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Gay-Straight Alliances (GSAs)

Linda McKay-Panos

Gay-straight alliances (GSAs) are groups formed in schools and run by students with teacher support or sponsorship. The purpose of a GSA is to create welcoming, caring, respectful and safe spaces for LGBTQ2S+ (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Two-Spirit, Intersex, Pansexual, Asexual, Androgynous) students and their allies. GSAs often work on advocacy, human rights and awareness projects to make their communities more inclusive. According to Calgary's Centre for Sexuality, over 100 schools in Calgary and area have GSAs.

Overview of GSAs

GSAs have sprung up in schools across the United States and Canada over the last thirty years. These groups have been formed mostly in response to some troubling statistics about LGBTQ2S+ youth. A 2011 Canadian survey revealed the following:

- one in five Canadian LGBTQ students experience bullying every day;
- 90% of those are bullied with words;
- 70% hear transphobic (fear, discrimination or hatred against transgender people) remarks every day;
- 37% of students are harassed about their parents' sexual orientation;
- 44% of LGBTQ youth reported thinking about, considering or planning suicide (compared to 26% of heterosexual youth);
- 50% of LGBTQ youth reported self-harming (compared to 35% of heterosexual youth);
- 53% of LGBTQ youth felt unsafe at school (compared to 3% of heterosexual youth); and
- 30-50% of homeless youth identify as LGBTQ.

According to Ian Macgillivray (see: *Gay-Straight Alliances: A Handbook for Students, Educators and Parents,* 2007), **gay-straight alliances ARE:**

- student clubs started and run by students, for students;
- treated like any other student club in a school;
- a safe place for students to get support that they sometimes cannot find at home;
- a good way to address the social and emotional isolation endured by some LGBTQ students;
- an effective way to educate the school community about human rights, equality and diversity; and
- shown to decrease bullying, violence and risky behaviours.

On the other hand, he notes that **gay-straight alliances are NOT:**

- sex or dating clubs;
- an official endorsement of sexual orientation;
- limited to LGBTQ students; or
- anti-faith or anti-religious.

Bill 8: The Education Amendment Act *will come into force on September 1, 2019.*

Studies conducted in schools with GSAs indicate that GSAs make schools safer for LGBTQ students by sending a message that verbal and physical harassment will not be tolerated. Further, LGBTQ students are less

likely to miss school because of safety issues. GSAs also help LGBTQ students identify supportive school staff, which can have a positive impact on their academic achievement and experiences. (See Gay-Straight Alliances: Creating Safer Schools for LGBT Students and their Allies, GLSEN Research Brief.) In addition, the University of British Columbia concluded that GSAs in schools reduce the risk of suicide for all students.

History of GSAs in Alberta

Alberta Education has stated that students who attend schools with GSAs are far more likely to say that their schools are supportive of LGBTQ people. Students are more willing to reveal their sexual orientation or gender identity and see their school climate as becoming less homophobic. Other positive impacts reported by Alberta Education include:

- greater school attachment and connectedness which lead to higher academic achievement, greater participation in the school community, and lower levels of depression;
- increased student safety and decreased incidents of bullying;
- improved mental health and student well-being;
- higher self-esteem and positive identity development;
- increased development of advocacy and leadership skills;
- increased representation of visible LGBTQ identities, which can help to challenge stereotypical gender norms; and
- improved climate of gender inclusion and improved respect for differences.

In 2015, the Alberta government amended the *School Act*. The key amendments provided that:

- Alberta schools could not notify parents if their child joined a GSA;
- principals could only inform parents that a GSA existed in the school (s. 50.1; s. 16.1(6));
- if a student or group of students applied for permission to establish a "student organization" (this included GSAs), permission should be *immediately* granted by the principal (s. 16.1);
- principals could not prohibit or discourage students from calling the club a "gay-straight alliance" or "queer-straight alliance" (s. 16.1(3.1)); and
- all schools in Alberta that receive public funding must publish a policy that clearly allows students to form a gay-straight alliance (s. 45.1).

Section 45.1(5) of the *School Act* set out requirements for these policies:

> *A code of conduct … must contain the following elements:*
>
> *(a) a statement of purpose that provides a rationale for the code of conduct, with a focus on welcoming, caring, respectful and safe learning environments;*
>
> *(b) one or more statements about what is acceptable behaviour and what is unacceptable behaviour, whether or not it occurs within the school building, during the school day or by electronic means;*
>
> *(c) one or more statements about the consequences of unacceptable behaviour, which must take account of the student's age, maturity and individual circumstances, and which must ensure that support is provided for students who are impacted by inappropriate behaviour, as well as for students who engage in inappropriate behaviour.*

In 2018, a group of parents, private schools and two public interest groups started a lawsuit challenging the constitutionality of sections 16.1 and 45.1 of the *School Act*. They alleged that GSAs are harmful and expose children to inappropriate, sexually explicit information, as well as information about gender and sexuality that was harmful, ideological or harmful to parents' and schools' beliefs (at para 10). They also argued that the limitation on notifying parents would violate their *Charter* s. 7 rights (at para 11). The parties applied for:

- an interim injunction to suspend the operation of s. 16.1; and
- a second interim injunction to prohibit the Minister of Education from not funding their schools for not complying with s. 45.1 of the *School Act*, until the court could hear the constitutional issues.

Justice Kubik denied the injunctions on June 27, 2018. A majority of the Alberta Court of Appeal upheld this decision.

Changes to the Law

During the recent Alberta election campaign, the United Conservative Party (UCP) stated it would amend some of the GSA provisions (such as parental notification) and proclaim the previous *Education Act* (that existed in 2014 under the former government). Bill 8: The *Education Amendment Act* will come into force on September 1, 2019.

With respect to GSAs, the Alberta Government notes the main changes made by Bill 8 include:

- removing the requirement that a principal must immediately form a GSA upon request;
- removing the guarantee that students can use "gay" or "queer" in their school club's name;
- while schools are required to create policies dealing with welcoming, safe, caring and respectful schools, the new legislation does not contain the same requirements for the content of the policies; and
- while Alberta privacy legislation governs privacy considerations, the provisions in the *School Act* prohibiting notification have been deleted.

There have been several protests against Bill 8. One concern with the proposed changes is that students will no longer be protected from being "outed" by their teachers to their parents. This can be a safety concern and could also prevent some students from joining GSAs. The new Education Minister, Adriana LaGrange, assured Albertans that existing privacy legislation will protect students.

There are two Alberta laws on privacy of personal information:

1. the *Freedom of Information and Protection of Privacy Act* (*FOIPPA*), which applies to school boards and charter schools; and
2. the *Personal Information Protection Act* (*PIPA*), which applies to private schools.

Both laws allow disclosure of personal information in the following situations:

- where a school receives credible information that someone is threatening to harm GSA members;
- if information comes to the attention of a teacher as a result of a student disclosure made in the GSA setting (e.g. possibility of self-harm), disclosure may be justified in order to stop or minimize a risk of harm; or
- if disclosure is required for the purposes of law enforcement.

Alberta's Privacy Commissioner, Jill Clayton, released a "rare" statement outlining the privacy implications of the new GSA laws. The *Advisory on Disclosing a Student's Participation in a School Club* (Advisory) states that public or private schools cannot disclose personal information except as allowed under *FOIPPA* or *PIPA*. Even where the disclosures are allowed under *FOIPPA* or *PIPA*, these disclosures are discretionary (schools are not required but are allowed to use their discretion in releasing the personal information). The Advisory notes that a student's membership

in a GSA is personal information to which *FOIPPA* and *PIPA* apply. Further, it sets out the provisions in *FOIPPA* and *PIPA* describing when personal information of students may be disclosed.

Of interest is the ability of children (people under 18) to consent (agree) to the release of personal information, including informing others that they are members of a GSA. Only children who are mature minors (children considered mentally capable of consenting) can consent to the release of their personal information, including that they belong to a GSA. For all other children at public schools or charter schools, the individual's guardian can consent to the release of the information, but only if the exercise of this right would not constitute an unreasonable invasion of the minor's personal privacy (*FOIPPA* s. 84(1)(e)). For private schools, *PIPA* provides that an individual under 18 can consent to the release of their information if they understand their right and the consequences of exercising that right. If the individual does not meet these requirements, their guardian can consent on their behalf.

The Advisory highlights the complex privacy issues surrounding GSAs. Instead of barring absolutely the release to parents of information about their children's membership in a GSA or attendance at a GSA function, teachers now decide whether they should tell the parents that a child has joined a GSA. This could discourage some youth from joining GSAs out of fear of not being able to decide themselves when to reveal their sexual orientation or gender identity to their parents. Arguably the students who need the most support from GSAs will not get it.

Linda McKay-Panos

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The purpose of a GSA is to create welcoming, caring, respectful, and safe spaces for LGBTQ2S+ … students and their allies.

In Loco Parentis

Peter Bowal and John Rollett

> *... only minor corrective force of a transitory and trifling nature. [No] corporal punishment of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. ... [T]he conduct [must] be corrective, which rules out conduct stemming from the [teacher's] frustration, loss of temper or abusive personality ...*
>
> *– Canadian Foundation for Children, Youth and the Law v Canada (Attorney General) (2004 SCC 4 at para 40)*

Introduction

In loco parentis is a Latin legal term which translates into "in place of a parent." Traceable to 1926, it grants individuals caring for children the same rights and responsibilities as a parent. It was originally associated with "one who has acted ... in the situation which is ordinarily occupied by the father for the provision of the child's pecuniary wants". Case law throughout the century now allows a more broad interpretation beyond simply financial support.

In modern Canadian law, the term *in loco parentis* can apply to various scenarios where a parent places a child in the care of another individual, ranging from a professional such as a doctor to an amateur such as a babysitter. However, the rights and responsibilities in each case vary depending on several factors.

Photo from Pexels

This article is about *in loco parentis* status of teachers. Teachers often educate and care for many children at once. Given their obvious responsibilities, teachers' roles and rights are set out in both provincial education legislation and in the federal *Criminal Code*.

Who is a Teacher?

Provincial governments issue certificates of qualification to teachers under the applicable provincial laws. In Alberta, this law is the *Education Act*. Alberta has clear educational and professional experience requirements:

- 16 years of formal education (including a 4-year, full-time university degree); and
- 10 weeks of supervised student teaching (a practicum).

The Supreme Court of Canada has defined a schoolteacher more generally as "a person who gives formal instruction in a children's school". Therefore, the benchmark is instruction rather than caregiving, along with prescribed education qualifications and licences to teach.

Teachers enjoy specific protections under Canada's *Criminal Code*, but they also must follow their provincial laws (such as Alberta's *Teaching Profession Act*) and professional codes of conduct (such as The Alberta Teachers' Association's *Code of Professional Conduct*) to remain employed.

Responsibilities of a Teacher

Traditionally, the *in loco parentis* doctrine clothed teachers with the same responsibility as a parent and exposed them to the same liability for a child's wellbeing. This meant a teacher must act in the manner of a reasonable and prudent parent.

However, several Supreme Court of Canada decisions, such as *Thornton* (1978) and *Myers* (1981), invested teachers with "supra-parental expertise". This means that teachers will be held to the standard of a reasonable, competent professional.

In loco parentis *is a Latin legal term which translates into "in place of a parent."*

Corporal Punishment

Legal protection of teachers to corporally punish – spank – their students emerged in Canadian case law in 1936. In *Rex v Corkum*, the Nova Scotia judge said that "the authority of a school teacher to chastise a pupil is to be regarded as a delegation of parental authority" (p. 80).

In *R v Haberstock* (1970), the Saskatchewan Court of Appeal acquitted a school vice principal who slapped three 12-year-old students on the side of their faces, chipping a tooth of one of them. The trial judge found that the students had done nothing wrong. The vice principal said the students had called him names (such as "short ribs") the previous week.

Every time a teacher intentionally restrains or strikes a non-consenting student, that teacher may be liable for the crime of assault under section 265 of the *Criminal Code*. But section 43 also states:

> *Every schoolteacher … standing in the place of a parent is justified in using force by way of correction toward a pupil or child … if the force does not exceed what is reasonable under the circumstances.*

Corporal punishment – spanking – has essentially disappeared from Canadian schools. While it remains legal, it is widely frowned upon as a disciplinary practice and most school boards outright prohibit it. Nevertheless, section 43 of the *Criminal Code* offers legal protection for both parents and teachers, allowing them to "correct children with force that is reasonable under the circumstances."

Children equally enjoy the right to "life, liberty and security of person" under the *Charter of Rights and Freedoms* (1982) as well as freedom from discrimination based on age. In 2004, the Supreme Court of Canada confirmed the constitutionality of section 43 of the *Criminal Code* in the *Canadian Foundation for Children* decision. However, the Court considerably limited spanking by teachers as corrective action:

- Teachers are protected by section 43 only when removing a child from a classroom or trying to get the child to follow the teacher's instructions.
- No one can legally spank a child above the age of 12 years. And no one can use a device to spank a child. (The headmaster's strap will remain a relic of history.)

Moreover, section 43 only provides protection against criminal prosecution. Again, most provincial education legislation and school boards across the country specifically forbid corporal punishment. Spanker teachers could be disciplined by their profession (possibly lose their teaching license) and employer (possibly lose their teaching job). And the spanker teacher may even be civilly liable for battery of the student and may have to pay damages.

It appears that section 43 may be used to defend the detention of a student who is suspected of criminal activity. In *R v Sweet* (1986), a teacher restrained a student, accused of marijuana possession, as the student attempted to escape investigation against repeated orders to remain.

Conclusion

Teachers are responsible not only for educating children but also for enforcing policies and maintaining order. The law confers upon Canadian teachers some immunities to achieve these goals but corporal punishment in schools has become an historical footnote. Despite a teacher having a possible legal defence against a charge of assault, spanking or otherwise physically punishing a student would violate the teacher's professional code of conduct, provincial school legislation and school board policy.

By way of the *in loco parentis* doctrine, teachers stand in essentially the same legal position as parents. The practical use of *in loco parentis* relates to discipline and physical punishment of children. As we have seen here, physical contact used by teachers fifty years ago would not be acceptable today.

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Legal protection of teachers to corporally punish – spank – their students emerged in Canadian case law in 1936.

Distracted Driving and the *Traffic Safety Act*

Shaun Fluker

As the new school year begins, it is important to be even more alert on the roads while driving and particularly in school zones and playground zones. Distracted driving has become a major public safety issue with the proliferation of mobile technology and the in-dash features of modern vehicles. Traffic safety legislation across Canada includes provisions which make distracted driving an offence, and some provinces impose a license suspension even on the first conviction. The Canadian Automobile Association reports that approximately 1/4 of all accidents involve the use of mobile devices (including hands-free modes). The message is clear: Stay away from your mobile device while driving.

Below is a reprint of my comment about a recent Alberta case which considered the distracted driving provisions relating to mobile devices in Alberta's *Traffic Safety Act*.

Case Commented On: *R v Ahmed*, 2019 ABQB 13 (CanLII)

Alberta added distracted driving offences to the *Traffic Safety Act*, RSA 2000 c T-6 in 2011, and two of these provisions are the subject of this decision by Justice John T. Henderson. The accused was charged under section 115.1(1)(b) for operating a vehicle while looking at his mobile phone. This particular section prohibits driving while holding, viewing or manipulating a hand-held electronic device or a wireless electronic device. The facts were not in dispute at trial, but the traffic commissioner ruled that a mobile phone is not an "electronic device" and thus acquitted the accused. The Crown appealed this decision to the Court of Queen's Bench. A literal or plain reading of section 115.1(1)(b) does lead one to question the view that a mobile device is not an electronic device, but statutory interpretation is not always a literal exercise – particularly when the provisions themselves are written in a complicated or "inelegant" manner as is noted by the court here. This case is perhaps more about distracted drafting than it is distracted driving.

The need for some interpretation in section 115.4, together with the requirement that the Crown has to prove beyond a reasonable doubt that the activity distracts from the operation of a vehicle, is likely why there are relatively few convictions under section 115.4.

The mobile phone is on a shortlist of technology which has effected a profound change in our daily routine. These devices are an impressive and powerful machine with all sorts of functionality. I'm old enough to remember when the Walkman fundamentally changed how we listen to music, followed later by the Watchman, which never did have the same impact on viewing. But these days your mobile phone offers both of these services in a much more convenient and far more powerful technology, along with many other functions and connectivity. Describing these devices as a 'phone' has become a misnomer, and harkens back to a time when people actually used mobile devices to talk to each other. These are

more properly described as a portal into the virtual reality of the internet and social media where most communication occurs as cryptic messaging and images.

The functionality of mobile devices is highly addictive, and this is readily observable in just about any public setting. Think of how many people walk past you with their head pointed down at their mobile device, thumbs and fingers punching away and buds in their ears. Nearly all of us have done the same. The addictive nature of these devices also means they can be a distraction. This can be an annoyance when someone focused on their mobile device while walking gets into the right-of-way of others, but when it comes to driving a vehicle this distraction is a public safety hazard.

Unfortunately, many of us succumb to the temptation of using these devices while driving. How many times have you looked over to other drivers waiting at an intersection with their attention focused on a mobile device? Alberta Transportation publishes distracted driving enforcement statistics compiled annually since 2011. I was surprised to learn that the total distracted driving convictions in Alberta have ranged from 23,500 to 27,500 per year. The statistics also provide a breakdown of convictions by age and gender for the 2014 to 2018 years. When the offences were enacted back in 2011, the penalty was a fine of $187 and the conviction did not result in demerit points. Today, the penalty for a distracted driver conviction is $287 along with 3 demerit points (see the *Procedures Regulation*, Alta Reg 63/2017 and the *Demerit Point Program and Service of Documents Regulation*, Alta Reg 331/2002). Other provinces are increasing the penalties in even greater magnitude. In **Ontario**, a distracted driver now faces a license suspension and a fine up to $1000.

The distracted driving offences are set out in sections 115.1 to 115.4 of the *Traffic Safety Act*. While only section 115.1 was at issue in *R v Ahmed*, I have set out all the sections (with some editing for length) in order to illustrate the peculiar drafting in these provisions:

> *Cellular telephones, electronic devices, etc.*
>
> *115.1(1) Subject to this section and the regulations made under section 115.5, no individual shall drive or operate a vehicle on a highway while at the same time*
>
> *(a) holding, viewing or manipulating a cellular telephone, radio communication device or other communication device that is capable of receiving or transmitting telephone communication, electronic data, electronic mail or text messages, or*
>
> *(b) holding, viewing or manipulating a hand-held electronic device or a wireless electronic device.*
>
> *(2) An individual may drive or operate a vehicle on a highway while using a cellular telephone or radio communication device in hands-free mode.*
>
> *(3) Subsection (1)(a) does not apply to … [**clauses (a) to (d) in subsection (3) are omitted here, but these clauses reference the use of a 2-way radio or cellular phone or other communication device for required purposes such as employment or in an emergency situation**]*
>
> *(4) Subsection (1) does not apply to an individual driving or operating an emergency vehicle while the individual is acting within the scope of the individual's employment.*
>
> ….
>
> *Display screen visible to driver prohibited*
>
> *115.2(1) Subject to this section and the*

regulations made under section 115.5, no individual shall drive or operate a vehicle on a highway if the display screen of a television, computer or other device in the vehicle is activated and is visible to the individual.

*(2) Subsection (1) does not apply in respect of the display screen of … [**clauses (a) to (f) in subsection (2) are omitted here, but these clauses reference a GPS system, cellular or radio communication device in hands-free mode, commercial tracking device, dispatch system, collision avoidance system, and instrumentation regarding status of vehicle systems**]*

(3) Subsection (1) does not apply to an individual driving or operating an emergency vehicle while the individual is acting within the scope of the individual's employment.

Global positioning system

115.3(1) Subject to this section and the regulations made under section 115.5, no individual shall use a global positioning system navigation device for navigation purposes while driving or operating a vehicle on a highway.

(2) An individual may use a global positioning system navigation device while driving or operating a vehicle on a highway if the system

(a) is programmed before the individual begins to drive or operate the vehicle, or

(b) is used in a voice-activated manner.

…

Prohibited activities

115.4(1) Subject to this section and the regulations made under section 115.5, no individual shall drive or operate a vehicle on a highway while engaged in an activity that distracts the individual from the operation of the vehicle, including but not limited to

(a) reading or viewing printed material located within the vehicle other than an instrument, gauge, device or system referred to in section 115.2(2)(f),

(b) writing, printing or sketching,

(c) engaging in personal grooming or hygiene, and

(d) any other activity that may be prescribed in the regulations.

….

These provisions set out four categories of distracted driving offences: a mobile device in section 115.1; a laptop or similar device with a display screen in section 115.2; a GPS navigation device in section 115.3; and the catch-all distracting activities in section 115.4. In *R v Ahmed*, Justice Henderson observes the potential for overlap in the application of these provisions, and notes that the use of a mobile device while driving could be the *actus reus* in each of sections 115.1 to 115.4 (at para 28). I would add, however, that while using a mobile device would fall within the literal meaning of the phrase "engaged in an activity that distracts the individual" in the catch-all section 115.4, the *ejusdem generis* principle of statutory interpretation tells us that a general phrase such as this should be limited in scope to activities which share the genus of the more specific activities listed thereafter, which in clauses (a) to (c) of section 115.4(1) seem to

be concerned with either printed materials or personal hygiene. No flossing teeth while driving!

None of the operative words and phrases used to identify distracting activities are defined in the *Traffic Safety Act*, so these provisions will necessarily be the subject of some interpretation in cases where the accused does not admit guilt. What constitutes "personal grooming or hygiene"? What other activities are captured by section 115.4? What is an "electronic device"? What is "hands-free mode"? What does it mean to "manipulate" a device? Etc.

Alberta Transportation provides some interpretive guidance on the terms used in these sections, although most of it is merely a literal reading of the legislation and thus not very insightful. The website includes the following as activities not specifically prohibited under the general prohibition in section 115.4:

- using an earphone – if it is used in a hands-free or voice-activated manner
- drinking beverages – coffee, water or pop
- eating a snack
- smoking
- talking with passengers
- listening to a portable audio player – as long as it is set up before you begin driving

Yet it is not difficult to envision scenarios where any of these activities conducted while driving constitutes an "activity that distracts an individual" under section 115.4. Eating a poorly wrapped donair with extra sub sauce while driving a vehicle with a standard transmission can be a distraction while driving if the person having this snack is preoccupied with ensuring the sandwich doesn't drip onto their clothes.

The need for some interpretation in section 115.4, together with the requirement that the Crown has to prove beyond a reasonable doubt that the activity distracts from the operation of a vehicle, is likely why there are relatively few convictions under section 115.4. The statistics compiled by Alberta Transportation reveal that the overwhelming majority of convictions are under section 115.1(1). This is because section 115.1(1) presumes the activities listed therein will be a distraction, so it is an offence to merely hold a cellular phone or hand-held electronic device while driving; there is no need for the Crown to prove it is a distraction. Which brings us to *R v Ahmed*. Readers may want to refer back to the excerpt of sections 115.1 to 115.4 above while reading the following.

It seems that what really transpired here was that the charge against the accused was incorrectly laid under section 115.1(1)(b).

The accused was charged under section 115.1(1)(b) for operating a vehicle while looking at his mobile phone, and the traffic commissioner acquitted on the ground that a mobile phone is not an "electronic device" under clause (b) in subsection (1). While a mobile phone would obviously fall within a literal meaning of an "electronic device", reading section 115.1(1)(b) in context with the other distracted driving sections places some doubt on whether this literal reading was intended by the Legislature; most notably, that the prohibition against using a mobile phone is expressly set out in clause (a) of subsection (1) with reference to a cellular phone. This context suggests that the Legislature intended clause (b) to capture devices other than a mobile phone – this is an application of the *expressio unius* principle in statutory interpretation, which holds that where a word is explicitly used in one provision its absence in another provision can be given meaning because had the Legislature intended to capture the word it would have explicitly

done so. This was the conclusion of the traffic commissioner in ruling that section 115.1(1)(b) does not cover the use of a mobile phone while driving.

The Crown argued that the traffic commissioner erred in this interpretation, asserting that clauses (a) and (b) should be interpreted as constituting a single offence, not separate ones. Justice Henderson did not appear to accept this argument by the Crown, however he granted the appeal because he found the traffic commissioner erred in the interpretation that clause (b) does not include the use of a mobile phone. Justice Henderson set out the following as the basis for his interpretation of section 115.1(1)(b):

- the literal meaning of a "hand-held electronic device" or a "wireless electronic device" in clause (b) obviously includes a mobile phone (at paras 15 to 21);

- the use of the disjunctive "or" between clauses (a) and (b) in section 115.1(1) is not determinative of an intention by the Legislature to create them as separate offences (at paras 25 to 27);

- the use of a mobile device while driving could be the *actus reus* in each of sections 115.1 to 115.4, thus supporting the view that section 115.1(1)(b) includes this as well (at paras 28 to 31);

- the *expressio unius* principle is the weakest principle of statutory interpretation and thus should not be followed here, and moreover the court should not read in the words 'other than those referred to in clause (a)' beside "hand-held electronic device" in clause (b) (at paras 35 & 36);

- the fact that the exceptions set out in section 115.1(3) only apply to clause (a) in subsection (1) and not clause (b) (see the excerpts from the provisions set out above) is acknowledged by Justice Henderson as problematic for a reading that mobile phones are captured by both clauses (a) and (b), however this is simply an oversight in the "inelegant" drafting of section 115.1 (at paras 32 to 41).

The knock on principles of statutory interpretation is that too often their application seems like a results-orientated exercise. John Willis made this observation almost 80 years ago in his seminal article "Statute Interpretation in a Nutshell" published in the Canadian Bar Review. The accusation is that judges pick and choose between whether to give emphasis to a literal reading of words in a statutory provision or whether to read the words using nearby provisions or other aides external to the statute to assert that the purpose or intention of the Legislature was to give a meaning different from the literal one. It can be difficult to predict when a literal reading will be preferred to a contextual or purposive reading, or vice versa. Likewise, there are other principles of interpretation that seem to arise in some cases but not others. Here, for example, I was surprised not to see reference to the canon of interpretation that says legislation should be construed strictly in favour of an accused. It seems *R v Ahmed* was exactly the sort of case for which that ancient maxim was designed for.

Today, the penalty for a distracted driver conviction is $287 along with 3 demerit points ...

In *R v Ahmed*, Justice Henderson fails to address the difficulty in section 115.1 which flows from his interpretation that clause (b) in subsection (1) includes the use of a mobile phone while driving: A person charged under section 115.1(1)(b) for holding their mobile phone while driving cannot escape liability by asserting one of the exceptions listed in subsection (3), whereas those exceptions are available to a person who is charged under

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section 115.1(1)(a) for the very same activity of driving while holding their mobile phone. Surely this was not simply an oversight by the Legislature in subsection (3) to only refer to clause (a) in subsection (1) and not clause (b). The complexity of sections 115.1 to 115.4 suggests otherwise, and it would be an absurdity to suggest it is not an offence to use a "cellular phone" for an emergency purpose because of the application of subsection (3) to clause (a) in subsection (1), but it is an offence to use a "hand-held electronic device", which is a mobile phone for the same emergency purpose because subsection (3) does not state that it applies to clause (b) in subsection (1). In addition, Alberta Transportation itself lists convictions by each clause in subsection (1) independently with its enforcement statistics: clause (a) is 'communication'; clause (b) is 'electronic', which also suggests an intention that clause (b) was intended to capture devices other than mobile phones.

It seems that what really transpired here was that the charge against the accused was incorrectly laid under section 115.1(1)(b). It was an oversight on the part of someone, but I would respectfully say it is not helpful to stretch the principles of statutory interpretation beyond what they can bear in order to correct a mistake made in charging the accused. There is no dispute that the overall purpose in these sections includes preventing drivers from using their mobile devices while driving (as noted by Justice Henderson at paras 43 to 50), but that purposive reading does little to support a finding that mobile phones are captured in both clauses (a) and (b) in light of how the section is drafted.

This article first appeared on ABlawg on April 2, 2019 and is reprinted with permission.

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Student Legal Assistance

Susan V.R. Billington and Michelle De Cambra

2019 SLA summer clinic student team.
Photo Credit: Student Legal Assistance.

Celebrating 40 Years of Providing Access to Justice in Calgary and Area

In 1979, a small group of law students at the then newly minted law school at the University of Calgary formed a non-profit society to focus on access to justice for low-income Calgary and area residents. Forty years later, Student Legal Assistance (SLA) is a registered charity and still going strong with over 100 law student volunteer caseworkers serving over 600 clients per year with their legal matters.

Located in Murray Fraser Hall at the UCalgary campus, Student Legal Assistance plays an important role in providing access to justice for disadvantaged and marginalized groups who otherwise would be left unrepresented or would remain self-represented.

In recognizing the 40 years of SLA at UCalgary Faculty of Law, Dean Ian Holloway says:

> *We are proud to have Student Legal Assistance as such an integral component of the clinical legal education program at the UCalgary Faculty of Law for the past 40 years. SLA provides our law students with the opportunity to make a meaningful contribution to access to justice for low income Calgary and area residents while building a strong ethic of pro bono legal service.*

What We Do

Legal services are delivered directly to clients by UCalgary Faculty of Law student caseworkers. These student caseworkers provide information and representation within the limits set out in the Rules of the Law Society of Alberta. This includes agency representation:

- in the Provincial Court of Alberta in criminal, family, traffic and civil matters;
- at certain administrative tribunals; and
- in a variety of outreach programs.

SLA takes on adult clients that meet the fee eligibility guidelines and whose needs are within the scope of legal services that law students can provide.

SLA caseworkers provide agency representation in family law matters heard in the Provincial Court Family Division. This includes cases relating to child access (parenting, guardianship and contact orders), child maintenance orders, and Maintenance Enforcement orders. SLA student caseworkers regularly make appearances in the Family Division and are involved in alternate dispute resolution in family law matters, such as mediation and Judicial Dispute Resolution. SLA cannot assist clients in family matters heard in the Court of Queen's Bench, such as contested

divorces, disputes on matrimonial assets, or spousal support applications. As well, SLA student caseworkers do not assist in matters where Child Protection Services or Emergency Protection Orders are involved.

The highest proportion of client files opened and agency representation provided by SLA caseworkers is in the Provincial Court Criminal Division. Forty-eight percent of SLA's files are criminal law matters. SLA can assist with low complexity summary conviction criminal matters where the Crown Prosecutor is not seeking a custodial sentence upon conviction. SLA can provide representation in court on charges such as impaired driving, refusal to provide a breath sample, assault, mischief charges, and other summary conviction matters. When there is a possibility of incarceration if found guilty, SLA refers the individual to Legal Aid Alberta for representation by a lawyer.

... Student Legal Assistance plays an important role in providing access to justice for disadvantaged and marginalized groups who otherwise would be left unrepresented or remain self-represented.

Provincial Court Civil Division (Small Claims) is another area where law student caseworkers can assist eligible clients. Assisting clients in civil law matters makes up approximately fifteen percent of SLA's total files. Students help clients resolve disputes relating to consumer contracts, wrongful dismissal, debt collection agencies, and other civil law matters. SLA can assist plaintiffs with drafting their Civil Claim (up to $50,000). SLA can also assist defendants who are being sued in the Civil Division.

The majority of SLA's civil matters are landlord and tenant disputes. SLA may represent the landlord or the tenant, and regularly provides agency representation at Residential Tenancy Dispute Resolution Service (RTDRS) hearings or in Provincial Court.

Another key aspect of SLA's operations is its Outreach Program. Law student caseworkers regularly attend at locations of community partners to provide information and offer legal services to their clients. These organizations include CUPS (Calgary Urban Project Society), Alpha House, Inn from the Cold, and Dream Centre.

The Trial Confirmation (Duty Counsel) Project is a joint program between SLA and Calgary Legal Guidance to inform self-represented criminally accused persons of their options and make sure they are ready to proceed on their trial date. Trial Confirmation hearings are scheduled in Courtroom 507 at the Calgary Court Centre every Friday morning and afternoon for all low complexity criminal trial matters. Senior SLA caseworkers appear at the Trial Confirmation hearings to help self-represented accused persons navigate the legal system. There will often be as many as 15-20 accused persons on the docket needing guidance and direction from an SLA student.

SLA also runs a summer clinic from early May to mid-August each year. This summer, SLA employed 15 summer law student caseworkers. These law student caseworkers worked full-time serving clients in all of the above areas of law and provided intake interviews for clients on the 3rd floor of the Calgary Court Centre.

Forty-eight percent of SLA's files are criminal law matters.

The People of SLA

The SLA Student Director for 2019-2020 is Brad Webber, a 3rd year law student. Brad leads the volunteer caseworker team, providing training and support. He summarizes his experience at SLA as follows:

> *SLA has enriched my student experience at law school particularly in understanding a legal problem from the perspective of the client. At SLA and in the UCalgary Law clinical program, the focus is on access to justice and building skills in our law student caseworkers that takes what we have learned in the classroom and puts it into practice.*

The law student caseworkers and the articling student at SLA deliver legal services under the supervision of a team of advising lawyers. The advising lawyers are the backbone of what we do at SLA. They provide individual guidance to our law student caseworkers on each of their client files, from opening the file through to resolution, whether it is a trial or negotiated settlement, and all the steps in-between.

Family and civil law lawyer Sandra Hildebrand has been an advising lawyer with SLA for 16 years:

> *I have seen so many dedicated and committed law student caseworkers serve thousands of low income clients who would otherwise be without legal guidance. It is truly inspirational to see law students have such a commitment to serve these marginalized clients. Every time I come to SLA, I learn something from the students that provides me with a new perspective on my own practice.*

SLA is also so fortunate to have a tremendous volunteer Board of Directors, amazing administrative staff, and the support of over 150 volunteer lawyers, many of whom are SLA alumni. SLA's volunteer lawyers provide supervision in the evening client intake interviews and in a variety of programs at SLA.

Celebrating 40 Years

Forty years of providing access to justice is worth celebrating. Student Legal Assistance will mark the occasion with a gala on October 23, 2019 featuring keynote speaker the Honourable Sheilah Martin of the Supreme Court of Canada. Justice Martin will speak on "Using Law to Make a Difference". For more information on SLA and the gala, visit the SLA website.

Susan V.R. Billington

Susan V.R. Billington, Q.C., is the Executive Director of Student Legal Assistance in Calgary, Alberta.

Michelle De Cambra

Michelle De Cambra is the 2019-2020 articling student with Student Legal Assistance in Calgary, Alberta.

Student Legal Services

Sarah McFadyen

2019 Criminal Law Project caseworkers at SLS.
Photo Credit: Student Legal Services.

Celebrating 50 Years of Providing Access to Justice in Edmonton and Area

From September to June of each year, over two hundred and fifty law students at the University of Alberta provide free legal information and assistance to low-income individuals in Edmonton and area. These students volunteer as caseworkers and project coordinators with Student Legal Services (SLS). During the summer, SLS operates with twenty-one caseworkers and seven project coordinators. The organization has been operating since 1969 and celebrated its 50th anniversary this past summer. To celebrate, in typical SLS fashion, SLS is expanding its reach to assist even more low-income individuals, both in terms of location and areas of law.

50 Years of Service

Student Legal Services is a not-for-profit organization run by law students at the University of Alberta. SLS was established to help fill the gap in the Edmonton justice system by providing the low-income community with free legal information and assistance. The organization was created in the summer of 1969 by fourteen law students who had a passion for access to justice and who were inspired by the student legal clinics emerging across Canada and the U.S.A. At that time, the students did not have an office space, so they purchased a school bus painted in psychedelic colours and used it as their office. The students drove around the city providing the low-income community with legal information and assistance in true hippie fashion.

During the early years, the law students assisted individuals with a variety of matters ranging from criminal charges to welfare disputes and tenancy problems. Since then, the organization has continually evolved and expanded (and has seen its fair share of office spaces).

Today, Student Legal Services has two offices: East Campus House (at the University of Alberta) and Corona Office (in downtown Edmonton). SLS runs five projects:

1. The **Criminal Law Project** provides legal assistance and representation to individuals charged with a summary offence in Provincial Court who do not qualify for Legal Aid. Each year, the project handles upwards of 1000 criminal files.

2. The **Civil Law Project** assists individuals in Provincial Court and before several administrative tribunals with matters including landlord tenant issues, Workers' Compensation Board appeals, employment disputes, Employment Insurance appeals, contract disputes and general civil claims.

3. The **Family Law Project** assists individuals in Provincial Court with child support and varying parenting matters. SLS also hosts Do-Your-Own-Divorce clinics.

4. The **Legal Education and Reform Project** provides legal information to individuals through outreaches at low-income community organizations, including the Mustard Seed, Boyle Street, Bissell Centre, Homeless Connect and Hope Mission.

5. The **Pro Bono Students Canada (PBSC) Project** provides assistance to other legal services in Edmonton (such as Civil Claims Duty Counsel and QB Amicus) and legal research to third-party organizations in Edmonton.

Up and Coming Expansions

To continue the tradition of constantly evolving and expanding, this year's project coordinators have been hard at work developing new initiatives and projects. This fall, SLS is expanding two of its projects: the Criminal Law Project and the PBSC Project.

The Criminal Law Project is expanding its services into Wetaskiwin and Vegreville. Currently, the project assists individuals in Fort Saskatchewan, Leduc, Morinville, Sherwood Park, St. Albert and Stony Plain. There is a substantial need for free legal services in rural Alberta, and SLS is trying to fill that gap as much as possible. Therefore, expanding into Wetaskiwin and Vegreville was a natural next step. Student Legal Services caseworkers will be at the Wetaskiwin courthouse to open files the third Tuesday of every month beginning August 20th. Caseworkers will be at the Vegreville courthouse the second Monday of every month beginning August 12th.

The Pro Bono Students Canada Project is also working on some exciting expansions. The project is kick-starting two new clinics this fall in collaboration with volunteer lawyers around Edmonton. PBSC will be hosting a free Trans ID Clinic monthly from October 2019 to March 2020. The Clinic will operate as a drop-in and appointment-based service facilitated by volunteer lawyers and law students at the SLS office. Anyone can come to change their name or gender marker on their government-issued identification. The office is a learning space where students and lawyers have received Trans Positive and anti-oppressive training.

The PBSC Project will also be hosting a free Wills Clinic in partnership with the Seniors Association of Greater Edmonton (SAGE). This clinic will be an excellent resource for low-income seniors who cannot afford legal assistance. The goal is to help individuals create their wills with the advice of a lawyer so that they can be at ease knowing their affairs are taken care of. SAGE will host the Clinic once a month at their office downtown from October 2019 to March 2020. Volunteer lawyers and law students will help the low-income seniors by drafting wills or Power of Attorneys.

SLS was established to help fill the gap in the Edmonton justice system by providing the low-income community with free legal information and assistance.

Conclusion

Over the past 50 years, Student Legal Services has championed access to justice initiatives and is continuing to do so to this day. Reflecting on the past five decades, we are proud of the many lawyers, judges and community members who have walked through the halls of Student Legal Services. We would like to acknowledge that SLS and other access to justice initiatives in Edmonton would not exist without the tireless work of so many. We are proud to follow in their footsteps and hope to continue the spirit of Student Legal Services through our new initiatives.

Sarah McFadyen

Sarah McFadyen is currently working as the Executive Coordinator at Student Legal Services and is entering her 3rd year of law at the University of Alberta.

Special Report Canada as a Bilingual Country

The Constitutional Basis for Bilingualism in Canada

Peter Bowal and John Rollett

> *Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is … a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality.*
>
> *– Ford v Quebec ([1988] 2 SCR 712 (SCC) at para 40)*

Introduction

Language underlies the human experience, and language rights are fundamental to the peace and order of Canada. Given its European history of British and French settlement, Canada has experienced a lively debate over centuries about language rights, which have largely taken constitutional form. This article describes the constitutionalization of language in Canada. The powers and responsibilities for language rights are divided between federal and provincial governments.

Constitution Act, 1867

This 1867 constitutional document, sometimes referred to as the *British North America Act*, sets out the powers of the federal and provincial governments. Municipalities derive all their power from the provinces in which they are located.

Language Rules in the Fledgling New Canada

Section 133 of the *Constitution Act, 1867* addressed language rights and obligations in a very limited way. It only prescribed the language of federal and Quebec parliamentary and court proceedings:

> *Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective*

Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

Photo Credit: Jessica Nobert

Regulating Language According to Federal and Provincial Jurisdictions

For over 100 years, Canada had no other constitutional guidance on language. In 1969, the federal government enacted the *Official Languages Act*, which conferred equal status on French and English in Government of Canada institutions. The Supreme Court of Canada, in *Jones v AG of New Brunswick*, confirmed six years later that this was constitutional – that language is important enough to the sphere of federal operations that it could be regulated under the overarching mandate of the "peace, order, and good government" of Canada.

In the 1985 case of* Re Manitoba Language Rights, *the Supreme Court of Canada concluded that all of the unilingual English statutes from the Manitoba legislature were and always had been invalid and of no force or effect.

But what about the power of each *province* to likewise regulate language within the spheres of activity over which they exercise constitutional authority? In other words, it is one thing for the federal government to legislate official language status in the post office and immigration hearings. However, did each province have equivalent power to legislate language over its own provincial institutions, such as in its schools, hospitals and municipalities?

In 1977, Quebec passed the *Charter of the French Language*. This *Act* established French as Quebec's official language and mandated that all commercial forms, invoices, receipts, signs, posters, advertising and publications be solely in French. It declared that every Quebecois had the right to communicate in French in matters of civil administration, health and social services, and business. Substantial fines and the forced removal of any non-conforming posters, signs or advertisements backed up this law.

The Supreme Court of Canada, in its 1988 decision in *Devine v Quebec*, found this language legislation to be *within* provincial competence under the "property and civil rights" head of 1867 constitutional power. The Court characterized this "not as a law in relation to language [which is not enumerated in the 1867 Constitution], but as a law in relation to the institutions or activities that the provision covers". The Court determined that language is not an independent matter of legislation but is rather "ancillary" to the province's exercise of its power over the subject matter assigned to it (in this case, public administration and commerce).

Provincial language legislation must relate to an institution or activity that is within provincial jurisdiction. This prevents

governments from over-reaching and creating laws for institutions and activities that they do not govern. The Supreme Court of Canada reaffirmed this principle a decade later in the *Reference re Succession of Quebec* case. In that case, the Court echoed the "autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction".

Special Case of Manitoba

The *Manitoba Act, 1870* was a constitutional statute that created the Province of Manitoba. It also gave rights to the Métis, including bilingual institutions. Section 23 accorded French and English equal status for "Acts, records and journals" in the legislature. Nevertheless, Manitoba enacted its own *Official Languages Act* in 1890, which appointed English as the only language for legislative processes.

Provincial language legislation must relate to an institution or activity that is within provincial jurisdiction.

In the 1985 case of *Re Manitoba Language Rights*, the Supreme Court of Canada concluded that all of the unilingual English statutes from the Manitoba legislature were and always had been invalid and of no force or effect. The Court reasoned that the constitutional duty in Manitoba – about the manner and form of enacting legislation – protected the substantive rights of all Manitobans to equal access to the law in either French or English.

The sudden declaration of invalidity of all of Manitoba's legislation "would create a legal vacuum with consequent legal chaos" and destroy the rule of law. The province would be left with "an invalid and therefore ineffectual legal system until the Legislature is able to translate, re-enact, print and publish its current laws in both official languages". Therefore, the Court granted the laws temporary validity until the government could translate and re-enact the laws in both languages. Seven years later the Court was still negotiating extensions of time with Manitoba.

Charter of Rights and Freedoms

As has been shown, until the *Constitution Act, 1982* (also known as the *Charter of Rights and Freedoms* or the *Charter*), the Canadian Constitution did not comprehensively engage the language issue. The *Charter* explicitly addressed language rights in detail in sections 16 through 23 as well as implicitly in section 2 as "freedom of expression". Most of these provisions copy and clarify the existing 1867 obligations (and add New Brunswick to the list of bilingual provinces) and entrench the principles of the federal *Official Languages Act.* (A thorough review of these rights is beyond the scope of this article.) There have been challenges and elaborations on many fronts, including language in education and law courts across Canada.

Much of the post-1982 *Charter* focus has been on Quebec's *Charter of the French Language* (known also as Bill 101). This *Act* endeavours "to make French the language of government and the law [in Quebec], as well as the normal and everyday language of work, instruction, communication, commerce and business" (preamble). It has, on several occasions, attracted the attention and analysis of the Supreme Court of Canada, including in two companion cases in 1988: *Ford* and *Devine*.

***Quebec (like all other provinces) can legislate for language within the province under the* Constitution Act, 1867 *(section 92) but all language laws must also comply with the* Charter.**

The Court struck down some provisions that required all public signs, advertisements and commerce be printed solely in French. The Court reasoned that these provisions unduly infringed on non-francophones' freedom of expression and engendered discrimination based on language. This led to the first – and only (to date) – invocation of the *Charter*'s "notwithstanding clause" (section 33). In the intervening three decades, Quebec's *Charter of the French Language* has been amended often to comply with Canada's *Charter*. In summary, Quebec (like all other provinces) can legislate for language within the province under the *Constitution Act, 1867* (section 92) but all language laws must also comply with the *Charter*.

Language and Education

The *Charter* sets out the language rights of Canadians in their public education. They enjoy constitutional rights to receive primary and secondary schooling in French or English, depending on which language they have first learned and understood. French-Canadians must be offered French schooling for the entirety of their basic education while English-Canadians are offered the same in English.

Quebec's *Charter of the French Language* requires all children in Quebec to attend a French language school unless they have parent who received a basic education in English, or they have already completed most of their education in English. This is the lone path to an English-only education in Quebec.

Conclusion

Today Canada is one of 55 bilingual countries around the world. Our Constitution establishes and protects bilingualism and gives the various levels of government power and responsibility over language and language rights to all Canadians.

The interlocking tension between the *Constitution Act, 1867* grant of power to governments to regulate the activities and institutions within their jurisdiction and the freedom of expression created by the *Constitution Act, 1982* will continue to define the living cultural waters of language in the years to come. This same constitutional process will also continue to ensure our official national bilingualism.

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John Rollett

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Why is Canada a Bilingual Country?

Myrna El Fakhry Tuttle

Photo from Pexels

Canada has two official languages: French and English. We always wonder why.

Canada's two colonizing peoples are the French and the British. They controlled land and built colonies alongside Indigenous peoples, who had been living there for millennia. They had two different languages and cultures. The French spoke French, practiced Catholicism, and had their own legal system (civil law). The British spoke English, practiced Protestantism, and followed a common law system.

The British controlled parts of what is now Newfoundland. The French existed in the Maritimes (modern-day Nova Scotia, New Brunswick and Prince Edward Island) and Québec.

The French colonized Canada first. However, the British took over all French colonies in the Maritimes and Québec through different wars, including the Queen Anne's War (1702-1713) and the Seven Years' War (1756-1763). As a result, the British managed these territories politically, but the French dominated them culturally. That was a matter the British had to deal with. People in those colonies spoke French and followed French religious and legal practices (see: Official Bilingualism in Canada: History and Debates) [Official Bilingualism in Canada]).

In Québec, the British decided to authorize French culture and language but within British control. The British passed the *1763 Royal Proclamation*. This action forced British law and practices on British colonies in North America, including those with large French populations. However, in 1774, the British enacted the *Québec Act*, which overturned this practice. This Act guaranteed the practice of the Catholic faith in Québec and allowed French civil law in private matters. In matters related to public administration, such as criminal prosecution, the common law system applied (see: Official Bilingualism in Canada).

In 1841, the *Act of Union* recognized that both the British and the French existed side-by-side but with the intention that French Canadians would eventually integrate into the British culture. The intention was that religious, cultural and legal dualism would be only temporary. This perception, based on the Durham Report, introduced a British parliamentary system including in Québec, but it could not banish the French language and the Catholic religion (see: Cultural Duality).

The first* Official Languages Act's *purpose was not to ensure that every Canadian spoke both English and French.

Following that, the federal government enacted many laws to preserve both

languages. In 1867, the year of Confederation, the British Parliament passed the *British North America Act* (now the *Constitution Act, 1867*). This *Act* united three British colonies – Nova Scotia, New Brunswick and the province of Canada (Ontario and Québec) – as the "Dominion of Canada". The *Act* allowed for other British colonies in North America to be admitted as well. With that came the idea that English and French-speaking communities should exist side-by-side and complete each other:

> *The Constitution Act of 1867 (formerly known as the British North America Act) established English and French as legislative and judicial languages in federal and Québec institutions. It also set out the right to denominational schooling, which at that time was closely associated with the anglophone (Protestant) and francophone (Roman Catholic) linguistic and cultural traditions. (See: Bilingualism.)*

Section 133 of the *Constitution Act, 1867* defined English and French as the official languages of the Canadian Parliament, as well as the courts. It also established both English and French as the official languages of the Québec legislature and courts. It states:

> *Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Québec.*
>
> *The Acts of the Parliament of Canada and of the Legislature of Québec shall be printed and published in both those Languages.*

In 1969, the federal government passed the first *Official Languages Act* on the recommendation of the Royal Commission on Bilingualism and Biculturalism. It proclaimed French and English as the official languages of Canada. According to this *Act*, all federal institutions must provide services in French or English, depending on the requested matter. In order to manage its implementation, the *Act* created the Office of the Commissioner of Official Languages (see: Official Languages Act (1969)).

The first *Official Languages Act*'s purpose was not to ensure that every Canadian spoke both English and French. The aim was to offer federal services to Canadian citizens in the official language of their choice. Those services were to be available in the requested language without any delay and were to be of equal quality, regardless of the chosen language (see: Understanding Your Language Rights).

The* Official Languages Act *is a federal act and applies only to federal institutions. It does not apply to provincial and territorial governments.

One year later, in 1970, the federal government established the Official Languages in Education Program. This program provides provinces and territories funding for second language instruction and minority language education in both English and French. Besides this program, federal, provincial and territorial governments have also embraced French immersion education programs. In these programs, students receive most of their education in the French language (see: Official Bilingualism in Canada).

Moreover, to ensure that all Canadians can read and understand product packaging, the federal government enacted the *Consumer Packaging and Labeling Act* in 1974. This *Act*

requests that consumer products sold in Canada be labelled in both English and French.

In 1982, the *Charter of Rights and Freedoms* recognized language rights. Section 16 of the *Charter* acknowledges that English and French are the official languages of Canada. Both languages have equal status and equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada. Sections 17, 18 and 19 state that English or French are to be used in any debates and in the proceedings of Parliament, in parliamentary papers, and in court established by Parliament. Section 20 deals with the use of English or French in communications between federal institutions and members of the public. Section 23 talks about minority language education rights for English-speaking children in the province of Québec and French-speaking children in the rest of Canada.

In 1988, the federal government revoked the *Official Languages Act* of 1969 and replaced it with a new *Official Languages Act*. Section 2 sets out that the purposes of the new *Act* are to:

> *(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, … ;*
>
> *(b) support the development of English and French linguistic minority communities … ; and*
>
> *(c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.*

In 2005, the Government of Canada amended Part VII of the *Official Languages Act*. This part requires all federal institutions to take positive actions to promote the acknowledgment and use of both English and French in Canadian communities (see: Archived – Perspectives of Canadians of Diverse Backgrounds on Linguistic Duality).

The *Official Languages Act* is a federal act and applies only to federal institutions. It does not apply to provincial and territorial governments. Therefore, each of Canada's provinces and territories has adopted its own official language policy. Québec is the only province that acknowledges French as its sole official language. New Brunswick is the only bilingual province where both English and French are official languages. In other provinces and territories where English is the main working language, they provide government services in French as well as Aboriginal languages (see: Language in Canada).

In 1841, the* Act of Union *recognized that both the British and the French existed side-by-side, but with the intention that French Canadians would eventually integrate into the British culture.

The government enacted the laws described above in order to protect language rights and ensure that all Canadians are treated equally. However, having two official languages does not mean that every Canadian must speak both languages. It means that all federal services must be offered to Canadian citizens in both French and English. Bilingualism is one of Canada's core values of inclusiveness and diversity. Canadians have recognized that diversity is a strength that has encouraged openness toward other peoples. And because of bilingualism, Canada is a more welcoming country for immigrants and refugees from different cultures and ethnic backgrounds.

Myrna El Fakhry Tuttle

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Other Official Languages in Canada

Charles Davison

Photo from Pixabay

Canada is known around the world as an officially bilingual country. Federally, French and English share equal status as the "official languages." The same is true in some of the provinces and territories. What is perhaps not known as widely (in southern Canada, at least) is that there are other official languages in two territories: Nunavut and the Northwest Territories.

Nunavut

In Nunavut, the "Inuit Language" is an official language, along with English and French. Interestingly, which "Inuit Language" is official depends in which geographical area of the territory you are:

- In the northeast (around Kugluktuk, Cambridge Bay, and the Bathurst Inlet area), Iniunnaqtun is the official language.
- Inuktitut is the official Inuit Language for the rest of the territory.
- The government may declare both Iniunnaqtun and Inuktitut to be the official languages depending on the place and the purpose.

Declaring the local Inuit Language to be an official language makes sense when one considers that the population of Nunavut is overwhelmingly of Inuit descent (over 80%) though not all speak an Inuit Language.

However, residents in many of the more remote, smaller and traditional communities often speak the local Inuit Language more than any other language.

The Northwest Territories

The Northwest Territories has the widest selection of official languages in Canada with eleven languages. In addition to English and French, nearly all of the Aboriginal languages used by sizable segments of the population have official status.

The nine other official languages of the Northwest Territories are:

1. Chipewyan (spoken mainly in the south-eastern corner of the territory, in the areas of Fort Smith and Fort Resolution and westwards toward Hay River);
2. Cree (spoken in the same regions as Chipewyan);
3. South Slavey (spoken in the southern part of the territory from Hay River to Fort Liard);
4. Tlicho (spoken in the area to the west of Yellowknife);
5. North Slavey (spoken in the Sahtu region along the Mackenzie Valley and around Great Bear Lake);
6. Gwich'in (spoken in the western part of the Mackenzie Delta, including the

communities of Tsiigehtchic and Fort McPherson);
7. Inuvialuktun (spoken in the western Arctic, around Tuktoyaktuk, Paulatuk and Sachs Harbour);
8. Inuuinnaqtun (spoken in Uluhaktuk, and elsewhere in the Northwest Territories bordering the western edge of Nunavut); and
9. Inuktitut (spoken mainly in the far Eastern Arctic in what used to be part of the Northwest Territories but is now Nunavut). According to the Prince of Wales Heritage Centre in Yellowknife, virtually all Inuktitut speakers in the Northwest Territories now live in Yellowknife itself.

Law vs. Practice

Because of their shared history – until 1999 Nunavut and the Northwest Territories were a single territory – the laws in the two territories are almost identical. In both territories, the official nature of the various languages means that all are legally equal when it comes to government agencies and institutions. Any of the official languages can be used in the legislatures. Translation services are provided for anyone who wants to observe, in person or through media.

In March 2019, the federal government introduced legislation to carry out most of the Commission's recommendations concerning Aboriginal languages.

Similarly, any of the official languages can be used in the courts, and interpreters will be provided as necessary. Laws or regulations are usually only published in English and French, although the government can direct for translation into any of the other official languages. In the Northwest Territories, the court is only required to issue its decisions in English or French (and sometimes in both). In Nunavut, an interested party may ask the court to provide a translation of a decision or order into the official language of their choice.

Both territories have Languages Commissioners whose role is to oversee and enforce respect for the language laws. The legislation in both Nunavut and the Northwest Territories set out legal options for individuals who feel their language rights are not being respected and honoured.

Despite the similarities between the two territories, the Nunavut language laws actually go further than those in the Northwest Territories in ensuring the local Indigenous languages are preserved and used. It is mandatory in Nunavut that government institutions use all of the official languages on signs and notices. Keep in mind that, at most, this means using four languages. Accommodating the official languages is somewhat easier in Nunavut than would be in the Northwest Territories. Signs and notices in the Northwest Territories would have to be displayed in 11 languages if the law was the same as in Nunavut. Instead, the Government of the Northwest Territories may communicate in an official language other than English or French where it considers the demand is high enough and where it is reasonable, in all of the circumstances, that services be available in that other language.

Perhaps, in the spirit of ensuring the survival of Indigenous languages, it is time for the Northwest Territories to adopt a more localized but mandatory approach (similar to that in Nunavut) in using its official languages. For example, only a couple of years ago the Government of the Northwest Territories spent a significant amount of public money to replace all of its English-only communications (signs, letterhead, business cards and so on) with bilingual English-French forms. The most public example of this was likely the signs in Territorial Parks, which now show French and English. However, roughly only three percent

of the territory's population is French. The government did not provide for signs to display the local Aboriginal language, even in the areas where residents speak the local Indigenous language more than French.

The Northwest Territories has the widest selection of official languages in Canada with eleven languages.

In a May 2019 newspaper column, Norman Yakeleya, the National Chief of the Dene Nation and regional Chief of the Assembly of First Nations, noted that only two of the Northwest Territories' eleven official language are given priority – English and French. The other nine are acknowledged as equal only in law but not in practice. When it comes to Territorial Park signs, he suggested that at least the local Indigenous language(s) should also be included.

In late 2018, the Supreme Court of Canada issued a decision on Canada's official languages. The Court confirmed that the government has a positive duty to implement and not interfere with the rights of French and English speakers, at least when it comes to contact with government agencies and institutions. In the Northwest Territories and Nunavut, the territorial governments surely have a similar important duty where the Indigenous languages are also "official".

Aboriginal Languages across Canada

Canada has recently started to seek reconciliation with its Aboriginal Peoples. An important part of the reconciliation process should be the preservation, and in some cases the revitalization, of the languages of our Indigenous communities.

In its 2015 report, the Truth and Reconciliation Commission called upon the federal government to implement legislation to preserve and strengthen the use of Indigenous languages, including by funding appropriate programs to accomplish this objective. This suggestion is particularly meaningful when we consider that a central part of the residential schools program included forcing (sometimes using violent methods) Aboriginal children to stop speaking their own languages and to use only English or French. In March 2019, the federal government introduced legislation to carry out most of the Commission's recommendations concerning Aboriginal languages.

It is mandatory in Nunavut that government institutions use all of the official languages on signs and notices.

The Inquiry into Missing and Murdered Indigenous Women and Girls went even further in its 2019 final report. It called for all governments to recognize (at least the local) Aboriginal languages as "official", "with the same status, recognition and protection provided to French and English".

We are now seeing more efforts of Aboriginal language revitalization and preservation:

- Local Aboriginal communities are reclaiming their traditional names. As self-governance becomes more common, more communities are using their own languages for their internal political affairs and decision-making.
- Across Canada, schools in both Aboriginal communities and larger municipalities are teaching more and more Indigenous languages.
- There are courts in some provinces where the working language is the local Aboriginal tongue. For example, there is a "Cree Court" in Saskatchewan and a Mi'kmaq language court in Nova Scotia. And the Federal Court of Canada just announced in May 2019 that it will start

translating some of its decisions into whatever Aboriginal language might be most relevant and appropriate in the circumstances.
- In larger cities, such as Edmonton and Toronto, municipal governments are renaming, or giving dual names to, streets and highways in the Aboriginal language of the area.
- Hockey Night in Canada recently produced its first Cree-language broadcast of a game. And in 2010, CBC broadcast a "Hockey Day in Canada" game in Inuktitut.

It is time for governments across Canada, at all levels, to be more proactive in promoting Aboriginal languages. The aim of past government policy was to extinguish Aboriginal languages. The only way to begin to repair the harm done is to now actively promote and encourage the rebirth and strengthening of the languages of Canada's original founding peoples.

Charles Davison

Charles Davison is the Senior Criminal Defence Counsel with the Somba K'e office of the Legal Services Board in Yellowknife, N.W.T.

Assurer l'éducation en français : les Franco-Albertains et leurs droits linguistiques

Photo Credit: Jessica Nobert

Association des juristes d'expression française de l'Alberta

Les droits linguistiques ont toujours été et sont toujours un sujet de discussion important dans de nombreux secteurs de la société canadienne, notamment :

- la promotion de l'accès aux services gouvernementaux et non gouvernementaux dans les deux langues officielles ;
- l'accès pour les justiciables à un système de justice sans barrière langagière ; ou
- la possibilité pour les parents de faire éduquer leurs enfants dans la langue officielle de leur choix.

Bien que de nombreux progrès aient été réalisés dans le domaine des droits linguistiques, la réalité est qu'un nombre significatif de Canadiens vivant en situation de minorité linguistique ont toujours de la difficulté à s'exprimer et à se faire comprendre dans leur langue maternelle lorsqu'ils tentent d'obtenir des services fournis par le gouvernement fédéral ou des agences fédérales.

La francophonie en Alberta

Fait peu connu : le français a été la première langue européenne parlée en Alberta. La langue a été importée avec l'arrivée des commerçants de fourrure au 17e siècle. En 1877, le français et l'anglais sont devenus les langues officielles de l'Assemblée législative des Territoires du Nord-Ouest, qui comprenait l'Alberta. En 1905, la *Alberta Act* créant la province de l'Alberta fut proclamée dans les deux langues, mais ne fit aucune mention des droits linguistiques.

Historiquement, l'enseignement du français était autorisé au cours des deux premières années d'école primaire.

En 1988, la législature de l'Alberta a adopté le projet de loi 60, la loi *Languages Act*, qui abolissait les droits linguistiques prévus à l'article 110 de la loi sur *les Territoires du Nord-Ouest de 1877*. La *Languages Act* a officiellement déclaré l'Alberta comme province anglophone unilingue, mais permettait toujours l'utilisation de la langue française à l'Assemblée législative et devant les tribunaux.

À la fin des années 90, le Secrétariat francophone de l'Alberta est créé. En 2017, la province adopte sa première politique en matière de francophonie. La même année, le drapeau franco-albertain devient un emblème de l'Alberta.

Aujourd'hui, la francophonie en Alberta est en pleine croissance. En effet, 7 % des Albertains parlent le français et 2 % ont le français comme langue maternelle. En fait, l'Alberta compte le troisième groupe de francophones en situation de minorité en importance après l'Ontario et le Nouveau-Brunswick. L'Alberta compte également la population francophone ayant la croissance la plus rapide au Canada après le Québec. Quatre municipalités albertaines sont officiellement bilingues, tandis que 31 communautés albertaines ont une francophonie forte et diversifiée. Enfin, plus de 100 organismes francophones à but non lucratif opèrent en Alberta dans divers secteurs.

Les droits linguistiques et le système d'éducation albertain

Les droits linguistiques en Alberta ont souvent été, et sont toujours, revendiqués dans le contexte de l'éducation.

Historiquement, l'enseignement du français était autorisé au cours des deux premières années d'école primaire. En 1964, la *School Act* était modifiée pour autoriser l'enseignement en français de la 1re à la 9e année, mais selon une progression décroissante. La 1re et la 2e année peuvent s'enseigner entièrement en français à l'exception d'une heure d'anglais par jour. En 3e année, on devait assurer deux heures d'enseignement en anglais par jour. À compter de la 4e année, l'enseignement en français devait se limiter à une heure par jour.

Un élève albertain sur trois apprend le français.

Quatre ans plus tard, une modification de la *School Act* autorisait l'enseignement en français à raison de 50 % de la journée scolaire, et ce, de la 4e à la 12e année. En 1976, l'adoption du *Règlement 250/76* modifiait de manière significative l'éducation en langue française. L'enseignement pouvait maintenant être offert entièrement en français, à l'exception d'une heure réservée à l'enseignement de l'anglais à partir de la 3e année.

À partir de l'année 1982, l'article 23 de la *Charte canadienne des droits et libertés* (la *Charte*) permet l'éducation dans la langue minoritaire si le nombre le justifie. En Alberta, les deux premières écoles francophones financées par des fonds publics ont ouvert leurs portes en 1984 : l'école Maurice-Lavallée à Edmonton et l'école Saint-Antoine à Calgary. En 1988, la province a adopté une politique permettant aux élèves albertains de s'inscrire dans un programme d'immersion française ou d'apprendre le français comme langue seconde.

Un exemple concret : l'affaire *Mahé c Alberta*

Bien que l'article 23 de la *Charte* accorde des droits aux minorités linguistiques, les parents franco-albertains n'avaient pas le droit de gérer leurs écoles de langue française, élément fondamental pour que la langue et la culture s'épanouissent en milieu minoritaire. En fait, il s'agissait là de la principale question soulevée dans l'arrêt *Mahé c Alberta* rendu en 1990 par la Cour suprême du Canada.

… le français a été la première langue européenne parlée en Alberta.

La partie appelante était insatisfaite de l'éducation en français à Edmonton. En 1982, la partie appelante a proposé au ministre de l'Éducation de l'Alberta de créer une nouvelle école primaire publique de langue française à Edmonton. Cependant, selon sa politique, le ministre ne pouvait pas créer de nouveaux districts scolaires français.

Comme mentionné ci-dessus, en 1984, l'école Maurice-Lavallée a ouvert ses portes comme école ayant le français comme langue d'enseignement et d'administration. Cependant, les appelants étaient toujours insatisfaits, car leur école relevait de l'Edmonton Roman Catholic Separate School District. La partie appelante s'est appuyée sur l'article 23 de la *Charte* pour faire valoir que la minorité linguistique a le droit à ce que leur école soit administrée par son propre conseil scolaire.

La Cour suprême du Canada a accueilli l'appel et a conclu que l'article 23 accordait à la minorité linguistique d'Edmonton le contrôle et la gestion de l'éducation et des établissements d'enseignement.

Les impacts de la décision *Mahé* et les considérations politiques qui en découlent

À la suite de la décision *Mahé*, les Franco-Albertains ont obtenu le droit d'avoir des écoles francophones homogènes et de les gérer.

En fait, en 1999, cinq conseils scolaires régionaux francophones étaient établis en Alberta. En 2013, il y a eu une fusion des deux conseils scolaires francophone du sud de l'Alberta. À ce jour, il y a quatre autorités régionales francophones en Alberta.

Remarques finales et perspectives futures

Aujourd'hui, 27 communautés comptent une ou plusieurs écoles de langue française pour un total de 42 en Alberta. Un élève albertain sur trois apprend le français. Il y a 8 403 élèves francophones, 45 543 élèves dans un programme d'immersion française, et 146 439 élèves qui apprennent le français comme langue seconde. De plus le Campus Saint-Jean de l'Université de l'Alberta offre une éducation postsecondaire en français à environ 850 étudiants (statistiques de l'année universitaire 2017-2018).

Compte tenu de la croissance actuelle de la francophonie en Alberta et de l'intérêt croissant pour l'éducation en français, il sera intéressant d'observer la direction que prendra l'Alberta pour respecter et mettre davantage en œuvre les droits linguistiques de sa minorité de langue officielle.

ENGLISH TRANSLATION

Ensuring French Education: Franco-Albertans and Their Linguistics Rights

Linguistic rights have always been and continue to be an important topic of discussion in many areas of Canadian society, including:

- promoting access to governmental and non-governmental services in both official languages;
- providing litigants with access to a justice system free from language barriers; or
- giving parents the opportunity to educate their children in the official language of their choice.

While much progress has been made in the area of linguistic rights, the reality is that a

significant number of Canadians living in a linguistic minority situation still have difficulty speaking and being understood in their first language when accessing services provided by the federal government or agencies.

Historically, French education was allowed in the first two years of elementary school.

The Francophonie in Alberta

A little known fact: French was the first European language spoken in Alberta. The language was imported with the arrival of the fur traders in the 17th century. In 1877, French and English became the official languages of the Northwest Territories Legislative Assembly, which included Alberta. In 1905, the *Alberta Act*, which created the province of Alberta, was proclaimed in both languages but made no mention of linguistic rights.

In 1988, the Alberta legislature adopted Bill 60, the *Languages Act*, which abolished language rights provided in section 110 of the *Northwest Territories Act of 1877*. The *Languages Act* officially declared Alberta a unilingual anglophone province but still allowed the use of the French language in the legislative assembly and in the courts.

At the end of the 1990s, the Alberta Francophone Secretariat was created. In 2017, the province adopted its first policy regarding francophone matters. The same year, the Franco-Albertan flag was declared as one of Alberta's emblems.

Today, the Francophonie in Alberta is growing. Indeed, 7% of Albertans speak French with 2% having French as their first language. Actually, Alberta has the third largest population of Francophones in a minority situation after Ontario and New Brunswick. Alberta also accounts for the fastest growing francophone population in Canada after Québec. Four Alberta municipalities are officially bilingual while 31 communities in Alberta have a strong and diversified Francophonie. Lastly, more than 100 non-profit francophone organizations operate in Alberta in various sectors.

Language Rights and the Alberta Education System

Linguistic rights in Alberta have often been, and continue to be, claimed in the context of education.

Historically, French education was allowed in the first two years of elementary school. In 1964, the *School Act* was amended to allow teaching in French from grades 1 to 9, but in a decreasing progression. Grades 1 and 2 could be taught entirely in French with the exception of one hour of English per day. In grade 3, two hours of English instruction per day were required. Beginning in grade 4, instruction in French was limited to one hour per day.

One in three Alberta students learn French.

Four years later, an amendment to the *School Act* allowed instruction in French for 50% of the school day from grades 4 to 12. In 1976, the adoption of Regulation 250/76 brought a significant change to French-language education. Teaching could now be offered entirely in French, with the exception of one hour per day reserved for teaching English starting in grade 3.

Starting in 1982, section 23 of the Canadian *Charter of Rights and Freedoms* (the *Charter*) allowed for education in the minority language where numbers warranted. In Alberta, the first two publicly funded French schools opened in 1984: École Maurice-Lavallée in Edmonton and École Saint-Antoine in Calgary. In 1988, Alberta adopted a policy allowing Alberta students to register in a French immersion program or to learn French as a second language.

A Case in Point: *Mahé v Alberta*

Although section 23 of the Charter grants rights to linguistic minorities, Franco-Albertan parents did not have the right to manage their French-language schools. This is fundamental for the language and culture to flourish in a minority setting. Indeed, this was the main issue in the 1990 Supreme Court of Canada decision in *Mahé v Alberta*.

The appellant was dissatisfied with French education in Edmonton. In 1982, the appellant proposed to the Alberta Minister of Education to create a new French-language public elementary school in Edmonton. However, according to his policy, the minister could not create new French school districts.

As mentioned above, in 1984, École Maurice-Lavallée opened its doors as a school with French as the language of instruction and administration. However, the appellants were still dissatisfied because their school belonged to the Edmonton Roman Catholic Separate School District. The appellant relied on section 23 of the *Charter* to argue that the linguistic minority is entitled to have their schools administered by their own school board.

The Supreme Court of Canada allowed the appeal and concluded that section 23 grants the Edmonton linguistic minority the control and management of education and educational institutions.

… French was the first European language spoken in Alberta.

Impacts of the *Mahé* Ruling and Ensuing Policy Considerations

Because of the *Mahé* case, Franco-Albertans have the right to manage and control their French-language schools.

By 1999, five francophone regional school boards were operating in Alberta. In 2013, the two French-language school boards in southern Alberta amalgamated. To this day, there are four French-language school boards in Alberta.

Concluding Remarks and Future Perspectives

Today, 27 communities have one or more francophone schools for a total of 42 in Alberta. One in three Alberta students learn French. There are 8,403 francophone students, 45,543 French immersion students, and 146,439 students learning French as a second language. Furthermore, the University of Alberta's Campus Saint-Jean offers post-secondary education in French to approximately 850 students (2017–2018 academic year statistics).

Given the current growth of the Francophonie in Alberta and an increasing interest in French-language education, it will be interesting to observe the direction Alberta will take to respect and further implement the language rights of its official language minority.

Association des juristes d'expression française de l'Alberta

The Association des juristes d'expression française de l'Alberta (AJEFA – French-speaking Legal Professionals Association of Alberta) is a non-profit organization that was created in 1990 to promote access to justice in French in Alberta.

BenchPress

Right to B.C. Provincial Court Trial in French

Bessette v British Columbia (Attorney General), 2019 SCC 31

Mr. Bessette was charged with a traffic offence in British Columbia under the province's *Motor Vehicle Act*. He asked that his trial in the Provincial Court be held in French. Mr. Bessette argued that the Court should apply s. 530 of the *Criminal Code*. That provision gives an accused the right to have their trial in French or English.

Mr. Bessette made the following arguments:

1. B.C.'s *Motor Vehicle Act* does not say anything about the language of a trial;
2. B.C.'s *Offence Act*, which sets out rules for the procedure of provincial offences trials, is also silent on the language of trial; and
3. section 133 of the *Offence Act* says that the *Criminal Code* applies where there are gaps in the *Act*.

The Crown argued that an 18th-century law applied that adopted all English criminal laws. The Provincial Court, the Supreme Court and the Court of Appeal all agreed with the Crown and decided Mr. Bessette's application was premature. The courts said he could raise this issue on appeal if he was convicted.

The Supreme Court of Canada ruled that Mr. Bessette had a right to a trial in French. The Court found that the *Offence Act* and its reference to the application of the *Criminal Code* overrode the old English law.

Sisters Challenge Brothers' Unfair Inheritances

Grewal v Litt, 2019 BCSC 1154

In their wills, a B.C. couple gave each of their four daughters $150,000 while their two sons split the rest of the estate. The estate was valued between $9 million and $9.3 million.

Section 60 of B.C.'s *Wills, Estates and Succession Act* allows the court to change "a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children". B.C. law allows an independent adult child to challenge their parent's will. Other provinces only allow dependents (including children, spouses or partners) to make a claim for maintenance and support.

The siblings all gave evidence of working hard on the family farm and being expected to loan their earnings back to the farm operations. The sisters gave evidence that their parents treated them poorly compared to their brothers. The sisters also gave evidence that they looked after their parents before the parents' deaths in 2016, about a month and a half apart.

The sisters successfully argued that "they were discriminated against by [their parents] and effectively disinherited, based on the fact that they are daughters and on [their parents'] adherence to traditional Sikh culture and values, which favoured sons over daughter" (at para 9). The court varied the will to give each sister 15% of the estate and each brother 20% of the estate.

Ontario Professor Loses Settlement Payment

Acadia University v Acadia University Faculty Association, 2019 CanLII 47957 (ON LA)

Dr. Rick Mehta, Acadia University, and The Acadia University Faculty Association entered into Minutes of Settlement on April 1, 2019. The parties engaged in voluntary mediation following Dr. Mehta's termination for cause from the University and the Association's filing of grievances contesting the termination.

The Minutes included the following terms:

- The issues between the parties were resolved "without any admission of liability or culpability by any of the parties."
- The parties agreed "to keep the terms of these Minutes strictly confidential except as required by law or to receive legal or financial advice."
- "If asked, the parties will indicate that the matters in dispute proceeded to mediation and were resolved, and they will confine their remarks to this statement. Stated somewhat differently, it is an absolute condition of these Minutes that no term of these Minutes will be publicly disclosed."
- The University agreed to pay Dr. Mehta an undisclosed amount.

After the settlement was finalized, Dr. Mehta began posting comments on his social media accounts. He wrote that he had "got the vindication [he] was seeking" and that the "NDA that [he] was required to sign by law is not for [his] protection." He also suggested that he had received a payment of money.

Acadia University brought the matter to arbitration, claiming that Dr. Mehta had breached the settlement agreement. The University argued it should not be required to pay anything to Dr. Mehta. The sole arbitrator agreed.

Jessica Steingard

Jessica Steingard, BCom, JD, is a staff lawyer at the Centre for Public Legal Education Alberta.

Note from the Publisher

Hello LawNow readers,

From all of us here at the Centre for Public Legal Education Alberta (CPLEA), we hope you had an enjoyable and relaxing summer!

As many of you know, LawNow is published six times per year by CPLEA. This issue marks the start of LawNow's forty-fourth year of publication.

We wanted to take this opportunity to announce a few changes at CPLEA and to LawNow.

Aaida Peerani, who began as Editor of LawNow in September 2017, has decided to leave CPLEA. She is grateful for all the support from readers, writers and the CPLEA family. We thank Aaida for her many contributions to LawNow and to CPLEA, and we wish her well in her future endeavors!

Special thanks also to Teresa Mitchell for stepping back in as Interim Editor for much of the past year. As many of you may know, Teresa was the long-time Editor of LawNow. We appreciate her continued support of LawNow and her willingness to dive back in for a period of time! We also wish Teresa well with her re-retirement!

We are pleased to announce that Jessica Steingard has now assumed the role of Editor. Jessica joined CPLEA in April of this year as a staff lawyer. Prior to that, she practiced law at a mid-sized Edmonton law firm in the areas of business law, employment law, and real estate law. Jessica is excited to build on LawNow's impressive legacy and continue to provide you with practical and interesting legal content.

Thank you for your continued support of LawNow. Our readers (that's you!) accessed LawNow online 666,928 times last year. That is an amazing accomplishment! The continuing success of LawNow year after year is a result of all the effort put in by Teresa, Aaida, and now Jessica working with our fantastic volunteer authors and the rest of our dedicated staff here at CPLEA. We are very grateful.

Jeff Surtees
Publisher, LawNow
Executive Director, Centre for Public Legal Education Alberta

Jeff Surtees, BComm, JD, LLM, is the Executive Director of the Centre for Public Legal Education Alberta.

Something Old Becomes Something New
Alberta's *Employment Standards Code*

Employers and employees in Alberta should be aware of changes made to the *Employment Standards Code*, most of which will take effect this fall.

As expected, the new government has reversed many of the changes that the NDP implemented to employment standards in 2017. However, not all the changes that were made have been reversed. For example, employees still have access to all the new unpaid leaves that were introduced, such as personal and family responsibility leave.

This article reviews the major areas of change—most of which represent a return to pre-NDP law—including general holiday pay eligibility, overtime pay, and a lower minimum wage for students.

The government made these changes through Bill 2: *An Act to Make Alberta Open for Business*, which became law in Alberta in July 2019, along with some corresponding regulatory changes.

General Holiday Pay: Stricter Eligibility Requirements

Starting September 1, 2019, the restrictions around holiday pay will be tightened.

Viewpoint

Employees will once again only earn holiday pay if they have worked for their employer for at least 30 days in the last 12 months before the holiday. This means that new employees may not be eligible for holiday pay in their first few weeks of employment.

Employees will only get holiday pay if the holiday falls on a day that is normally a workday for the employee. If the holiday is on a day that is not normally a workday for the employee, and the employee does not work, the employee is not entitled to holiday pay. For example, if an employee only works Monday to Thursday, they are not eligible for holiday pay if the holiday falls on a Friday (unless they work on the holiday).

… new employees may not be eligible for holiday pay in their first few weeks of employment.

For employees that work irregular hours (for example, shift workers), eligibility is determined based on whether the employee worked on that weekday in at least 5 of the 9 weeks before the holiday. For example, if an employee has worked every Monday since April 29, 2019, the employee would get holiday pay for July 1, 2019 (Canada Day).

Another restriction is that an employee is not entitled to holiday pay if the employee:

- does not work on a general holiday when they were required or scheduled to do so, or
- is absent from work, without the employer's approval, on the employee's last regular work day before, or the employee's first regular work day after, a general holiday.

The government described these changes as "reducing burdens on job creators by returning to the previous general holiday pay and banked overtime rules."

Overtime Pay: Back to Straight Time

Starting September 1, 2019, employees will no longer be able to bank time off at time and a half. The ability to earn 1.5 hours off for every hour of overtime worked was one of the most significant changes made by the NDP, from the average employee's perspective.

... the government has also repealed Flexible Averaging Agreements ...

Under the new rules, time off in lieu of overtime pay will be banked at straight time, as it was previously. For every hour of overtime worked, an employee can bank one hour of time off (if there is an overtime arrangement in place with the employer).

Any overtime hours that have been earned, but not paid or taken, before September 1, 2019 will have to be used in accordance with the current rules (i.e. at time and a half).

Because of this change, the government has also repealed Flexible Averaging Agreements, an arrangement that allowed for employees and employers to enter into an agreement with respect to overtime hours. Flexible Averaging Agreements that are already in effect will remain valid until the earlier of the cancellation date of the agreement or August 31, 2021.

Minimum Wage for Students

... the minimum wage for students under 18 years of age has been reduced to $13.00 per hour.

The government has reduced the minimum wage for young Albertans, effective June 26, 2019.

Specifically, the minimum wage for students under 18 years of age has been reduced to $13.00 per hour. The $13.00 per hour wage only applies where:

- the student is working less than or equal to 28 hours a week; or
- the student is working more than 28 hours a week, but during a school break. For example, a student who works 35 hours a week over spring break will be paid at $13.00 an hour.

However, students who work more than 28 hours a week when school is in session must still be paid at $15.00 an hour for any hours over 28 hours. For example, an employer must pay a student who works 40 hours a week during the school year at $13.00 an hour for the first 28 hours and $15.00 an hour for the remaining 12 hours. This is meant to reflect that students who work close to full-time hours are likely dependent on their employment income, as opposed to part-time workers who may live at home or have more financial stability.

Victoria Merritt

Victoria Merritt is an Associate at Reynolds Mirth Richards & Farmer LLP in Edmonton, Alberta. The views expressed do not necessarily reflect those of the firm.

Columns

Introduction to Contracts

Contracts are in every aspect of our everyday lives. When you rent a home, you have to abide by the terms of a lease. If you have a mortgage on your home, you essentially have a contract with your bank to pay back the money they lent you. When you go to work, the terms and conditions of your employment are likely outlined in a written employment contract. You are under a contract whenever you use your mobile phone or queue up your favorite show on your television subscription service. By the end of today, you will probably enter into some more contracts. Did you buy a coffee in the morning or grab some groceries? Work out at a gym? How about open up your web browser to read the news? Have you done some online shopping? All of these activities are governed by contracts.

The main source of law that applies to contracts is common law (judge-made law).

What is a contract?

A contract is a type of agreement where there is an exchange of legally enforceable promises between parties. To create a legally-binding contract, there must be 6 essential elements:

1. There must be an **offer** where one party is willing to enter into an agreement with another party.
2. There must be an **acceptance** where one party signifies their willingness to enter into a contract with the party making the offer. An offer can be accepted by words or actions.
3. There must be **consideration** given by each party. Consideration is a right, interest, profit or benefit experienced by one party with some detriment, forbearance, loss or responsibility experienced by another party. An example of consideration between parties is one party paying money and the other party providing a service.
4. Parties to a contract must **intend for the agreement to become binding** when it is accepted by the other party.
5. Generally, only parties who are **privy** to (named in) a contract can sue or be sued on the contract. Third party rights are usually not recognized except in specific circumstances.
6. There must be **certainty of terms** between the parties to the contract. Each party must know what the terms of the contract are.

For each of these elements, there are additional rules that have been developed in case law. While we won't be going into further details about the elements of a contract in this article, what you should know is that the elements of a contract often overlap. For example, the rules of certainty of terms and the rules of offer and acceptance overlap.

Consumer

Judy Feng

What does a contract look like?

A contract is often in the form of a written agreement between parties. Contracts can also be in the form of an oral agreement but oral agreements can be much harder to prove when a dispute arises.

A typical form of a written contract contains information such as:

- the names of the parties to the contract;
- when and where the contract was made;
- terms and conditions that must be met by the parties;
- what service, product or good is provided;
- what is being exchanged (e.g., money) for the service, product or good that is provided;
- an acknowledgment that the parties agree to the terms in the contract; and
- the signature of the parties agreeing to the contract.

For example, when your employer offered you your job, they may have sent you an offer letter. This letter would have set out the name of your employer, your name, your salary, the number of holidays you get, your job description and duties, and any other terms of the job. This is a contract.

What laws apply to contracts?

The main source of law that applies to contracts is common law (judge-made law). The general rules on agreements and contract theory comes from the decisions of judges in past contract dispute cases, many of which come from England. While our body of knowledge in contract law in Canada has its roots in English case law, it has evolved over the years in the Canadian courts to suit our circumstances. In Canada, the Supreme Court of Canada has the ultimate authority in making binding decisions that Canadian courts must follow in contract dispute cases.

There is some legislation (parliament or legislative assembly-made law) that applies to particular types of contracts. However, the legislation is usually limited to setting out what the default rules are for the particular type of contract. There are varying degrees on how far legislation goes in setting out the "default rules" for a particular type of contract.

A contract is a type of agreement where there is an exchange of legally enforceable promises between parties.

For example, the *Residential Tenancies Act* (*RTA*) applies to residential leases. If there's an inconsistency between the *RTA* and a residential lease, then the terms in the *Residential Tenancies Act* will override the inconsistent terms of the lease. The *RTA* doesn't go as far as setting out what information must be in a lease. On the other hand, the *Consumer Protection Act*, which applies to direct sales contracts, outlines specific information that must be in a direct sales contract—for example, a detailed description of goods, a statement of cancellation rights, etc.

Conclusion

Contracts can take many different forms and exist in many different situations. In upcoming issues of LawNow, we will look closer at specific types of contracts that consumers enter into.

Judy Feng

Judy Feng, BCom, JD, is a staff lawyer at the Centre for Public Legal Education Alberta. The views expressed do not necessarily reflect those of the Centre.

Employment

Peter Bowal

How Earnings Must Be Paid

Introduction

In 1981, when I was a student working for the summer in London, England, every two weeks I would walk over to another building and join a queue to collect my pay packet. In the little cardboard pouch, I found a very narrow strip of paper of numbers that explained how my earnings and deductions were calculated. My employer paid the net salary in bills and coins, all in the packet. There were no direct deposits in those days or cheques to take to the bank, much less payday cheque-cashing shops.

I figured that employers paid wages in cash because that was the most liquid form of money. I also figured there must have been a legal obligation on employers to do so because workers, at that time, could not easily access earnings that were not in cash.

This sort of rule is one example of workers' rights in a universe of "employment standards" under provincial laws (such as the *Employment Standards Code* in Alberta). I cannot remember the basic cash pouch being a legal *requirement* in Alberta, although they are permitted. Nevertheless, we have several other rules in effect today around the payment of wages.

The topic of this column is the requirements on Alberta employers when paying earnings to workers. Other provinces and territories in Canada have very similar rules. Workers should review the employment standards legislation in effect where they work to learn the details of how their earnings must be paid.

General Provisions

Employers must set out pay periods for calculating wages, which cannot be longer than one month. Wages, overtime and holiday pay earned must be paid within 10 days after the end of each pay period.

It is important to remember that the workers' accrued earnings belong to the workers and not to the employer.

An employer must pay at least the minimum wage – currently $15 per hour ($13 for workers under 18 who are in school). Workers paid by commission or other incentive must also be paid the minimum wage in each pay period.

Employers must pay workers for a minimum of 3 hours of work. Meal periods are not counted in this. There are a few exceptions to the minimum 3 hour work period, including:

- school bus drivers;
- young workers teaching swimming lessons or lifeguarding part-time at municipal recreation facilities;
- workers on a movie set or other "artistic endeavour";
- jobs up to 2 hours on school days.

These employees must be paid minimum wage for at least 2 hours each work period.

When either party terminates the employment with notice, employers must pay the employees' earnings no later than 3 days after the last day of work. If the termination by either party is for cause, or if the worker quit without giving the required notice, Alberta employers have 10 days to pay the earnings.

Employers must pay earnings in Canadian currency. Payment can be made in cash or by cheque, bill of exchange or order to pay (payable on demand from an authorized

financial institution). Alternatively, employers and employees may agree to direct deposits in an authorized financial institution at the employees' direction.

When reducing an employee's wages, employers must give the employee notice of the reduction before the start of the pay period in which the reduction is to take effect. If this notice is not given, the reduction is not valid.

Employer May Not Make Some Deductions From Pay

Employers cannot deduct, set off against or claim from the earnings of an employee any sum of money unless the law permits. Deductions allowed by law include:

- anything deductible under legislation, such as garnishees, judgments or court orders (e.g., child support payments);
- withholdings for income taxes, Canada Pension Plan and Employment Insurance;
- union dues set out in a collective agreement binding on the employee; or
- anything the employee has personally approved, such as the repayment of a loan or wage advance from the employer.

However, a collective agreement or a written approval by an employee can never permit deductions from earnings for:

- faulty work, including any act or omission by the employee that results in a loss to the employer;
- damage or breakage caused by the employee;
- innocent mistakes;
- cash shortages or other loss of property if, as is very common, someone other than the employee also had access to the cash or property. For example, if more than one person has access to the cash register, an employer cannot hold only one employee responsible for shortages;
- cash shortages due to a failure to collect all or any part of the price paid by a purchaser. Simply, workers cannot be used as guarantors of the business' receivables; or
- any costs associated with providing, using, repairing or cleaning uniforms or other apparel that the employer requires the employee to wear at work.

Employers cannot deduct, set off against or claim from the earnings of an employee any sum of money unless the law permits.

If an employer provides board or lodging, or both, to a minimum wage employee, the deductions cannot exceed $3.35 for a single meal and $4.41 per day for lodging. Employers cannot deduct a meal not consumed by an employee from the minimum wage.

Advances on wages and inadvertent over-payments of wages can be recovered by employers from employees' earnings.

Conclusion

It is important to remember that the workers' accrued earnings belong to the workers and not to the employer. Employers might be tempted to take advantage of their superior positional and economic power over the workers and help themselves to some of the workers' earnings. Employment standards legislation prohibits that. Employers who try to do this may be slapped with administrative penalties or subject to prosecution and fines.

The cash pay period pouch may be gone but other detailed rules remain in place to prevent employers from 'playing with' or taking workers' earnings.

Peter Bowal

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Water Regulation in Alberta: 5 Things You Need to Know

Water plus Earth, Wind and Fire. No … it's not a day at the beach with a great band from Chicago. These are the names of the four classical elements, which in ancient times were thought to explain the nature of how the world worked. They are also the subjects of the next four LawNow Environmental Law columns – the regulation of water, land, air and fire under Alberta law. In each case, we are going to look at five things that I think are interesting and important to think about to get a feel for the area.

We will start this time with water.

1. Alberta water law isn't found in one place.

Just like the Facebook relationship status of that one wild friend that everyone has, the law about the use of water is complicated. It's a mixture of common law (including riparian rights, drainage rights and nuisance) modified by written statutes, written regulations and policies put in place by the federal, provincial and municipal governments.

The main provincial statute that deals with granting water licenses and how much water a licence holder can use (called an allocation) is Alberta's *Water Act*. Under that statute, the government can approve a water management plan for a river basin. So far there are approved plans in place for the South Saskatchewan River basin and the Battle River basin. Other important provincial statues containing provisions that could affect water in some way include:

- the *Environmental Protection and Enhancement Act*,
- the *Municipal Government Act*,
- the *Public Lands Act*,
- the *Alberta Land Stewardship Act* (and the regional plans created under it),
- the *Irrigation Districts Act*,
- the *Forests Act*,
- the *Wildlife Act*, and
- many of the regulations and plans created under the above statutes.

Other important provincial rules come from the Alberta Water for Life strategy, the Alberta Wetland Policy and various codes of practice put in place for different industries and activities. Important federal statutes include the *Fisheries Act*, the *Navigation Protection Act*, the *Species at Risk Act* and the new *Impact Assessment Act*. Municipalities also create bylaws to regulate water use, treatment and disposal. These bylaws can impact things as varied as preserving wetlands within a city's boundaries to regulating people watering their lawns or washing their cars on the street.

Another wave of complication comes when rivers flow across borders. We covered how the United States and Canada settle cross-boundary water disputes

Jeff Surtees

in LawNow in **September 2017**. Several important rivers originate or have tributaries in one province but flow through others (the Mackenzie River, the North and South Saskatchewan rivers and the Beaver River, among others). Alberta is a party to agreements with British Columbia, the Northwest Territories, Saskatchewan and Manitoba about how those rivers are treated. One of those agreements says that Alberta has to leave one-half of the natural flow of water in the rivers that cross the border into Saskatchewan.

2. You can own the land adjacent to a river, stream or lake but you don't actually own the water and you probably don't own the "beds and shores" of the water body.

The provincial Crown claims ownership of all water on or under non-federal land in the province. A water user can only divert water from where it naturally occurs or use it for the purposes set out in the *Water Act*. The user must either have the benefit of a water licence or fall under one of several possible exemptions. There are exemptions for household water use by landowners whose land touches the water and for some other users. The government uses a system known as "first in time, first in right" (commonly called FITFIR) to decide who gets a water license. If you were there first, you have priority regardless of whether your use of the water is the best use.

Under Alberta's *Public Lands Act*, the provincial government also owns the beds and shores of all "permanent and naturally occurring bodies of water" and of "all naturally occurring rivers, streams, watercourses and lakes".

3. The extraction industries (oil, gas and mining) might be the biggest contributors to GDP in Alberta, but the agriculture industry uses most of the licensed water, primarily for irrigation.

According to the Alberta Water Portal website, the agricultural sector has 45.3% of the total water allocations (water they are licensed to take but don't necessarily always use) in Alberta and 75% of the allocations in the South Saskatchewan River basin. Irrigation of crops actually uses 60 to 65% of all the licensed water taken in the province. In the Bow River basin, it has not been possible to get a new water licence for most purposes since 2006, largely because of agricultural use.

4. Fish and wildlife need water too.

That might seem like an obvious statement but historically water law has been aimed at promoting economic development and helping settle disputes between landowners. The needs of the natural environment were an afterthought, if they were considered at all. Habitat loss is now seen as the most important factor in loss of biological diversity. With climate change, melting headwater glaciers and pressure from increasing human populations in Alberta, it is becoming more and more important to think carefully about how we manage water. We also need to be more aware about managing the land across which the water flows

to drain into our lakes, rivers, streams and wetlands. We have to think on an ecosystem scale and always remember that the effects of many activities out on the landscape are cumulative.

5. You cannot have a full understanding of water law without considering Aboriginal rights and interests.

These include rights under section 35(1) of the Canadian *Constitution Act*, rights under the Treaties covering land in Alberta (Treaties 6, 7 and 8) and rights to carry on certain traditional activities such as hunting and fishing both on and off reserve. Whenever there is a potential that a law allows activity that impacts Aboriginal rights or interests, governments have a duty to consult and accommodate. This is too big a topic to discuss now but it will be the subject of a future LawNow article.

For anyone who wants to dive a little deeper, an excellent in-depth resource on water law in Alberta is the second edition of *Alberta's Wetlands: A Law and Policy Guide*, written by Professor Arlene J. Kwasniak and published by the Canadian Institute of Resources Law at the University of Calgary.

Jeff Surtees

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Famous Cases

Peter Bowal and
Andrew Broschinski

Confidentiality Clauses: the Jan Wong Case

. . . I can't disclose the amount of money I received
I'd just been paid a pile of money to go away . . .
Two weeks later a big fat check landed in my account.
Even with a vastly swollen bank account . . .

Introduction

Almost all lawsuits are settled or abandoned. Only about 5% go through to a full trial. Nearly all settlements where lawyers are involved have a confidentiality clause in the settlement agreement. If there is a payout of money, generally no one can talk about it. Most of the time, the parties all agree to these clauses in order to get the cash and end the legal hostilities.

This column describes a recent case that demonstrates the seriousness of these confidentiality clauses.

The arbitrator ordered Wong to pay back the entire $209,912 she had received in the settlement.

Provocation of Journalist Jan Wong

In September 2006, Jan Wong's employer, the *Globe and Mail*, instructed her to write an article on the assassination of a student at Dawson College in Montreal. In her article, "Get Under the Desk", Wong expressed a view that the shooting, along with two previous school shootings in Quebec, could be linked to the alienation of non-native Quebecois in the province. After publication, public outcry challenged the suggestion that Quebec society was obsessed with "racial purity".

Wong became the target of hate mail, racial comments and even death threats. Many politicians and Quebec journalists denounced the article and demanded an apology. Wong refused to retract her view, and the *Globe and Mail* defended her on the basis of free speech. The *Globe and Mail* took the position that a journalist's job is to ask hard questions and explore different ideas, even those which are controversial. Neither Wong nor the *Globe and Mail* apologized for the article.

Depression and Settlement

The personal attacks against Wong were relentless. Her mental health deteriorated, and she developed severe depression. She took sick leave from work between October 2006 and the spring of 2007. In April 2007, Wong went back to work but relapsed, and she took more time off work.

After refusing to pay sick leave between June and November of 2007, the *Globe and Mail* ordered Wong back to work in May 2008. They did not believe she was still sick or unable to work. Wong said she was still medically unfit to return to work. When she did not return, the *Globe and Mail* terminated her employment.

The court found the settlement agreement's confidentiality clause was clear and unambiguous.

Wong's union grieved the unpaid sick leave and wrongful dismissal. After a few months

of arbitration, the union and the *Globe and Mail* reached a settlement. The *Globe and Mail* agreed to pay Wong for the unpaid sick leave between June and November 2007 along with two years of salary for a total settlement of $209,912.

During the arbitration, Wong expressed her desire to write a book about her experience. The *Globe and Mail* demanded Wong keep the agreement confidential and not speak negatively about the *Globe and Mail*, in exchange for the payment.

In the settlement agreement, both parties agreed not to disclose the terms of the settlement and not to speak negatively of the other party for a period of approximately one year. If Wong breached the agreement, the agreement said the arbitrator could make a decision and could require Wong to return the $209,912.

"Out of the Blue" **Trouble**

Beginning in October 2010, publisher Doubleday advertised Wong's new book, titled *"Out of the Blue"*. Wong commented on the *Globe and Mail*'s reasons for firing her in an article in *Chatelaine* magazine. The *Globe and Mail* contacted Doubleday to voice its concern about these comments. Doubleday chose to not publish the book after pressure from the *Globe and Mail*, but Wong went ahead and self-published the book in May 2012.

After the book's publication, the *Globe and Mail* argued to the arbitrator that 23 phrases in Wong's book violated the confidentiality provision in the settlement agreement. The arbitrator agreed that at least four phrases in the book (set out at the top of this article) were in breach of the agreement because they disclosed that the *Globe and Mail* had paid Wong to settle the case. The arbitrator ordered Wong to pay back the entire $209,912 she had received in the settlement.

In 2014, Wong appealed the arbitrator's decision. Wong had thought she could still speak about the terms of the settlement as long as she did not reveal the exact amount paid. She further argued that, if she did breach the terms of settlement, the arbitrator should not have forced her to repay the full settlement amount as that constituted an oppressively punitive forfeiture provision. She argued that the arbitrator should not enforce the penalty because it was disproportionate to the harm caused and was penal in nature.

Decision on Appeal

All three judges dismissed Wong's appeal and ordered her to pay costs of $15,000 to each of her former employer and the union. The court found the settlement agreement's confidentiality clause was clear and unambiguous. It stated that the parties could not disclose the "terms of the settlement", and Wong had disclosed a large lump sum payment had been made to her.

While the harm suffered by the *Globe and Mail* was intangible and hard to quantify, the court concluded the return of the settlement money was not excessive or punitive. Wong was not required to pay back what she received for unpaid sick leave. The repayment provision was not unconscionable. The union represented Wong during settlement negotiations with the *Globe and Mail* so there was equal bargaining power.

Moreover, Wong did not have standing to appeal the arbitrator's decision because the settlement was between the union (on behalf of Wong) and the *Globe and Mail*, not Wong and the *Globe and Mail*.

... both parties agreed not to disclose the terms of the settlement and not to speak negatively of the other party for a period of approximately one year.

Where Is Jan Wong Now?

Wong's latest book, *Apron Strings: Navigating Food and Family in France, Italy, and China*, came out in 2017. It appears she currently lives in Fredericton, New Brunswick and is a professor in journalism at St. Thomas University. She writes for the *Halifax Chronicle Herald* and *Toronto Life* magazine, speaks on a variety of topics and issues, and promotes her latest book at readings and book signings across Canada.

Peter Bowal

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

Andrew Broschinski

Andrew Broschinski is a student at the Haskayne School of Business, University of Calgary.

When is Reinstatement Possible for Employment Discrimination?

A worker experiencing discrimination must choose the legal avenue that will give them the result they want. For example, if pursuing the matter in court, the worker will have to start a contract claim (e.g., wrongful dismissal) or tort claim. One cannot sue in tort for discrimination, but one can sue in tort for the intentional infliction of mental suffering. The usual remedies available to the worker under tort or contract claims are money damages:

- money in lieu of notice;
- aggravated damages (if the employer terminated the plaintiff in a way that caused mental distress); or
- punitive damages (awarded in extreme cases to punish the employer for harmful behaviour).

All of these remedies have one thing in common: the court can only award money to address the losses suffered by the employee.

There are times when a worker may want money compensation, but also an apology or for the employer to introduce a discrimination policy.

In some cases, the worker may want their job back, but without having to continue to experience the discriminatory behaviour. There are ONLY two ways that a worker can get their job back:

1. For union workers, if the collective agreement allows for reinstatement; or
2. If a complaint is started under human rights legislation or occupational health and safety legislation that allows for reinstatement, and the complainant requests reinstatement. Human rights commissions usually have the ability to grant reinstatement. However, reinstatement is not possible in every situation and will depend largely on the facts of each case.

The recent *Pratt v University of Alberta* (*Pratt*) case may open the doors wider to the possibility of reinstatement. Carmen Pratt made a human rights complaint in June 2013 alleging discrimination at work under section 7(1) of the *Alberta Human Rights Act* (*AHRA*) (*Pratt* at paras 1, 4). The Alberta Human Rights Tribunal heard Pratt's complaint. Chair D. Jean Munn, Q.C., held that the employer, the University of Alberta (U of A), had discriminated against Pratt on the ground of mental disability.

... reinstatement is not possible in every situation and will depend largely on the facts of each case.

Further, Chair Munn held that the U of A failed to acknowledge its duty to accommodate (*Pratt* at para 18). After the complainant has established *prima facie* discrimination, the burden shifts to the respondent (the employer, in this case) to show that the treatment of

the complainant was a *bona fide* occupational requirement or otherwise was reasonably justified (*Pratt* at para 154). The onus is on the employer to show that it would be impossible to accommodate the employee without undue hardship.

Chair Munn found that there was no evidence that the U of A ever considered whether Pratt needed accommodation for a disability. At a meeting on June 26, 2012, Pratt told her supervisor about her limitations and asked the supervisor to modify her job duties. At this point, the U of A had a duty ask for more information (*Pratt* at para 155). Chair Munn also noted that the U of A had accommodation policies in place and that it could have and should have asked Pratt to provide evidence from health professionals as to her limitations (*Pratt* at paras 155-156). Chair Munn concluded that there was no justification for the U of A's failure to accommodate Pratt (*Pratt* at para 157).

Having found discrimination, Chair Munn turned to the remedy. This is where the parties differed:

- The Director of the Human Rights Commission asked for $25,000 to $30,000 in compensation for discriminatory treatment and lost wages for a period of 12 months.
- Pratt sought reinstatement and compensation for lost wages. She claimed she had not been able to find similar employment and that the U of A should be able to accommodate her disability given its size and sophistication (*Pratt* at para 168).
- The U of A argued that the appropriate range of damages for hurt feelings should be between $8,000 to $10,000 and that the claim for lost wages should be limited to the end of the six-month probationary period (August 31, 2012) (*Pratt* at para 158). The U of A opposed reinstatement, arguing that the employment relationship was no longer healthy. For example, Pratt had demonstrated dislike towards her supervisor.

Chair Munn awarded damages for injury to dignity and self-respect in the amount of $20,000 (*Pratt* at para 162). Chair Munn also ordered an award for loss of income of $34,795.40 (*Pratt* at para 167).

... there was no evidence that the U of A ever considered whether Pratt needed accommodation for a disability.

Chair Munn then looked at three previous cases where reinstatement had been ordered. In all three cases, the workplace was large and sophisticated, and there was an opportunity for the employee to be placed in a setting outside of where the discrimination had occurred. Further, the complainants did not hold any ill will toward the respondent organizations as a whole (*Pratt* at paras 171-177). In one case, the Tribunal found that the complainant's career would have ended without reinstatement given the nature of his termination (*Pratt* at para 177).

Chair Munn concluded that:

- Pratt had been unable to secure comparable employment and is unlikely to do so, thus eliminating her career options (*Pratt* at para 179);
- Pratt's pursuit of legal rights and remedies within the employment setting and beyond should not be held against her; and
- there are numerous and varied library systems at the U of A that would allow Pratt to be placed in a similar position but not in a position with her immediate supervisor where there may remain "hard feelings" (*Pratt* at para 180).

Chair Munn ordered that the U of A reinstate Pratt as an employee.

In conclusion, it would seem that the remedy of reinstatement may be available if:

- the employer is "large and sophisticated";
- there is an opportunity to re-instate the person into an equivalent position but in a different setting; and
- the position is rather specialized or depends on particular training and education, and the employee's career would likely end (e.g., teacher, police officer, library staff).

Decision-makers should consider reinstatement more often, if the facts support it.

Linda McKay-Panos

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Law & Literature

Rob Normey

The White Angel: An excursion from Chinatown to posh Shaughnessy Heights and back

John MacLachlan Gray is a celebrated playwright who penned the immortal masterpiece *Billy Bishop Goes to War*. Having not seen any new plays from Gray for many years, I had wondered whatever had become of him. Not to worry. It turns out that in recent years he has reinvented himself as a mystery novelist. His latest work is *The White Angel*, a novel to be embraced by lovers of both suspense and literary fiction.

In this novel, Gray offers us a panoramic look at Vancouver circa 1924, when the city is at least momentarily distracted from celebrations of the British Empire in favour of the exciting investigation into the hard-to-fathom death of a Scottish nanny. The official investigation concludes that the young woman committed suicide. This narrative unravels quickly though, as the police force proves incapable of backing up its elaborate but rather clumsy theories. Quick to reach the conclusion that murder, not suicide, was the likely cause of death, is our engaging protagonist: the poet turned sensationalist journalist Ed McCurdy. As McCurdy digs deeper, the authorities reluctantly designate the death as a murder.

Gray has drawn significantly on one of Vancouver's most famous cold cases – the mysterious death of Scottish nanny Janet Smith. And during a key moment in the city's evolution. World War I had ended a mere half dozen years earlier, and the British Empire was apparently still very much a united cultural entity.

I was in Vancouver recently and found it interesting to stroll through a number of the districts described in such lively and often humorous prose in the third person narration Gray adopts. My visit led me to appreciate the deep knowledge and appreciation for the city that Gray possesses. McCurdy and his undertaker friend, Howard Sparrow, visit a variety of districts in the early chapters of the novel. Gray's vivid descriptions remind the reader that, while Vancouver's business and political elite would like to attribute the city's growth to its British (read "white only") citizenry, in fact there are many ethnic communities interacting in interesting ways.

Gray leads us on a rambling but meaningful journey through much of Vancouver …

I stayed at the historic Patricia Hotel on East Hastings Street on the edge of Chinatown – a street that McCurdy spends considerable time on. The Patricia became a lively entertainment hub in the '20s. It could easily have been one of the sites McCurdy and his friends would have sought refreshment and solace at, while also hoping to get tips from the clientele for his sensationalist stories about the Janet Stewart investigations. In 1924, one could have checked out the resident band featuring legendary pianist Jelly Roll Morton and the larger-than-life singer and dancer Ada "Bricktop" Smith, both who resided at the hotel during their long residence. Live jazz performances continue to offer dynamic and irresistible music.

I strolled through the streets of Chinatown – past pagoda roofs, red and white restaurants and the world's slimmest building, the Sam Kee building. The office building is a perfect

display of the ingenuity of the Chinese business community over the years. Several Chinese characters feature in *The White Angel*, including some involved in slightly less legal activity, such as opium trafficking.

I also witnessed the police at work investigating a man lying on the pavement with a significant gash on his head. The police officers in the novel who investigate the death of Janet Stewart are certainly less diligent than the officer I saw at work. Given the political dynamics at work, with an election fast approaching, it seems the police have orders to favour the interests of one of the tycoons, who is keen to seize the mayor's office. He does not wish to have unwanted scrutiny thwart his ambition. Nonetheless, racial tensions quickly bubble to the surface.

The powerful United Council of Scottish Societies demands a full inquiry. A Chinese houseboy who worked alongside the Scottish nanny quickly becomes a murder suspect. The Klu Klux Klan and the Asian Exclusion League, convinced of the dishonesty of a member of what they trumpet to be an "inferior race", march through the streets and demand immediate action. Provincial politicians cynically propose a *Protection of Women and Girls Act*, with a racist, anti-Chinese motivation. This happens parallel to the barrage of racist commentary in the "yellow" newspapers of the day, owned by powerful business tycoons.

Gray has drawn significantly on one of Vancouver's most famous cold cases – the mysterious death of Scottish nanny Janet Smith.

Gray leads us on a rambling but meaningful journey through much of Vancouver, stopping dramatically at the courthouse for the inquiries and then the trial of the houseboy, Wong Chi. Chi takes the Fire Oath and then later the Chicken Oath before giving his testimony.

We see the veteran defence counsel Harry Stickler at work. Stickler makes full use of an encyclopedic knowledge of procedural rules "delivered in a voice seething with outrage and a sincerity that have exculpated some of the shadiest characters in the province's history."

I much appreciated the descriptions of the stately courthouse with its marble steps, a symbol of the British respect for decorum and the rule of law. Gray contrasts this with the bedlam on opening day of the inquiry when a frenzied crowd stampedes up those steps, the "stone lions above them averting their eyes."

The White Angel stands not only as a beautifully constructed crime novel that affords insights into a fascinating historical case and an entire era, but it is superbly written and features engaging characters. Gray stated in an interview that the novel bears comparison with the Polanski film *Chinatown* insofar as a crime leads to a deepening mystery that affords the reader a genuine insight into the ways in which society is run, favouring a wealthy and largely unaccountable elite. I would add, though, that this is a very Canadian Chinatown, which does not descend as far into the lower depths as does Polanski's dark film. *The White Angel* creates its own magic, lacing humour with sharp commentary. It is one of the best novels I have read in the past year.

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.

Not-for-Profit

Peter Broder

Senate Report Offers Blueprint for Federal Charity Law Reform

With a federal election slated for this October, there is little chance we will see any major changes to the *Income Tax Act* (ITA) rules governing registered charities in the coming weeks.

Once the election is over, however, whichever party forms government could do worse than use the recently-released Report of the Special Senate Committee on the Charitable Sector as a blueprint for a needed and long-awaited revamping of federal regulation of charities and non-profit organizations. The report, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector*, is available online.

Leaving aside the issue of the role of registered charities in public policy debate, which was the subject of new legislation passed by Parliament last December, charity regulation is not something that has drawn much attention federally in recent years. (Indeed, action on the political activities rules was only prompted once there had been a successful court challenge to the old ITA provisions under the *Canadian Charter of Rights and Freedoms*.)

The report offers a roadmap for addressing a host of problems plaguing the current regulatory regime.

It features 42 recommendations, and while not all of them will be feasible to implement or are uncontroversial, taken broadly they present the opportunity to:

- modernize the current regulatory system;
- simplify or clarify various regulatory structures or requirements;
- reduce unnecessary red tape for registered charities and other sector groups; and
- better align Canadian regulatory practice with that of comparable jurisdictions.

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Major reform of the framework would also almost certainly trigger large efficiency gains both for the regulator and sector organizations.

Before any reform is undertaken, it is important to better define the rationale for charity regulation. That will both help ensure consistent future development

of law in this area and reduce the risk of overwhelming organizations that are heavily volunteer-driven with compliance obligations. Commonly cited rationale are:

- to preserve tax-assisted assets (for eventual use on public benefit purposes);
- to economize or limit a tax expenditure; and
- to justify, and support, some idea about what is legally considered charity.

Historically, in Canada, what qualifies as a registered charity has largely been defined through the common law – past rulings by judges about what kinds of philanthropic endeavours fall within the legal meaning of charity. But, because registered charities and their donors enjoy generous tax privileges, there has been ongoing debate over to what extent ITA legislation should reinforce or modify the common law of charity – which allows for a wide range of altruistic, public benefit endeavours.

In the view of many legal scholars, once a group's endeavours (as set out in its purposes or objects) have been accepted, a charity can engage in whatever conduct it chooses so long as that conduct is not illegal, contrary to public policy or otherwise at odds with its charitable character. In contrast, it is typical under the ITA for certain transactions or types of transactions to be prohibited or constrained. How these approaches are reconciled will obviously have a big impact on whether charities operate in an enabling or restrictive environment.

Once these preliminary questions have been answered, attention can be turned to the Senate report.

Crucially, the report endorses:

- a new Tax Court appeal process for charity registration and revocation decisions;
- a program to assist organizations in bringing those appeals;
- streamlining of the categories of registered charity (from a charitable organization/public foundation/private foundation model to a public charity/private charity model);
- development of a standardized reporting mechanism across departments and jurisdictions and improved treatment of overhead and infrastructure costs in government funding of sector groups; and
- reform and/or clarification of direction and control (specifically, a move to an expenditure responsibility standard of accountability) and related business regulatory requirements and several operational improvements in the CRA Charities Directorate.

Other positive ideas featured in the report include calls for:

- more systematic and regular research on the sector;
- regular review of ITA provisions governing registered charities and more precise drafting of legislation pertaining to them;

- policy changes to promote giving and volunteering and an initiative to reduce volunteer screening costs for sector organizations;
- better support for charity and non-profit organization human resources including development of a portable pension plan for the sector;
- measures to foster diversity in the sector governance and personnel;
- a commitment to federal funding practices based on longer timeframes and proportionate reporting requirements;
- bringing sector organizations more fully into government innovation and procurement initiatives;
- more accessible capitalization for sector work and ventures; and,
- reform and clarification of certain rules for non-profit organizations.

Further study is proposed for issues such as: the most appropriate regulatory regime for non-profit organizations that are not registered charities; what charities should report on the T3010, and public disclosure of sector ITA filings and decisions; the current ineligible individual rules; the impact of anti-spam measures on the sector; and, certain changes around tax treatment of gifts of real estate and shares in privately-held corporations.

Another aspect of the report worth commending is a call for pilot projects on a destination of funds test and permitting gifts to entitles other than qualified donees with appropriate safeguards.

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Matters that the report recommends be referred to the newly-established Charity Advisory Committee (for which one recommendation endorses a broad and inclusive membership) include:

- the question of adoption of a statutory definition of charity versus continued reliance on the common law;
- the merit of changing the disbursement quota and whether it ought to be set by statute or in regulation;
- establishment of clear policy rationale and a principle-based framework for qualified donee and other tax-assisted categories of organizations; and,
- exploring an appropriate regulatory approach to donor-advised funds.

At least one recommendation needs to be re-thought or refined. It isn't clear that the suggestion to situate a Sector Secretariat under the Minister of Innovation is the best option for ensuring that adequate thought is given to how a wide range of government policy potentially affects the voluntary sector.

Overall, however, the report charts an exciting path forward.

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