, immoral, or wrong-headed" ideas. Instead, members of the university community and the university itself should openly and forcefully contest the ideas they oppose. The Chicago Principles also recognize the U.S. law's limitations on free speech:

> The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades

"... if an outside agency determines the university has not implemented and followed policies (like the Chicago Principles), threatening to cut funding ironically imposes on both freedom of expression and academic freedom."

> substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. (Chicago Principles.)

Unlike most Canadian universities, the University of Chicago is a private research university and is not operated or funded by governments, but may be subject to government regulation.

Academic freedom and freedom of expression are not the same concept. How do they differ?

- Freedom of expression is guaranteed under the *Canadian Charter of Rights and Freedoms*, but it is not clear whether the *Charter* applies to campuses;
- Academic freedom in Canada is described as: "the right, without restriction by prescribed doctrine, to freedom to teach and discuss," and the "freedom to express one's opinion about the institution, its administration, and the system in which one works" (see: Paul Axelrod, "Academic Freedom: Can History be Our Guide?" (Axelrod)). Academic freedom policies apply to university campuses across Canada.

However, academic freedom and freedom of expression are not mutually exclusive. They are similar or related in these ways:

- In Canada, there are limits on both concepts (neither is absolute):
  - Freedom of expression does not protect violence or threats of violence. It is limited by our *Criminal Code* hate speech laws, our provincial human rights codes' hate/ discriminatory speech provisions, and anti-defamation laws.
  - Academic freedom "is constrained by the professional standards of the relevant discipline and the responsibility of the institution to organize its academic mission" (Axelrod).
- Alberta Court of Appeal Justice Marina Paperny, in *Pridgen v University of Calgary,* explained how these two concepts do not usually compete:

> [115]… Academic freedom and freedom of expression are inextricably linked. There is an obvious element of free expression in the protection of academic freedom, whether limited to the traditional conception of academic freedom as protecting the individual academic professional, or applied more broadly to promote discussion in the university community as a whole. Interestingly, the protection of free speech on campus is not universally seen as a threat to academic freedom.
>
> [117]… Academic freedom and the guarantee of freedom of expression contained in the *Charter* are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason why they cannot comfortably co-exist. That said, if circumstances arise where these values actually collide, a [*Charter*] section 1 analysis would be required to properly balance them. …

While freedom of expression is an important value, it is only one tool that supports the main purpose of universities. That purpose is "to serve society by pursuing knowledge and

advancing our understanding of the world in its many aspects. Universities exist not merely to communicate, but to try to get the story right" (see: Shannon Dea, "First dispatch: Academic freedom and the mission of the university" (Dea)). On the other hand, academic freedom is complex and may be defined as "a cluster of freedoms associated in various ways with various scholarly personnel and institutions. Freedom of expression is just one of those subsidiary freedoms" (Dea).

> *"Freedom of expression is guaranteed under the Canadian Charter of Rights and Freedoms, but it is not clear whether the Charter applies to campuses..."*

The freedom of expression and academic freedom issues that arise from Doug Ford's policy are:

1. Does the difference between Canadian and U.S. law, and funding of universities practices, require that the policies be modified or implemented differently?

2. Can a provincial/federal government refuse to provide funding to a university that fails to adopt freedom of expression policies and practices that are approved?

First, there is a significant difference between the U.S. and Canada when it comes to free speech (freedom of expression). In the U.S., commitment to the First Amendment protections of free speech is almost limitless, and it could be said to almost supersede all other considerations (including academic freedom). In Canada, the rights and freedoms guaranteed by the *Charter* are subject to both internal limitations (e.g., freedom of expression does not protect violence) and the limitations of *Charter* section 1 (reasonable and justifiable in a free and democratic society). Applying *Charter* section 1 can involve balancing other rights with freedom of expression—such as the right to equality, which may be harmed by expression in some situations.

In Canada, universities and degree granting colleges receive most of their funding from governments and tuition fees. Conversely, in the U.S., universities and colleges receive funds from many sources, including states and the federal government. However, it does not appear that following the Chicago Principles is tied to the receipt of government funding.

Second, while the concept of freedom of expression at Canadian universities (if the *Charter* applies) would seemingly encourage broad debate that would seek to arrive at the "truth", this debate should be done in a respectful and civil way that complies with *Charter* section 1. The "appropriate" topic of the expression should not be forced on universities by governments (which are subject to the *Charter*) by threatening their funding. Rather, open debate should be encouraged.

Finally, if an outside agency determines the university has not implemented and followed policies (like the Chicago Principles), threatening to cut funding ironically imposes on both freedom of expression and academic freedom. This would ultimately amount to government intervention into the autonomy of universities. ◆

Hoarding and Tenancy Situations

Judy Feng

Dealing with hoarding in a tenancy situation involves a balancing act between a landlord's rights and a tenant's rights under the law. Under the *Residential Tenancies Act* (*RTA*), a tenant has the right to quiet enjoyment of their property. A landlord has a corresponding duty to make sure this right is upheld. A tenant also has a duty to keep their home in a reasonably clean condition. And a landlord has a duty to meet minimum housing and health standards in their housing premises. Hoarding situations can be especially challenging when mental disability or other human rights issues are involved.

It is estimated that 2 to 6 out of every 100 people suffer from hoarding disorder, which is recognized as a mental disorder in the 5th Edition of the *Diagnostic and Statistical Manual of Mental Disorders*. Hoarding disorder is the persistent difficulty in getting rid of things and/or a strong desire to acquire things, resulting in extremely cluttered living space and significant impairment in important areas of functioning (for example, social and occupational functioning).

Hoarding disorder can present in different ways and can vary in severity. For example, a hoarding tenant may simply accumulate an inordinate amount of clutter or a large number of animals. Sometimes hoarding becomes so severe that it can lead to potential health and safety hazards for both the tenant and others. For example, hoarding can lead to fire hazards, mold, insects, rodent infestations, or noxious odours. Extreme hoarding can lead to property being declared unfit or unsafe for human habitation.

I'm a landlord and have received several complaints that one of my tenants is a hoarder. What can I do?

If you suspect that your tenant is hoarding and there may be potential safety and health issues in the premises, you can serve the tenant with a 24-hour Notice of Entry to inspect the premises. You should document the inspection and outline your concerns in writing. Talk to your tenant about your concerns and work with them to formulate solutions for removing clutter – especially any clutter that poses an immediate health and safety concern. You can also refer your tenant to community resources for hoarding disorder.

> **Tip**: The *Residential Tenancies Act* does not address the issue of accumulation and removal of clutter on rental properties. If the law is silent on a particular issue, then the landlord and tenant can agree to anything in the rental agreement, as long as it is not illegal. Consider having your standard rental agreement reviewed by your lawyer. Your lawyer may be able to give advice on how to address this issue in your rental agreement, as well as any other concerns.

If you are concerned about a tenant's hoarding, be aware that you may have a duty to accommodate the tenant. Under the *Alberta Human Rights Act*, a landlord cannot discriminate against a tenant based on mental disability or any other grounds under the *Act*.

Hoarding may be considered a disability requiring accommodation under the *Act*. If a tenant is suffering from hoarding disorder that is a symptom of or amounts to a disability, a landlord has a duty to accommodate that tenant up to the point of undue hardship. Undue hardship occurs if accommodation would create onerous conditions for a landlord, such as intolerable financial costs or serious disruption to business.

> **Tip:** To learn more about the *Alberta Human Rights Act* and a landlord's human rights obligations in a tenancy situation, refer to the Alberta Human Rights Commission's website.

How can I accommodate a hoarder?

Accommodation means making changes to certain rules, standards, policies, and physical environments to ensure that they don't have a negative effect on a person because of the person's mental disability or any other protected ground. In a tenancy situation, reasonable accommodation may include:

- allowing tenants to accumulate more clutter than other tenants;
- working with tenants to help them improve any legitimate health and safety implications of a large accumulation of property; or
- after all other efforts have failed, providing extra storage space for tenants unable to get rid of possessions that are safety concerns.

(Content in list adapted from article by Sarah Eadie, "Human Rights in Residential Tenancies and the RTDRS".)

What can I do if accommodation doesn't work?

Eviction may be an option if accommodation doesn't work. Under the *RTA*, if a tenant breaches the rental agreement or the RTA, a landlord can evict a tenant through a 14 Day Eviction Notice. If a tenant opposes or fails to move out, the landlord can apply to the Residential Tenancy Dispute Resolution Service (RTDRS) or the Provincial Court for an order terminating the tenancy. While eviction is an option, balancing a tenant's right to enjoy their property with a landlord's duty to maintain minimum housing and health standards is difficult. The situation can become especially complicated when a tenant has a mental disability or if there's any other human rights issues involved. Landlords should speak with a lawyer before evicting a tenant with hoarding disorder or pursuing any legal remedies.

> **Tip:** If a situation involves a tenant hoarding animals, you can contact your local Humane Society or SPCA. Different agencies will investigate concerns based on the animal's location and type and the nature of the concern. For more information, refer to the Edmonton Humane Society's webpage on reporting animal concerns in Alberta.

CPLEA recently released a Hoarding and Tenancy Tip Sheet (complete with community resources and links to information on hoarding disorder). For more information on tenancy law in Alberta, go to www.landlordandtenant.org. ◆

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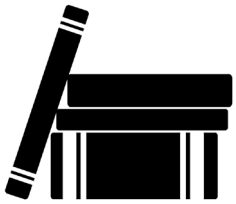
Revolution Mañana: Carlos Fuentes and the revolutionary potential in law and politics



Rob Normey

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

For me, Carlos Fuentes (1928-2012) remains one of the great writers of the Latin American Boom. He combined his talents as an imaginative novelist and short story writer with an unwavering dedication to participation in the major political and social debates of his time. He operated as a leading public intellectual and cultural ambassador for Mexico, while spending considerable time teaching in the U.S.A. He was perfectly bilingual and indeed bicultural in his vast knowledge of literature, history and film. Fuentes attended the School of Philosophy and Letters and the Law School in Mexico City. He was greatly influenced by his professors and their idealistic sense of the possibility of using international law and human rights norms to advance a progressive form of politics.

I have long been fascinated by Mexico and its often violent but also hopeful history, particularly its revolutionary heritage. I first travelled there in the early 1980s and was overwhelmed by the strange, vibrant and dynamic country I travelled through by bus (often putting the hammock I acquired in Merida to good use). On those long bus journeys, I was quick to pull out the novels of Fuentes as my foremost guide to the history of the ancient land which had so remarkably maintained its traditions in the challenging transition to modernity and 20th century economic development.

> *"A consistent theme in Fuentes' work is fusing the past, present and future."*

The Death of Artemio Cruz

This novel remains for me the most insightful account of the cultural meaning of the Mexican Revolution that began in 1910 and unfolded over two chaotic decades. Fuentes uses the stories

of a revolutionary fighter, Cruz, to trace the development of the country and the decay of the ideals for which volunteers like Cruz, and the companions who fought alongside him, risked their lives. At the very end of his life, Cruz is haunted by the memory of having escaped a prison sentence and death while a young lawyer (who shared his cell) and a courageous indigenous guide (Tobias, "the Yaqui") met their untimely deaths. In this novel, as in other works, Fuentes affirms the valiant efforts of indigenous peoples to ensure the success of the Revolution and its commitment to greater equality.

Written in 1962, this exceptional modernist novel employs a sophisticated 12-part structure. Cruz narrates events in his life in a fractured recounting of significant turning points. These events parallel historical developments, many of which unravel the noble ideals for which Cruz supposedly fought. The narration shifts in a dynamic pattern between first, second and third-person point of view.

The Years With Laura Díaz

In this later companion novel to *The Death of Artemio Cruz*, Fuentes provides us with another epic recounting of the years of the Mexican Revolution and its aftermath. Fuentes focusses on a woman who was briefly mentioned in the earlier novel, Laura Díaz. She is a politically committed woman with artistic ambitions who befriends the great painters Diego Rivera and Frida Kahlo. Years later, she embarks on a career as a photographer.

The novel is not the masterpiece that The Death of Artemio Cruz surely is and struck me as being too slack and diffuse. However, it is a valuable addition to Fuentes' body of work. In the short, episodic chapters, we see various points where the revolutionary impulse reaches fulfillment – or at least affords a sense of what was achieved by overthrowing both the nation's dictatorship and the economic domination of foreign corporations.

> *"I have long been fascinated by Mexico and its often violent but also hopeful history, particularly its revolutionary heritage."*

For me, the novel comes together best in those chapters depicting or alluding to the political breakthroughs of President Lázaro Cárdenas. In the years 1934-1940, his government enacted a whole raft of progressive legislation. A few of the government's notable achievements mentioned in the novel include:

- expropriating lands that had been taken from peasant communities, including indigenous communities, and returning them through communal holdings (ejidos);
- enacting laws giving social benefits to the poor and modernizing the education system to ensure that millions would be entitled to publicly-funded schooling for the first time;
- nationalizing the oil industry and asserting control over the economy and wider society. This allowed the Mexican government to use its natural resource wealth for its most needy citizens. President Cárdenas initiated the process of nationalization by referring his actions to the courts. Foreign oil companies from the United States and Britain then attempted to ignore the court's ruling and

repudiate their obligations to employees and the state. It was a classic miscalculation, premised on the notion that Mexicans would never be able to run the industry in an orderly and efficient manner; and

- supporting the democratically-elected Republican government of Spain, which was threatened by an attempted coup by fascists and their conservative allies in the country. President Cárdenas also ensured that Mexican law permitted persecuted Spaniards and members of the International Brigades to be granted refugee status in the country.

Fuentes references these significant events throughout the novel. For example, some of the Spanish refugees become close friends of Laura and carry on a series of philosophical dialogues on the prospects for social justice and a democratic rule that would respect human rights.

> *"He combined his talents as an imaginative novelist and short story writer with an unwavering dedication to particiation in the major political and social debates of his time."*

Fuentes also narrates a moment worth cheering for at the midpoint of the novel. Laura and her friends gather with other jubilant Mexicans in the Zocalo, where wild cheering takes place. All eyes momentarily turn to the "revolutionary President", who is saluted for possessing the courage to confront the oil companies who had bullied and exploited the Mexican people for years. Citizens hand over what they can – their jewellery, their chickens and their produce – to help pay the expropriation debt that will, they hope, free the country and inaugurate an exciting new era.

Conclusion

Fuentes previously wrote that the word "mañana" is often misunderstood by foreigners. It does not really mean putting things off for the morrow. Rather, it connotes the idea that the future should not intrude on the sacred completeness of today. A consistent theme in Fuentes' work is fusing the past, present and future. This fusion allows the reader to return to key moments in the unfolding of the Mexican Revolution (which is viewed as part of the wider sweep of world history), to find inspiration, and to discover ways to connect with moments of political transformation. Those chapters dealing with the legal and political reforms of President Cárdenas, made in the face of fierce opposition, illustrate one key to Fuentes' process of fusion. ◆

Ottawa situation highlights governance obligations in managing misconduct risks

Peter Broder

News earlier this year of the mass resignation of the Board of the Ottawa Lions Club should come as no surprise to followers of recent developments in organizational governance. The resignations came in response to a report commissioned by Athletics Canada into the group's handling of allegations of sexual harassment and abuse. The report didn't mince words about the organization's governance shortcomings and fiduciary failures.

The allegations related to incidents that took place over many years, involved both male and female athletes and were made against more than one member of the organization's personnel. The Ottawa group, one of the top track and field clubs in Canada, has had its reputation badly tarnished by the controversy. It drew fire for the original incidents, but more particularly for its ineptness in dealing with them.

"... due diligence should include not just identifying problems, but also thinking through processes for dealing with them."

Among the report's 21 recommendations was a call for resignation of the Board. In response, the full Board decided to depart and let new leadership of the group deal with the continuing fallout of the allegations.

At least two Ontario arts organizations – a theatre company and a radio station – have seen board turmoil in the wake of misconduct allegations. From the various controversies it has become apparent that, while sometimes accusations involve staff and program participants, it is also common for frontline volunteers and/or individuals with governance roles to be the subject of allegations.

And anyone thinking these types of problems relate primarily to voluntary sector organizational governance can have that view dispelled by a recent American PwC study of leadership changes in major corporations, which found that ethical lapses (including sexual misconduct) were the number one reason for top executives leaving their jobs in 2018. That category even outpaced poor financial performance as a cause of CEO turnover.

There has clearly been a societal shift in attitudes around this issue, and a growing expectation for measures to identify and deal with this type of misconduct.

Among the steps recommended by the report on the Ottawa group were:

- exclusion of coaches and former coaches from board positions;
- establishment of an ombudsman to handle misconduct complaints; and
- mandatory harassment training.

Where someone subject to an allegation has a governance role, it can make it particularly difficult to address the situation.

It is now well established that voluntary groups dealing with vulnerable populations need to have policies and protocols to manage the risk of harassment or abuse. Indeed, background checks and other proactive measures are typically routine for these organizations. It is increasingly apparent that the time has come for governing bodies across all sectors to routinely put in place harassment and whistleblower policies and other procedures to address improper behaviour wherever it may occur within an organization.

Neither legislation nor the courts have yet provided unambiguous guidance as to what directors need to do in this area to satisfy their fiduciary obligations. Uniform practice is probably unrealistic given the wide variety of circumstances and stakeholders across sector organizations. That said, the report on the Lions Club incidents pointedly noted "failings of fiduciary duties to athletes" by the Board of the Ottawa group.

> *"It is increasingly apparent that the time has come for governing bodies across all sectors to routinely put in place harassment and whistleblower policies and other procedures to address improper behaviour wherever it may occur within an organization."*

In the absence of more specific direction, members of an organization's governing body must turn their attention to the issue and adopt measures to manage the risk of harassment, abuse or other misconduct. It has become essential to do this to protect directors by allowing them to show that there was due diligence done in this area. That due diligence should include not just identifying problems, but also thinking through processes for dealing with them.

One of the harder aspects of this issue to grapple with is establishing a safe and effective process for responding to a complaint. As in the Ottawa case, allegations often involve people

that are embedded in the organization's governance structures. That's why it is essential to have a Whistleblower policy to reduce the chances of retaliation against someone lodging a complaint, and more broadly to have open communication channels to ensure that even those in positions of authority can be called out.

Many boards limit themselves to interactions only with the organization's senior staff person, or do not have routine *in camera* sessions at board meetings. Recruitment of directors, who are apt to bring more independent thinking, from outside the organization may not be a high priority. It is important for directors to consider whether, without these or other tools, enough opportunities exist for problems to be raised, or frankly discussed if they are raised. Unless the proper checks and balances exist, it may not be reasonable to assume an allegation will come to light, or can be dealt with fully and fairly.

One doesn't have to have followed this topic closely to know that there have been countless instances where allegations of sexual misconduct within organizations have been – deliberately or through happenstance – ignored or poorly pursued. Or, that when the incidents eventually surfaced, the reputational damage suffered by the organizations in question was likely exponentially worse than it would otherwise have been. And, as the Ottawa group discovered, it doesn't much matter whether the cover-up is deliberate or just the consequence of flawed governance.

While organizations will likely never be able to entirely eliminate sexual mischief in their operations, what boards can realistically do is make clear their willingness and ability to respond to bad behaviour when it occurs. In today's world, doing so is strongly recommended. ◆

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New Resources at CPLEA

All resources are free and available for download on cplea.ca. 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

In this issue of LawNow we are highlighting our new and updated FAQs. These resources can be found on CPLEA's Canadian Legal FAQs website at www.law-faqs.org. CPLEA's FAQ pages provide a list of frequently asked questions and answers on a particular topic. Canadian Legal FAQs are organized by legal topics that apply nationally or to Alberta.

New and updated Alberta FAQs:

- Adoption Records in Alberta
- Bicycle Laws
- Cannabis
  - Buying, Using, and Growing Cannabis in Alberta
  - Impaired Driving and Cannabis
  - Cannabis in Condos and Rentals
  - Cannabis in the Workplace
- Adult Interdependent Relationships (AIRs)
  - General Questions
  - Adult Interdependent Relationship Agreements
  - Ending an Adult Interdependent Relationship
  - Effect on Wills and Estates
- Marriage
- Organ Donation
- Searching Court Records

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