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20/20 Looking Back

Celebrating 20 years of evolving law

PLUS

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Rural Law

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Feature

20/20 Looking Back

CONSUMER

Canada's Law on Consumer Product Safety

Judy Feng

In the past 2 months alone, you've probably heard about the recent food recall warnings on beef and romaine lettuce. Did you know that we have a law in Canada that deals with product safety and recalls?

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The *Canada Consumer Product Safety Act* ("CCPSA") regulates consumer products that pose or might pose a danger to human health and safety. Since the CCPSA came into force on June 20, 2011, over 7,000 items have been recalled in Canada. Consumer products, food, health products and vehicles – you name it.

Before the CCPSA

Before the CCPSA (which was also known as Bill C-36), Part I of the *Hazardous Products Act* governed the health and safety of consumer products. Enacted in 1969, Part I of that Act covered products that were restricted through regulation or prohibited from being advertised, sold or imported into Canada.

The Act regulated approximately 30 products and product categories (for example, toys and chemicals) and prohibited 25 others (for example, baby walkers). For consumer products that posed a health or safety risk (but were not prohibited or regulated under the Act), it was up to industry to voluntarily issue and manage a product recall. The federal government's power was limited to issuing a public warning and, if necessary, taking steps to regulate or prohibit products under the Act. Not only were there concerns about the Act's limited application, there were concerns about it not keeping up with the swathe of consumer products entering the Canadian market.

2007 was a particularly rough year for product safety in Canada. Tainted pet food, spinach contaminated with E. coli, contaminated toothpaste and unsafe children's toys were among some of the 90 products recalled that year. To put that in perspective, there was almost 3 times the number of product recalls in 2007 compared to 2006. Compounded with increasing concerns about the global nature of the marketplace for consumer goods and other products, the federal government had to make decisions about modernizing Canada's approach to product safety. So in December 2007, then-Prime Minister Stephen Harper introduced the Food and Consumer Safety Action Plan and committed $113 million over two years to implement it.

The legislative path to what we now know as the CCPSA was a little bumpy. The government introduced two different bills to replace Part I of the *Hazardous Products Act*. One died when Parliament was dissolved in 2008 and the other died when Parliament was prorogued in 2009. Finally, the government introduced Bill C-36, *An Act respecting the safety of consumer products*, in the House of Commons on June 9, 2010. It received royal assent on December 15, 2010.

The CCPSA

The CCPSA consists of a preamble and 76 clauses. Its purpose is to protect the public by addressing or preventing dangers to human health or safety posed by consumer products in Canada. This includes consumer products circulating within Canada and those that are imported. The CCPSA carves out certain exceptions to its application in Schedule 1.

Issues have also been raised as to how often, if at all, Health Canada imposes fines under the CCPSA.

Under the CCPSA, a "consumer product" is a product (including its components, parts or accessories) that you can reasonably expect an individual to obtain. It is a product used for non-commercial purposes, including domestic, recreational and sports purposes.

"Danger to human health or safety" under the CCPSA means any unreasonable hazard (existing or potential) posed during a consumer product's normal or foreseeable use. For example:

- anything that can cause death to an individual exposed to it
- anything that has an adverse effect on the individual's health, including an injury
- any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health.

The death or adverse effect does not have to occur immediately after exposure to the hazard.

Administered by Health Canada, the CCPSA gives the federal government authority to order product recalls, levy penalties and establish mandatory reporting of consumer products that pose a health or safety risk. Unlike Part I of the *Hazardous Products Act*, the CCPSA requires industry to provide information and report on consumer product incidents to Health Canada. For example, manufacturers, importers and sellers of consumer products must report the following to the Minister of Health:

- dangerous incidents associated with the products
- product or labelling defects that result, or might reasonably be expected to result in, death or serious adverse effects on health (including serious injury)
- consumer product recalls initiated by governments and government institutions in Canada or elsewhere.

The CCPSA also:

- prohibits sale, manufacture, import and advertisement of certain products
- provides for testing and evaluation of consumer products
- requires inspection and seizure of consumer products to verify compliance or non-compliance with the Act
- empowers the federal government to institute interim and permanent recalls of products that pose, or might reasonably be expected to pose, a danger to human health or safety.

The offences for failing to comply with the CCPSA and its regulations are complex and severe. For example, a person who contravenes the CCPSA (other than sections 8, 10, 11 or 20) or its regulations could be fined up to $5 million or imprisoned for up to two years, or both. Due diligence is a defence for this type of offence. As long as the person (individual or corporation) shows that they exercised a level of judgment, care, prudence or activity that a person would reasonably be expected to exercise, then they might be found not guilty.

The* Canada Consumer Product Safety Act *("CCPSA") regulates consumer products that pose or might pose a danger to human health and safety.

Sections 8, 10, 11 and 20 of the CCPSA mostly have to do with the advertising and selling of goods, misleading claims, and false and misleading information. A person who contravenes these provisions, or knowingly or recklessly contravenes other provisions of the CCPSA or its regulations, can be fined (at the court's discretion) or imprisoned for up to 5 years. For a first offence, there is a fine of up to $500,000 or up to 18 months' imprisonment, or both. For a subsequent offence on summary conviction, there is a fine of up to $1 million or imprisonment of up to 2 years, or both. The defence of due diligence is not available in these circumstances.

Conclusion

Whether we realize it or not, the CCPSA has been a major development in consumer protection law in Canada within the last 20 years. Compared to its predecessor, the CCPSA was a legislative step forward in dealing with the expanding marketplace for consumer products in Canada. That said, critics have raised issues about the CCPSA over the years.

According to a 2016 case study done by the Centre for Public Impact, while some progress has been made through the CCPSA, Health Canada has failed to enforce the legislation strongly enough. As they point out, Canada's auditor general in 2016 found:

> [Because] Health Canada fails to systematically verify that industry is reporting incidents and submitting cosmetic notifications, health and safety issues may go unnoticed for extended periods. Furthermore, the Department cannot assure Canadians that it has acted promptly to address risks or that it has been effective in holding industry accountable for non-compliance.

While the auditor general's report was done in the context of chemicals in consumer products and cosmetics, its observations about systemic lapses in incident reporting are concerning. Recent departmental reports on Health Canada indicate that it is working on addressing issues raised by the auditor general.

Issues have also been raised as to how often, if at all, Health Canada imposes fines under the CCPSA. Questions also remain as to whether the existing mandatory industry reporting and stiff penalties actually deter industry from manufacturing, importing and selling unsafe consumer products. After all, consumers continue to be barraged with what seems to be similar product recalls every so often – do pre-washed salads and frozen chicken products sound familiar, anyone?

… there was almost 3 times the number of product recalls in 2007 compared to 2006.

As suggested by some critics, the CCPSA's enforcement issues come down to lack of resources. There is not enough staff and money allocated to consumer products in Health Canada's overall budget. Until that changes, the CCPSA can only accomplish so much.

Judy Feng

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CRIMINAL

The Right to be Tried Without Undue Delay

Charles Davison

Since the turn of the century, there are many – too numerous to count – "important cases" in the field of criminal law. Some have dealt with procedure, some with the substantive law, and some with enhancing and protecting the basic rights of Canadians. However, as shall be seen, the case which I have selected as "the most important" deals with all these aspects. What makes this case important are the significant "ripple effects" we have experienced and continue to experience as a result of this ruling.

The Runners Up

Before turning to this "most important" decision, however, I want to mention some of the "runners up".

First on the list is the 2009 Supreme Court of Canada decision in *R v Grant*. In this case, the Court revisited the 1987 test for excluding evidence when the police or other state actors violate the rights of an accused person. The Court sought to reinvigorate, and clarify, the factors a judge should consider in making this decision. It directed judges to look at the nature of the rights-infringing conduct, and to decide whether this is state behavior which the court should tolerate or whether it is misconduct of a sort the court must clearly condemn and disassociate itself from. The decision reemphasized the importance of ensuring state actors respect the rights of the individuals with whom they are in contact.

Another is the 2012 decision in *R v Ipeelee*. In this case, the Supreme Court returned to the question of the proper sentencing of Aboriginal offenders in Canada. In 1999, the Court rendered a decision (the famous *Gladue* ruling) telling judges how to interpret and apply a *Criminal Code* provision requiring that the circumstances of Aboriginal offenders be taken into account in sentencing. The *Criminal Code* provision and *Gladue* were intended to reduce the over-representation of Aboriginal persons in our prisons. However, in the years after 1999, the rates of Indigenous imprisonment only increased. In *Ipeelee* the Court re-emphasized, and provided further direction to the lower courts, about when and how to take into account the background circumstances of both the individual offender and their community in general during sentencing. (Sadly, the imprisonment of Aboriginal persons in this country continues at the same, or higher, rates as before either of these rulings.)

A longer-term response to the Jordan decision has been to find ways to "streamline" the criminal court system.

Finally, in 2015, the Supreme Court responded to the Harper Conservatives' efforts to impose mandatory minimum sentences for many offences where none had existed previously. In the case of *R v Nur*, the Court struck down

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a mandatory minimum sentence for a gun crime, and in doing so explained how other, similar mandatory punishments might also be challenged. Lawyers across the country have gone on to use these principles to successfully challenge other mandatory minimums for other gun crimes, some sexual offences, and other penalties which do not allow judges to take proper account of the actual circumstances of the offence or the personal histories of the offender. The Court invoked these same principles to strike down laws making payment of victim surcharge penalties mandatory for every offender, regardless of their personal and financial circumstances and ability to pay.

R v Jordan

The single case which, in the last 20 years, seems to me to have led to the most significant and wide-spread change is the 2016 Supreme Court of Canada decision in *R v Jordan*. In this case, the Court addressed and changed the principles which define the rights of Canadians to be tried without undue delay.

Barrett Jordan was involved in a drug trafficking operation in the lower mainland area of British Columbia. He and 9 other accused were arrested and charged in 2008. For various reasons, Jordan's trial did not begin until September 2012 and did not end until early 2013. Total time from charge to conviction was over 49 months.

At the beginning of his trial, the accused made an application to end the prosecution due to the delay. He argued that his right "to be tried within a reasonable time" as guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms* had been violated. The trial judge dismissed his application, and the Court of Appeal of British Columbia dismissed his appeal. Mr. Jordan appealed to the Supreme Court of Canada.

Before *Jordan*

Until *Jordan*, this right had relatively flexible meaning. An accused who felt they had not been tried within a reasonable time would have to prove to a judge that:

- the matter had taken too long;
- they had suffered prejudice (damage or loss of some sort, including emotional and mental stress from having the charges hanging over them for so long); and
- the only proper remedy was a court order halting the proceedings.

In the months following the Jordan decision, Crown prosecutors abruptly halted hundreds of prosecutions across the country, allowing accused persons to walk away from charges without trials being held.

The courts interpreted and applied this law by engaging in an assessment of which side was responsible for how much of the delay and whether that delay was acceptable and tolerable in the circumstances. Where an accused person could point to actual loss or damage, less delay was likely to be acceptable. On the other hand, if there was no form of real prejudice, the court would grant the Crown

more leeway in the assessment of what was "reasonable" delay. The court also took into account other factors, such as the caseloads of the courts and prosecution services, court facilities, and the like. Because of the great variations in court workloads and resources, the right began to take on different meanings in different parts of Canada.

The Court's Decision

In its ruling, the Supreme Court overturned about 25 years of law concerning the right of Canadians to a "trial within a reasonable time" after being charged. The Court imposed fairly rigid deadlines for the completion of criminal prosecutions:

- For less serious matters (known as "summary conviction" prosecutions under the *Criminal Code*), the Crown now has 18 months to complete the trial.
- For more serious files ("indictable" prosecutions), the time limit is 30 months (2.5 years).

Where a file remains unresolved by these deadlines, the accused is entitled to apply to the court to halt the proceedings (formally called a "stay of proceedings") as a remedy for the breach of their constitutional right.

In *Jordan*, the Supreme Court hoped to simplify and clarify the law. By fixing firm deadlines, the Court intended to avoid the rather inconsistent and overly flexible interpretations other courts across the country were giving this right. While some leeway to explain and justify delays past the 18- and 30-month deadlines continues to exist, the onus will usually fall on the state to justify and explain why a particular case has not concluded within those time frames.

The Ripple Effect

While the ruling in *Jordan* addressed only the question of delay, the "ripple effect" – being the reaction of governments across the country – has been radical changes to our criminal justice system in ways we could not have foreseen. First, there have been some efforts to ensure all levels of court are properly staffed, with enough judges and court officials to operate as many courtrooms as possible as often as possible. As well, many provinces have invested in more Crown prosecutors and support staff in order to move cases forward at an appropriate rate. The changes also go much further than this.

The Court imposed fairly rigid deadlines for the completion of criminal prosecutions ...

In many jurisdictions across the country, the initial response of prosecution services was to "weed out" and end prosecutions for many more minor types of offences in order to be able to concentrate resources on more serious crimes and wrongdoing. Especially in the more populous jurisdictions, the prosecution services found themselves having to suddenly make some hard choices about what matters should move forward and what should not. In the months following the *Jordan* decision, Crown prosecutors abruptly halted hundreds of prosecutions across the country, allowing accused persons to walk away from charges without trials being held.

A longer-term response to the *Jordan* decision has been to find ways to "streamline" the criminal court system. One of the most significant changes is the abolition of Preliminary Inquiries in all but the most serious cases. Governments and victims groups have long complained that these pre-trial hearings (held to determine whether there is sufficient evidence to justify a trial – there almost always is – and to allow the parties to find out more about the case) delayed the proceedings and exposed complainants and witnesses to additional courtroom questioning. Whether Preliminary Inquiries actually delayed

proceedings is a subject of heated debate. Nonetheless, the federal government listened to the various agencies and lobbyists who sought to abolish these proceedings. Using *Jordan* as an excuse, the government amended the *Criminal Code* to allow such hearings only where the punishment for the crime may be life imprisonment or imprisonment for up to 14 years. This amendment restricts Preliminary Inquiries to only the most serious cases: mainly, murder cases and the most serious sexual offence cases.

The federal government also enacted changes intended to address other sources and causes of delay. Minor breaches of release orders may now be dealt with by a means other than the prosecution of charges in court. As well, the rights of Canadians to jury trials – which usually take longer to schedule and consume more court and other state resources – have been curtailed. This keeps more prosecutions in the lower courts to be heard and decided by judges sitting without juries.

Whether or not these changes have ultimately improved the court system remains to be seen. However, there can be little doubt that of all of its decisions in the area of criminal law in the last 20 years, the Supreme Court of Canada's ruling in *Jordan* is the most significant, with the most far-reaching effects of all.

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ENVIRONMENT

The Crown's Duty to Consult

Jeff Surtees

What is the most important environmental law case in Canada since the turn of the century? Twenty years is a long time in Canadian environmental law, given that this area of law has only existed as a 'thing' for a little more than twice that length of time.

One well-reasoned view is that choosing such a case is an impossible task because courts routinely sidestep the important environmental issues, seeing them as primarily political rather than legal matters. (See the analysis by Professor Shaun Fluker from the University of Calgary in a piece he wrote for ABlawg in 2010 titled "The Nothing that is: The leading environmental law case of the past decade".)

The subject matter of environmental law is vast, complex and varied. Over the past twenty years, cases have been decided by all levels of courts and by an assortment of administrative tribunals. The subject matters of these decisions include:

- constitutional law (both division of powers and under the *Charter*);
- environmental assessment;
- Aboriginal law;
- review of regulatory decisions made by local authorities;
- judicial review of decisions of administrative boards;
- the extent and processes of public participation (standing);
- protection of endangered species;
- protection of physical spaces, such as rivers, parks and marine conservation areas;
- public trust;
- criminal law and enforcement actions under a myriad of mostly provincial regulatory statutes and regulations.

(See William A. Tilleman and Alastair R. Lucas Q.C. *Litigating Canada's Environment: Leading Canadian Environmental Cases by the Lawyers Involved* (Toronto: Thompson Reuters, 2017).)

Photo from Pexels

Courts and parties have grappled with how to deal with key environmental concepts such as sustainable development and the precautionary principle when environmental damage has occurred, issues related to prosecution, issues related to sentencing, evidentiary issues, and the role of government agencies in the prosecution of environmental offences. (See Allan E. Ingelson, ed, *Environment in the Courtroom* (Calgary: University of Calgary Press, 2019.)

Cases that are not even about the environment can have a big impact on environmental law. One such case that was suggested to me is a very recently published decision of the Supreme Court of Canada which

provides a revised framework for determining the appropriate standard (correctness or reasonableness) courts are to apply when reviewing decisions made by Canadian administrative tribunals (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65). Administrative boards routinely make decisions about environmental regulation. Accordingly, changes to the principles that courts must use when reviewing those decisions will have a broad impact.

The case provided a framework to be used for consultation where claims for Aboriginal rights and title had been made but not yet decided.

In the end, choosing the **most** important case might be like trying to choose the best band from the last twenty years. You could reasonably take the view that there were no good bands so therefore there can be no best band. Or you say that you need better guidelines as to what would make one band better than another. Or you could say you can only pick the best band from each different category of music.

Or you could say (as I am about to do) that 'most important' is probably an impossible standard and the best you could hope to say is just 'significant'. And there are many worthy candidates for significant cases. But since it is my column and I make the rules, I get to pick one!

In my view, a significant case – an important case possibly (but not necessarily definitely) the most important environmental law case decided in the past twenty years – is *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

The facts of the case are not complicated. The government of British Columbia holds legal title to the islands of Haida Gwaii (the Queen Charlotte Islands) and issues licences to timber companies to harvest trees on those islands. The people of Haida Nation claim legal title to the islands of Haida Gwaii and the waters surrounding the islands (this claim is ongoing). Timber companies had already heavily logged the forests, which are central to the Haida people's identity and culture. The Haida Nation objected to the government issuing or transferring the timber licenses and to the further harvesting of timber on the lands. Their claim for legal title was complex and the court had not yet heard it. Their fear was that by the time the court decided the title issue, all the trees would have been cut down. Once old growth forests are cut down, argued the Haida Nation, they could never be replaced.

The question before the Supreme Court of Canada was:

> *In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in [the area for which the licence had issued] should be harvested before they have proven their title to land and their Aboriginal rights? (at paragraph 6).*

The* Haida Nation *case was not the beginning nor the end of the story of the development of the extent of the Crown's duty to consult.

Although the decision used principles developed in earlier cases, the Court said this was the first time a court had considered this specific question. The case provided a framework to be used for consultation where claims for Aboriginal rights and title had been made but not yet decided. The Court ruled that indeed the government did have a legal duty to consult with the Haida people about the issuing or transferring of timber licences.

The Court also decided that:

- the government had to consult in good faith in a meaningful way;
- consultations might (but didn't necessarily have to) lead to an obligation to accommodate the Haida people's concerns;
- there was no obligation on the government to actually reach an agreement;
- the government could not discharge its duty by delegating consultation to the timber company; and
- the timber company did not have its own independent duty to consult.

Where did this duty come from? Relying on earlier cases (including *Badger*, *Marshall* and *Delgamuukw*, all cited in the *Haida Nation* decision between paragraphs 21 and 24), the Court said it comes from the 'honour of the Crown'.

The Court states at paragraph 25:

> *Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.*

The *Haida Nation* case was not the beginning nor the end of the story of the development of the extent of the Crown's duty to consult.

The case has been cited hundreds of times. It is an important backdrop to cases on what it takes to prove Aboriginal title, such as *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. *Haida Nation* establishes that the Crown's duty to consult arises as soon as the Crown has "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (paragraph 35). But the details of what that actually means on the ground – what the Crown actually has to do to carry out its duties – have not been clear and are still being clarified by court decisions. The duties will be different in every case.

The lack of clarity around the extent of the duties, and how they are to be properly performed, received national attention when the Federal Court of Appeal quashed the federal approval of the expansion of the Trans Mountain pipeline in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153. One of the reasons for the decision was that the government had failed to consult meaningfully and address the real concerns of the affected Indigenous groups. On the negative side, the case has fueled western alienation. On the positive side, hopefully the *Tsleil-Waututh Nation* decision has shifted how government and industry work with Indigenous groups when planning large projects impacting the environment. More and more it is becoming apparent that Indigenous groups must be seen as full partners who must actually consent to any impact on their lands and rights.

Jeff Surtees

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FAMILY

DBS v SRG: Retroactive child support claims

Photo from Pexels

John-Paul Boyd

I was not short of choices when LawNow asked me to write about one of the most important family law cases in the last twenty years. After consulting with Sarah Dargatz, my fellow columnist on family law issues, I decided to talk about *DBS v SRG*, a critical 2006 decision of the Supreme Court of Canada on the law relating to retroactive child support claims.

While most court orders take effect – begin to work, that is – only at the moment a judge makes them, a *retroactive* order is meant to take effect at some point in the past. *Child support* is money paid after separation by one parent to the other as a contribution toward the day-to-day costs of raising a child. A *retroactive child support* claim, therefore, is an application seeking an order for the payment of child support starting at a date earlier than the date the order is made, sometimes long before the date the application for support is delivered.

Before *DBS*, the law in this area had become confused, with some judges saying one thing and others saying another. This made it very hard to predict the outcome of an application for retroactive child support. Two of the key functions the Supreme Court of Canada serves is correcting the law when conflicting lines of cases emerge and clarifying the legal tests that apply to a problem. These functions are the real importance of *DBS*.

Personally, I really enjoy decisions like *DBS* because they give the court the important opportunity to talk about the principles and theories that underlie the framework of family law in Canada. To *really* understand family law, you need to understand its philosophical foundations. Why and when can retroactive child support orders be made? That is the question *DBS* answers.

In fact, *DBS* wasn't just one case but four. It, and the other three – *LJW v TAR*, *Henry v Henry* and *Hiemstra v Hiemstra* – came from the Alberta Court of Appeal. All concerned claims for retroactive child support, some of which were successful at trial, others not. Some cases involved unmarried parents who had applied for support under provincial law, some were married and applied under the federal *Divorce Act*. In all four cases, the parent receiving child support had failed to apply to increase the amount of child support payable as quickly as they should have. This meant their children went without the level of support to which they were entitled as a

result. The different circumstances behind each of the four cases allowed the Supreme Court of Canada to develop a single analysis of retroactive child support and play those principles out against the facts of each case.

Principles of child support

The Court's reasoning, in the majority decision written by Justice Bastarache, is surprisingly easy to follow. First, Justice Bastarache said that the mere fact of being a parent creates both moral and legal obligations. The legal obligations include financially supporting the child, a duty that arises when the child is born.

A retroactive child support claim … is an application seeking an order for the payment of child support starting at a date earlier than the date the order is made …

Secondly, the right to child support belongs to the *child*, not to the parent who receives it. This right survives the breakdown of the relationship between the child's parents.

Thirdly, since 1997, the calculation of the amount of child support has been set by the Child Support Guidelines. This regulation fixes the amount payable according to the income of the person paying support and the number of children entitled to support. The Guideline shifted the way we look at child support, from the obligation of both parents to cover the children's expenses to the income of the parent paying support, the payor. In most cases, the actual cost of the children's expenses is irrelevant, as is the income of the parent receiving support, the recipient.

Fourthly, and most importantly, because the Guidelines link the amount of child support payable to the income of the payor, the amount of support owing changes as the payor's income changes. The court can't make orders about child support until someone applies for a support order. However, where a duty to pay child support wasn't met, or fully met, *before* the application, the court may decide to enforce that unmet obligation through a retroactive support order.

When applications are made

Parents can apply for retroactive child support orders in three different circumstances:

1. when there is an existing order;
2. when there is an existing agreement; and,
3. when there is neither.

Each situation has its own considerations.

When there is already an order in place, payors need to know that they are meeting their duty by paying the amount of support the order says needs to be paid. However, Justice Bastarache, who wrote the majority decision, said that "parents should not have the impression that child support orders are set in stone." Parents must understand that support orders are "based upon a specific snapshot of circumstances which existed at the time the order was made." Those circumstances may change down the road. Retroactive support orders address deficiencies in the original order that arose as the payor's income changed and the amount of support being paid didn't.

When there is an agreement in place, things are a bit different. Justice Bastarache said the courts should generally respect the parents' right to settle their legal issues. However, payors cannot have the same certainty that they are meeting their duty by paying the amount the agreement says needs to be paid. "A payor parent who adheres to a separation

agreement that has not been endorsed by a court should not have the same expectation" that they are fulfilling their legal obligations as does "a payor parent acting pursuant to a court order."

… the right to child support belongs to the child, not to the parent who receives it.

When there is no order and no agreement, however, the court is much more likely to make a retroactive order. Justice Bastarache said that it is "unreasonable for the non-custodial parent to believe (s)he was acquitting him/herself of his/her obligations towards his/her children" in not paying, or in underpaying, child support.

Factors the court considers

Justice Bastarache wrote that there are four factors a court should consider when asked to make a retroactive child support order:

1. the recipient's reasons for not applying for the order sooner (Were they bullied by the payor? Did the payor refuse to provide financial disclosure? Or, did they know more support should be paid but just never bothered to ask for it?);

2. how the payor handled their obligation to support the children;

3. whether the children went without as a result of child support not being paid, or being underpaid (Did the children suffer because not enough support was paid? Were there things the children needed but the recipient couldn't afford? Or, did the children have a good standard of living and want for nothing?); and

4. the hardship to the payor if a retroactive order is made (Will the payor go into debt if the order is made? Or, can the payor actually afford to pay the amount owing?).

Of these four factors, probably the most important is the payor's behaviour with respect to their support obligation, particularly if the payor's behaviour was "blameworthy." Justice Bastarache said that blameworthy behaviour is "anything that privileges the payor parent's own interests" over "the children's right to an appropriate amount of support." Examples of blameworthy behaviour include the payor concealing changes in their income, intimidating the recipient into not applying for child support, and misleading the recipient into thinking they are meeting their obligation. However, Justice Bastarache also wrote that:

> *No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct.*

When retroactive orders can start

The last and most important part of *DBS* is about how far back a retroactive child support order can go. Justice Bastarache said that the usual starting date should be the date the payor has "effective notice" of the recipient's intention to seek child support or adjust the amount of support being paid. Effective notice is "any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated … all that is required is

that the topic be broached." Once notice is given, the payor can no longer assume that the existing situation is fair.

Because it can take so long to get from giving "effective notice" to a hearing in court, Justice Bastarache said that there should generally be a limit of *three years from the date the recipient delivered the actual application* to the payor. However, where the payor's conduct was blameworthy, the court can decide to go back as far as *the date when the amount of child support became inadequate*. Three years is a long time, but when the payor has misbehaved, the court can make the order start the moment that the amount of child support being paid became less than what the payor should have paid.

Conclusion

If there is a lesson to be drawn from *DBS* for payors, it is this. The Child Support Guidelines allow recipients to ask for your income information once every year. Whether the recipient asks for this information or not, you should provide it. You should also voluntarily adjust the amount you're paying to match any increases in your income. If you don't do these things, you risk the court deciding that your conduct has been blameworthy and making a retroactive award.

The lessons for recipients are also important. Ask the payor for the financial information you are entitled to once each year. If the amount being paid is less than what should be paid, bring it up with the payor. Don't drag your feet. Keep receipts for what you're spending on the children, and make a record of anything that you can't buy for the kids when you suspect the payor is paying less child support than they should.

... because the Guidelines link the amount of child support payable to the income of the payor, the amount of support owing changes as the payor's income changes.

John-Paul Boyd

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Access to Justice Given a Boost by *Downtown Eastside Sex Workers* Case

Linda McKay-Panos

In *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 (DESW), the Supreme Court of Canada (SCC) adapted the rule on public interest standing. This resulted in the potential for better access to justice, especially for vulnerable peoples who may not otherwise have heard their issues addressed by a court.

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History of Standing

"Standing" means that, in order to participate in a lawsuit (stand before the court and advocate for their position), a person must have a sufficient interest in the issues brought forward.

The Canadian civil litigation system is premised on the norm of "private standing" or "standing as of right". This means that individual litigants will come to court raising grievances personal to them (for example, they were injured in a car accident and are suing for damages).

Private standing has traditionally been viewed as the best way to operate our court system because:

- it prevents mere "busybodies" from using up scarce judicial resources;
- it ensures contending points of view are raised by those personally invested in the outcome of the case; and
- it preserves the proper role of courts and their relationship to the other branches of government.

Beginning in 1974 and only in limited circumstances, the SCC allowed litigants without a direct stake to proceed under public interest standing (see *Thorson v Attorney General of Canada*, [1975] 1 SCR 138). Over the next couple of decades, the law of public interest standing evolved. Then, in 1992, the

SCC set out a three-step test for public interest standing in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236:

1. There is a serious issue to be tried.
2. The plaintiff is directly affected by the law or action or has a genuine interest in the issue.
3. *There is no other reasonable and effective way to bring the matter before court.*

The third requirement was restrictive and often prevented groups from being granted public interest standing. For example, in *Canadian Bar Association (CBA) v British Columbia*, 2008 BCCA 92, the CBA challenged government cuts to the legal aid system in British Columbia. The British Columbia Supreme Court held that the CBA lacked standing to bring the claim in part because lawyers would gain by the potential rise in legal fees paid to them with an increase in legal aid fees, and there were other reasonable and effective ways to bring the matter before the court (e.g., a class action lawsuit). The British Columbia Court of Appeal upheld the decision on other grounds.

The test changed again in 2012 when the *DESW* decision relaxed this third requirement. The Court's reformulation has significantly reduced the onus on prospective public interest litigants. The case is also important because it was the first time the SCC characterized public interest standing as an access to justice issue. Marginalized groups often lack resources to advance *Charter* litigation. Public interest standing is a way for these groups to effectively participate in adjudication of important social issues.

The *DESW* Decision

The DESW is an organization whose objectives included improving working conditions for female sex workers. The DESW and an individual who worked with sex workers (together) sought a declaration that sections 210 to 213 of the *Criminal Code*, which dealt with prostitution matters, violated several *Charter* rights. Because the *Criminal Code* provisions did not directly impact the DESW and the individual, they requested public interest standing.

The Canadian civil litigation system is premised on the norm of "private standing" or "standing as of right".

The *DESW* case raised the issue of whether the court should treat the three factors set out in *Canadian Council of Churches* as a rigid checklist or as simply considerations to take into account when exercising judicial discretion with respect to granting standing.

The trial court held that the DESW and the individual did not meet the test for public interest standing. One of the trial court's reasons, relating to the third factor of the test, was that sex workers themselves could commence a claim. The DESW argued that sex workers in the area were not willing to bring forward a comprehensive challenge because they feared loss of privacy and safety, and increased violence by clients, among other concerns. The British Columbia Court of Appeal overturned the trial court's decision. Canada appealed the decision to the SCC.

The SCC affirmed the first two factors of the test set out in *Canadian Council of Churches*. The first factor (*justiciability*) is important because the court must possess the ability to provide a legal resolution to the dispute. This ability relates to the constitutional relationship of the court to the other branches of government and to the concern about the allocation of "scarce judicial resources". Courts

exercising their discretion to grant standing must stay within the bounds of their proper constitutional role and should analyze whether the Statement of Claim reveals at least one serious constitutional issue. The second factor is concerned with whether "the plaintiff has a real stake in the proceedings or is engaged with the issues they raise" (para 43). The Court confirmed that the issue at hand in *DESW* satisfied these two factors.

Turning to the third factor, the SCC noted that courts often express it as a strict requirement – there is "*no other* reasonable and effective manner in which the matter may be brought before the court". The Court listed several considerations that assist with interpreting the third factor in a manner that "reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area":

1. The Court has not always expressed and rarely applied this factor rigidly;
2. This factor must be applied purposively; and
3. A flexible approach is required to consider the 'reasonable and effective' means factor (paras 45 to 51).

DESW *constitutes a significant step forward in increasing access to* Charter *litigation.*

The SCC noted that courts should apply the third factor in "light of the need to ensure full and complete adversarial presentation and to conserve judicial resources." The court should have the benefit of hearing:

- the contending views of the people who are most directly affected by the issues;
- whether the proposed action is an economical use of judicial resources;
- whether the issues are presented in a context suitable for judicial determination in an adversarial setting; and
- whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality (para 50).

The SCC also provided an illustrative list of examples of matters that courts could find useful when assessing the third discretionary factor. These include:

- the plaintiffs' capacity to bring forward a claim – their resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed manner;
- whether the case is of public interest – does it transcend the interest of those most directly affected by the challenged law?
- the lack of realistic alternative means which could favour a more efficient and effective use of judicial resources;
- the existence of other potential plaintiffs, particularly those who would have standing as of right – will the plaintiff bring any particularly useful or distinctive perspective to the resolution of the issues?
- the potential impact of the proceedings on the rights of others who are equally or more directly affected.

The SCC concluded that the third factor should be expressed as "whether the proposed suit is, in all the circumstances, a reasonable and effective means of bringing the matter before the court" (para 52).

The SCC concluded that all three factors favoured the Court exercising its discretion to grant public interest standing to the DESW and the individual.

Conclusion

The relaxation of the third factor is a welcome change to those public interest groups who have previously encountered difficulties in obtaining standing.

"Standing" means that … a person must have a sufficient interest in the issues brought forward.

There are many examples of the impact of DESW on public interest standing and access to justice. One example is *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (MMF). In that case the trial judge denied standing to MMF (based on the *Canadian Council of Churches* decision). The Manitoba Court of Appeal upheld the trial court's decision but a majority of the SCC overturned that decision in light of the outcome in *DESW*. The SCC granted MMF public interest standing. The action advanced was a collective claim for a declaration intended to reconcile the claims of the descendants of the Métis people of the Red River Valley and Canada. Accordingly, it merited allowing the body representing the collective Métis interest to come before the court.

DESW constitutes a significant step forward in increasing access to *Charter* litigation. It recognizes that public interest litigants are crucial to realizing the *Charter*'s democratic potential because they can address the systemic impacts of the law on the most vulnerable people in a way that isn't possible in individual litigation. The decision paves the way for systemic issue Charter challenges in the future and validates the importance of public interest litigation.

Linda McKay-Panos

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The Unchanging Meaning of 'Charity'

Peter Broder

It is often said that the only constant is change. But some things move faster than others.

With 5G in the offing, few people now remember the days of dial-up internet and the non-profit groups that sprang up twenty or so years ago to offer access to the then-budding worldwide web. That, however, was the last time a Canadian federal court endorsed a specific broadening of the meaning of charity for *Income Tax Act* purposes.

There was a period in the 1980s and 1990s, when if you wanted to get online, chances were that you didn't do so through one of the handful of major telecom providers so familiar these days. Access was through universities and colleges or through a series of local, largely volunteer, non-profit networks. (Dial-up, once you were online, required a somewhat longer attention span than is common these days.)

One of those network groups was the Vancouver Regional Freenet Association. After being incorporated as a British Columbia Society, it sought status as a registered charity. Initially turned down by the Department of National Revenue (predecessor to the Canada Revenue Agency), it appealed that decision to the Federal Court of Appeal. The case is known as: *Vancouver Regional FreeNet Assn v MNR (FreeNet)*. The Court found that it did meet the criteria to be a registered charity because its purposes were comparable to those previously

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recognized as charitable in legislation and at common law.

Hugessen, J.A. held that the purposes of the Association were broadly to establish and encourage development of community communications resources. These purposes were similar to the support for physical public infrastructure – such as repair of bridges, ports, causeways and highways – referenced in the Statute of Elizabeth. Justice Hugessen wrote:

> *While I do not want to insist unduly on the analogy to the information highway, there is absolutely no doubt in my mind that the provision of free access to information and to a means by which citizens can communicate with one another on whatever subject they may please is a type of purpose similar to those which have been held to be charitable; it is within the spirit and intendment of the preamble to the Statute of Elizabeth.*
>
> *[1996] 3 FC 880 at para 17.*

As was confirmed in 1999 by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women (Vancouver Society)*, drawing analogies between purposes of contemporary groups and purposes previously held to be charitable is the appropriate way to develop the meaning of charity in Canada. Additional considerations, the Supreme Court held, should include whether the purposes fit within the classification scheme set out in the 1891 British decision in *Commissioners for Special Purposes of the Income Tax v Pemsel* and whether the purposes are within the "spirit and intendment" of the Statute of Elizabeth.

... drawing analogies between purposes of contemporary groups and purposes previously held to be charitable is the appropriate way to develop the meaning of charity in Canada.

The law of charity is, famously, a "moving subject". It is supposed to evolve with society and not be frozen in time. Community needs and norms frequently change, and it is important that the responses offered through charities adapt as well. In Canada, since there is no federal statutory definition of charity, it generally falls to the courts to update the meaning. Although there is potentially some authority for the Canada Revenue Agency (CRA), through its Charities Directorate, to accept novel purposes similar to those recognized in the past, the extent to which it can do this is unknown and has never been judicially tested. Because CRA decisions are not necessarily publicized and are not binding precedents, the need for guidance from the courts remains crucial.

As it turned out, however, neither Justice Hugessen drawing ingenious parallels between upkeep of brick-and-mortar transportation infrastructure and the maintenance of cyberspace widgets and wires, nor the Supreme Court essentially endorsing the methodology in the *FreeNet* case, was taken by the judiciary as a green light. In the two decades since the *Vancouver Society* and the nearly quarter century since the *Freenet* case, there has not been any significant broadening by the courts of what qualifies as charity under the *Income Tax Act*.

There has been some improvement around the edges. Notably, Justice Iacobucci's extensive analysis in *Vancouver Society* of when educational endeavours can be charitable has widened the ambit for advancement of education purposes to be recognized by CRA. As well, there has been acknowledgement by the regulator of some societal changes (often paralleling what has been done in other jurisdictions). So, for example, purposes related to promoting racial equality have won favour.

In Canada, since there is no federal statutory definition of charity, it generally falls to the courts to update the meaning.

But major change remains elusive. Tax policy considerations and other factors often come into play and militate against judges getting too creative with their analogies. In December, the Federal Court of Appeal denied an appeal by the Church of Atheism to overturn its CRA registration denial, because it need not meet the traditional criteria for religious purposes. Based on recent case law, prevention – as opposed to relief – of poverty also falls outside the scope of charity in Canada (at least federally).

In the face of the reluctance of other Federal Court of Appeal judges to embrace the bold approach taken by Justice Hugessen, and

endorsed by the Supreme Court, one option is to change the venue for registration appeals. (The Senate in its report on a study of the charitable sector undertaken in 2018 and 2019 called for moving initial appeal jurisdiction to the Tax Court.) A second step would be to endorse or entrench in legislation the methodology for developing charity law laid out in *Vancouver Society*.

It is no doubt overly ambitious to expect charity law to keep pace with developments in the world of hi-tech. But exploring and finding new ways of doing things are as necessary – and worthwhile – in the voluntary sector as they are in other parts of society. Let's hope, whether with more open attitudes among judges or with structural changes, we can improve on dial-up.

Peter Broder

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YOUTH

Canada's Youth Criminal Justice System

Jessica Steingard

In April 2003, the *Youth Criminal Justice Act* (YCJA) replaced the *Young Offenders Act*. The YCJA sets out the justice system that applies to young persons – aged 12 to 17 – charged with an offence in Canada. Children under 12 cannot be charged with a crime. The YCJA looks at your age when the crime was committed.

Canada's youth justice system operates according to several guiding principles, including:

- protecting the public by holding you accountable for your actions while also recognizing you may not fully understand the consequences of your actions
- promoting your rehabilitation and reintegration back into society
- encouraging you to repair the harm done to those impacted by the offence, including the surrounding community.

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In this article, I will summarize some of the stages of the youth justice system.

What happens if the police catch me?

The YCJA promotes using measures outside of court processes (called "extrajudicial measures") to respond to less serious youth crime. Extrajudicial measures include:

- Taking no further action.
- Giving an informal warning.
- Giving a formal warning, called a police caution. This could be a letter to you and your parents or a meeting at the police station between you, your parents and a senior police officer.
- Referring you to community programs or agencies that may help you not to commit offences.

If extrajudicial measures are not appropriate, the police can lay charges or give you a ticket. They may or may not arrest you, depending on the offence you committed.

What happens if the police charge me?

1. **The police will give you a document that says when you must appear in court.**

   It may be called a Promise to Appear or a Recognizance. You must report to court on that day or there may be further consequences. All youth are eligible to

receive representation by a lawyer through Legal Aid Alberta. Contact Legal Aid Alberta for more information.

2. **The police will contact your parents or guardians.**

   You cannot keep it a secret from them. If the whereabouts of your parent is not known or if your parent is not available, then the police must notify an adult relative or other adult who is known to you and is likely to assist you.

   There is an exception: if you were under 18 when you committed the crime but are at least 20 years old when you first appear before a youth justice court, your parents do not have to be notified.

Judges have a wide range of sentencing options available, with custody usually being a last resort.

3. **The police can hold you in custody until your court hearing.**

   At a bail hearing, a judge or justice of the peace will not release you if:

   - you have been charged with a serious offence or if this is not your first offence; and
   - it is likely that you will not appear in court when required to, you are likely to commit a serious offence, or the circumstances justify you being held in custody; and
   - no release conditions are suitable to your situation.

   A serious offence is an indictable offence for which the maximum punishment for an adult is five years or more in jail. The YCJA specifically states that police cannot hold you in custody as a substitute for appropriate child protection, mental health or other social measures. The court may also order that you be placed in the care of a responsible person instead of being held in custody.

   If you are released until your court hearing, you may have to comply with various conditions. If you do not comply, there may be further consequences.

4. **You must attend the court hearing.**

   At the court hearing, the court may decide that you are eligible for **extrajudicial sanctions**. You may be eligible:

   - depending on the offence you committed;
   - if you have not been referred for extrajudicial sanctions in the past two years; and
   - if you have spoken to a lawyer about your rights.

You must also admit responsibility for the offending behaviour and agree to participate in the program.

Note: Extrajudicial sanctions can also be used before you are charged with an offence. The police will put the charge on hold. If you complete the sanctions, then the police will not charge you. If you do not complete the sanctions, then the police will charge you and you will go to youth justice court.

All youth are eligible to receive representation by a lawyer through Legal Aid Alberta.

If you proceed with extrajudicial sanctions, you will be referred to a probation officer or a youth justice committee for an intake meeting

(or "conference"). They will meet with you and work with you to create conditions that are meaningful and achievable for you. Your parents, social worker and other supports may also be included in the conference. Conditions are meant to recognize and repair the harm you have done to those affected by your actions. For example, if you are being charged with shoplifting, your conditions might include writing a letter of apology to the store, reflecting on your behaviour, community service or personal service (for a family member). If you successfully complete the agreed upon conditions within the given time period (usually 3-4 months), the charges will be withdrawn – meaning they will not appear on your record. If you do not complete the conditions, the charges will remain.

There are various youth justice committees across the province, each with different focuses. One example of a youth justice committee is the Youth Restorative Action Project (YRAP) in Edmonton. This organization is run by youth, for youth. It works with youth affected by a variety of significant social issues including substance abuse, homelessness, family violence and prostitution. In addition to convening conferences under the YCJA, YRAP provides ongoing supports to youth in the community through its mentorship program and weekly drop-in events.

Extrajudicial sanctions can also be used before you are charged with an offence.

If you are not eligible for extrajudicial sanctions, or you do not successfully complete your extrajudicial sanctions, the Crown prosecutor will proceed with the charges against you. If you plead "guilty", the judge will sentence you (at a separate hearing). If you plead "not guilty", there will be a trial. Do not enter a plea until you speak with a lawyer. At the trial, if the Crown prosecutor successfully proves that you committed the offence, the judge will find you guilty and sentence you.

What will my sentence be?

The principle of proportionality says that less serious crimes should have less serious consequences and more serious crimes should have more serious consequences. Your sentence should also promote your rehabilitation and reintegration back into society. For example, you won't necessarily be sentenced to jail for stealing a chocolate bar, but there will still be consequences.

Youth justice committees, such as YRAP, can also get involved at the sentencing stage. They may meet with you and brainstorm sentencing options. They will present their sentencing recommendations to the judge in a pre-sentence report. The judge can accept, change or ignore the recommendations. Ultimately, your sentence is up to the judge.

Judges have a wide range of sentencing options available, with custody usually being a last resort. In 2016-2017, only 13% of guilty youth cases received a custody sentence, compared to 38% of guilty adult criminal court cases. Options include:

- The judge giving you a stern lecture or warning.
- A court order saying you must report to someone or attend a specific program. For example, if you are more likely to get into trouble right after school, or on weekends, when you are unsupervised, the order could require you to attend a program during these times.
- A court order directing you to complete community service.
- A court order directing you to attend a rehabilitative program. This is only available for serious violent offenders.

If you are sentenced to custody, you will be held in a youth custody facility until you are 18. Once you turn 18, you can be moved to an adult corrections facility.

The judge can sentence you as an adult, instead of a youth, for your crimes if:

- you were at least 14 years old when the crime was committed;
- an adult could be sentenced to jail for more than two years for the same crime;
- the Crown prosecutor proves to the court that you behaved like an adult and that a youth sentence would not be long enough to hold you accountable for your actions.

How long does my youth record last?

As a general rule, your name cannot be published if you are accused or found guilty of a crime as a young person. (The rules change if you are sentenced as an adult.) The YCJA also sets out who has access to your records and for how long, usually depending on what type of sentence you receive. For more information, see the Government of Canada's Youth Records webpage.

Jessica Steingard

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In the next issue of LawNow, we will be looking at Instagram and Snapchat's Terms and Conditions. Just what are you agreeing to when you click that button without reading?

Special Report

Rural Law

Promoting the Practice of Law in Rural, Regional & Remote Communities

Tonya Lambert

In 2012, 14% of lawyers in B.C. practiced outside of Vancouver, Victoria and Westminster.

In 2014, 11% of lawyers in Alberta practiced outside of Calgary and Edmonton.

In 2018, 22% of lawyers in Saskatchewan practiced outside of Saskatoon and Regina.

Note: Most lawyers practicing outside of these large cities are located in smaller urban centres.

The Problem

There is an access to justice crisis developing in rural, remote and regional communities across the country. Lawyers in small towns are growing older and nearing retirement. Newer lawyers are not stepping in to fill their shoes, preferring to stay in larger cities. Rural firms are either shutting down or being bought by larger firms in regional centres, which then send a lawyer to the town for a few days every month. Combine this with the closing of many small courthouses and cutbacks to legal aid funding and you have an impending access to justice crisis.

The increasing shortage of lawyers in rural regions has a far-reaching effect on communities in these areas. Lawyers often fill leadership roles within their communities, serving on boards and political councils. They are members of the Chamber of Commerce and play a key role in businesses at every stage of their development. Community-minded, lawyers volunteer in a variety of organizations, from community leagues to sports teams to local non-profits and many more. In short, lawyers occupy many key roles within a community, and their absence is felt keenly far beyond the walls of any courtroom.

Work needs to be done to highlight the benefits of rural living … and rural practice …

The Obstacles

Nationally, only 8.7% of new lawyers (having less than five years of experience) practice in a rural setting. A survey of the Law Society of British Columbia found that most students would leave the province before considering practicing in a rural area. Such a sentiment is not unique to students in B.C. The overwhelming preference of most law students to work in an urban centre is found across the country. Why is this?

1. Most law students are from urban centres and have little experience with rural life. Their friends and family live in the city and, unsurprisingly, many students wish to remain close to them. The same is true for their partners, who may find it difficult to find work in a smaller centre.

2. Big city firms dominate recruitment in law school. Students are hit early on with the message that the goal is to work in one of these firms with their money and prestige, and that ending up anywhere else somehow makes you a lesser lawyer. Even students who had no desire to work in such a firm upon entering law school, often quickly succumb to the pressure.

3. There is a perception that small town equals small income. With many students carrying high student loan debt, there is a need to find a lucrative position quickly. Many students do not realize that there is money to be made in rural areas where the need for legal assistance is great.

4. Most rural practitioners are generalists. The need to be well-versed in a variety of legal areas can seem daunting to a new graduate. In addition, as the bulk of legal work in rural areas is solicitor's work, those who wish to litigate prefer to remain in the cities.

5. Rural firms are far less active in recruiting students than their urban counterparts. This is in large part due to finances. It costs time and money to travel to colleges to talk with students. It is also more difficult for small firms and sole practitioners to absorb the cost of training articling students, especially if the students then return to the city to practice. Thus, students often must seek out opportunities in small communities.

6. Law school does not teach the business skills necessary to operate a law firm. This makes it very difficult to set up as a sole practitioner in a rural area or step into the role of a partner only a few years out of college.

The increasing shortage of lawyers in rural regions has a far-reaching effect on communities in these areas.

Photo from Pexels

Seeking a Solution

Law schools, legal organizations and rural development groups across Western Canada have been exploring ways of promoting the practice of law in rural, regional and remote regions. The solutions put forth are many; the success rates varied. Moving from British Columbia to Manitoba, here is a list of some efforts that have been made:

1. **Rural Education and Access to Lawyer (REAL) Initiative**: In 2009, the Canadian Bar Association – British Columbia established a summer student placement program to expose students to the practice of law in small urban and rural areas. REAL offers assistance with funding and helps to match second-year law students with lawyers

in high needs communities. The hope is that students will then return to these communities to article and practice. One hundred and thirty students have been placed, with 61 percent continuing to work in rural communities.

2. **Career Advisor – Rural Regions**: In 2017, the University of Calgary's Faculty of Law hired a second career advisor. Part of this advisor's mandate is to build relationships with rural firms and promote the practice of law in rural areas. The university's Career and Professional Development Office hosts luncheons and invites regional and rural practitioners to speak with students.

3. **Rural Energy and Agriculture Students' Law Society (REAL)**: Established in 2011, the purpose of REAL at the University of Calgary is to promote the practice of law (particularly agriculture and energy law) in small communities and to provide some guidance on managing a generalist practice. To this end, REAL organizes and supports several events. With the university's Career and Professional Development Office, REAL hosts an annual Small and Regional Firm Day which attracts over 100 practitioners from small firms across the province. (The University of Alberta hosts a similar event – the Small Firm Career Day.) REAL also organizes a Rural Judge Shadowing Day and a tour of firms in a small urban centre.

4. **Opportunities Outside of Edmonton and Calgary Seminar**: The Faculty of Law at the University of Alberta has offered a seminar on job opportunities for students in rural, regional and remote regions. Lawyers from these areas are invited to give a guest lecture. As a result, interest in practicing in places outside of Edmonton and Calgary has been increasing.

5. **Rural Access to Justice (RAJ) (later Alberta Rural Law Opportunities (ARLO)) Initiative**: From 2014 to 2018, the Alberta Rural Development Network, with funding from Justice Canada, helped first and second-year students find summer placements in francophone communities in rural areas. The program was similar to REAL BC and was successful in placing several students in rural communities.

6. **Regional Barbecues**: The Canadian Bar Association – Alberta Branch's Small Communities Initiative sponsors barbecues in regional centres. Lawyers, law students (current and incoming) and the judiciary are invited to attend. The idea is to expose students to the benefits of practicing in a regional market before they are bombarded by big firm recruiters at law school.

7. **Regional and Rural Mentorship Program**: The Canadian Bar Association Alberta Branch has expanded their mentorship program to include the option of mentoring with a regional or rural practitioner.

8. **Small Urban and Rural Firm Committee (SURC)**: SURC is a student-driven initiative at the University of Saskatchewan. Every year as part of Access to Justice Week, a student committee organizes a daylong tour of firms and communities in a rural area of the province. The tour gives interested students the opportunity to discover some of the benefits and challenges of working in a small urban or rural area. The Canadian Bar Association Saskatchewan Branch funds this program.

9. **Forgiving Student Debt**: In 2010, the Law Society of Manitoba introduced a program to offer a limited number of law students the opportunity to have their student debt

forgiven (up to $25,000 per year of tuition and living expenses) if they work in an underrepresented community. One-third of their debt is forgiven each year with the hope that after three years in a community, the new lawyer will have put down roots and decide to stay.

Another possible solution put forward by Dustin Link, Bonita Mwunvaneza and Tanner Schroh – former law students at the University of Saskatchewan – is to establish a legal incubator that would provide legal and business training to articling students and new lawyers while at the same time providing affordable and accessible legal services to people in rural and remote communities. The Rural Practice Working Group of the Nova Scotia Barristers' Society has suggested the possibility of establishing a system that would enable rural firms to share articling students, making it easier to absorb the costs of hiring a student.

The need for lawyers in rural, regional and remote areas of the country is steadily increasing as the baby boomers reach retirement age. Law schools, legal organizations and rural practitioners need to do more to present working in a smaller community in a more positive light. Work needs to be done to highlight the benefits of rural living (shorter commute times, better work-life balance, lower cost of living, friendly neighbours, being an integral part of the community) and rural practice (wider variety of legal issues, quicker advancement, lower overhead costs, easier to network). These are advantages of which students are often not aware.

Tonya Lambert

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Crime in Rural Alberta

Dave Pettitt and Jessica Steingard

Photo Credit: Jessica Nobert

Rural crime is a problem in Alberta. In the city, if you have a security alarm on your home, you can realistically expect it to be effective. In the country, who is going to hear the alarm? How long will it take for a police response?

Before moving to an acreage, I (Dave) spent most of my life living in the core of Canadian cities. Crime was part of everyday life. I was never surprised to find my car broken into when I lived in the city. Not a week went by without some kind of theft, be it empty bottles or a freshly planted shrubbery. My solution was moving to the country, and it has worked for me.

I am a lucky acreage owner who has not had to deal with any property crime. Rural life has been wonderful for my family. However, many of my neighbours have had problems, and they are afraid.

The Alberta government recently made several announcements regarding rural crime and policing. First, it announced it will be increasing the number of RCMP officers serving rural Alberta. By 2024, there will be an additional 300 RCMP officers. Second, the government passed a series of amendments to Alberta's trespassing laws aimed at discouraging rural crime.

Preventing Crime

When talking to rural Albertans about what they have done to prevent crime, there are a lot of ideas but no real solutions. One neighbour purchased a top of the line security system when they moved into their home. The security system did not prevent a thief from hooking up to their enclosed trailer and driving away with the owner's tools and livelihood. Gates are broken, thieves smile at security cameras and nobody is close enough to hear the alarm. Big dogs seem to be the most effective deterrent.

In a video series, Crime Prevention Through Environmental Design, the RCMP tells rural Albertans how to prevent crime. Some tips from the video series include:

- Limit visibility of items from the road (keep your toys hidden)
- Limit theft by making it difficult
- Install a driveway alarm so you know when people enter your yard
- Clean lines of sight (make sure your entire yard is visible from the house)
- Lock all outbuildings
- Install deadbolts with strike plates on all exterior doors

- Keep gates closed at all times
- Ensure property is looked after
- Install motion-activated LED lights

The RCMP tips focus on decreasing the likelihood that a thief will choose your property. Arguably, this does not prevent the crime, as much as move it down the road to the next house without motion-activated LED lights.

Responding to Crime

The RCMP website says to report suspicious activity to the local detachment. And wait?

The bottom line is, occupiers can be criminally responsible for their actions and sued by the trespasser for their injuries or death.

Where the police cannot help, farmers and acreage owners are looking for solutions within their own communities. Another neighbour had their truck stolen from their garage while they were home. After this incident, an RCMP officer recommended that the community start a Facebook chat group to communicate. Now, every time a strange vehicle enters the community, someone is talking about it, taking pictures and writing down license plates. When another property was hit, the homeowner called the RCMP with the license plate of the truck as it drove off with their camper filled with gear. Not surprisingly, the stolen truck and the criminals were long gone before the police could arrive.

Another common thread of conversation among my neighbours is what actions can we take against trespassers? We have heard of the recent cases where farmers have taken action and themselves been subject to civil lawsuits (by the trespassers) or even criminal proceedings.

There are a few different laws in Alberta that address an occupier's liability towards a trespasser and penalties for trespassing. Changes to these laws came into effect on December 5, 2019 but are retroactive to January 1, 2018. (Note: The term occupiers includes homeowners and renters.)

When can an occupier be liable for the injuries or death of a trespasser?

The bottom line is, occupiers can be criminally responsible for their actions and sued by the trespasser for their injuries or death.

The *Occupier's Liability Act* sets out when an occupier is liable for people coming onto its premises. An occupier has different levels of liability towards visitors it allows onto its land, child trespassers and adult trespassers.

With respect to trespassers, the Act distinguishes between criminal trespassers and non-criminal trespassers. A trespasser is a criminal trespasser if the occupier has reasonable grounds to believe that the trespasser is committing or about to commit an offence under the *Criminal Code* of Canada. Notable about this definition is that the occupier must have reasonable grounds – this means more than just a suspicion. The courts generally ask what an ordinarily prudent person in the same situation would do.

Where the trespasser is a criminal trespasser, the trespasser cannot start a civil claim for death or injury damages against an occupier. There is an exception though where the occupier causes the death or injury by conduct that is wilful and grossly disproportionate in the circumstances AND results in the occupier being convicted of a criminal offence (by way of indictment).

If the trespasser is convicted of a serious criminal offence, victims can apply for a restitution order.

Where the trespasser is not a criminal trespasser, an occupier is not liable to them for damages for death or injury unless the death or injury results from the occupier's wilful or reckless conduct.

Where the trespasser is a child, the occupier has greater liability. The occupier must make sure the child will be reasonably safe from dangerous conditions or activities on the premises that could harm or kill the child. The child's age and ability to appreciate the danger are taken into account, along with the occupier's burden in removing the danger or protecting the child.

What are the penalties for trespassers?

Trespassers can be charged with various criminal offences under Canada's *Criminal Code*. The sentences can range from fines to prison terms.

Alberta's *Petty Trespass Act* and *Trespass to Premises Act* also create offences for entering a person's land without permission. They also set out pretty steep fines for breaking these laws. The penalties depend on whether or not the trespasser had notice (oral or written) not to enter onto the land.

A person cannot enter onto land without the occupier's permission if entry is prohibited *with* a notice, such as a "No Trespassing" sign or a verbal warning. A person must also leave the land immediately after being directed to do so by the occupier or some other authorized person, such as a security guard.

A person also cannot enter onto land without the occupier's permission if entry is prohibited *without* notice. This includes land that is:

- a lawn or garden;
- used for crops, raising animals (such as cattle, horses, birds or fish), or beekeeping;
- surrounded by a fence, natural boundary or a combination of the two; or
- enclosed in a way that indicates the occupier's intention to keep people off the land or keep animals on the land.

The penalties for contravening these provisions varies. For a first offence, the fine cannot exceed $10,000. For a second offence and all other offences on the same land, the fine cannot exceed $25,000. If a corporation helps or directs a person to commit the offence, the corporation can be fined up to $200,000. The government collects these fines. The victim does not get this money. Compensation of victims is restitution.

A person who trespasses despite a notice not to, or does not leave after being directed to, can also be sentenced to prison for up to 6 months.

Restitution

In some cases, the person who suffered lost or damaged property can get restitution if a trespasser is caught, charged and convicted of an offence.

Where the trespasser is a child, the occupier has greater liability.

If the trespasser is convicted of a serious criminal offence, victims can apply for a restitution order. This is a court order requiring the offender to pay out-of-pocket expenses directly related to the crime, including for damage, destruction or loss of property. However, restitution is only available for certain crimes. One such crime is robbery. Robbery means to steal using violence or threats of violence or using an offensive weapon (or imitation).

If the trespasser is convicted of a provincial offence, such as trespass under the Acts described above, the judge can order the offender to pay up to $100,000 to the victim. This is compensation for loss of or damage to property suffered by the victim as a result of the offence. There must be a way to determine the amount of the loss or damage. Previously the maximum amount of compensation was $25,000.

Conclusion

While these changes to the law are encouraging, enforcement is a concern. To fine or imprison a trespasser means to catch a trespasser. And to get restitution means the trespasser is convicted of an offence. From my experience, that does not happen a lot.

Dave Pettitt

Dave Pettitt manages the Centre for Public Legal Education websites and has specialized in SEO and digital marketing for legal websites for over 20 years.

Jessica Steingard

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BenchPress

Subway Pictogram: Warning sign or law?

Kosoian v Société de transport de Montréal, 2019 SCC 59

On May 13, 2009, Ms. Kosoian rode a down escalator in one of Montreal's subway stations. She didn't hold the handrail. A police officer saw this and ordered her to hold the handrail or he would issue her a ticket. She refused. Another police officer arrived. The police officers led Ms. Kosoian to a holding room, searched her bag without her consent and handcuffed her. Ms. Kosoian was given a $100 ticket for refusing to obey the pictogram and a $320 ticket for hindering an inspector in the performance of inspection duties.

The Municipal Court dropped the ticket. Ms. Kosoian started a civil claim against the police officer, the transit authority and the City of Montreal for "unlawful and unreasonable arrest on the basis of a pictogram that did not create an offence" but simply gave a warning. The trial judge dismissed Ms. Kosoian's claim and applauded the actions of the police officers. The majority of the Court of Appeal also dismissed Ms. Kosoian's claim. The Supreme Court of Canada overturned both lower courts.

The Supreme Court of Canada held that a reasonable police officer would not have concluded that failing to obey the pictogram was an offence under a by-law. A reasonable officer would have concluded the pictogram was a safety warning. Accordingly, the Court found the police officer civilly liable for his actions.

The Court also held that the transit authority and the City of Montreal were liable. The transit authority was directly liable because it trained police officers that disobeying the pictograms were offences. It was also liable as mandator for the police officer's fault. The City of Montreal was liable as the police officer's principal.

Over ten and a half years after the incident, the Court awarded Ms. Kosoian $20,000 in damages – 50% payable by the transit authority and 50% by the police officer.

Roads on Reserve: Private or public?

R v Adams, 2019 ABPC 296

In February of 2019, Mr. Adams was convicted of driving while prohibited in Edmonton. He was prohibited from driving on a "street, road, highway, or any public place in Canada" that the public has a "right of access" or is ordinarily "entitled or permitted to use" (per s. 2 of Canada's *Criminal Code* and s. 1 of Alberta's *Traffic Safety Act*).

The next month, Mr. Adams was driving on Paul First Nation in central Alberta – from his mother's house to his uncle's house to pick up medication for his sick mother. An RCMP officer pulled over Mr. Adams for having a burned-out taillight. The officer then discovered the driving prohibition from the February conviction. The officer arrested Mr. Adams and impounded the vehicle (belonging to his mother). After 30 days, the impound fees were higher than the vehicle's value, and it was abandoned.

Provincial Court Judge Shaigec had to decide whether the public had a right of access to use the roads on Paul First Nation. He noted that:

- the *Indian Act* confirms that Paul First Nation land is set apart for the use and benefit of the people who live there;
- there are "No Trespassing" signs located at different entry points into Paul First Nation;
- the roads are maintained by Paul First Nation;
- the general public has no reason to drive on the roads – the roads are not necessary to travel on to connect to any highways or other locations outside of Paul First Nation;
- anyone from outside of the community who travels on the roads is usually doing so to attend special ceremonies or to provide services in the community.

Judge Shaigec concluded he had reasonable doubt that the *public* had a "right of access" or is ordinarily "entitled or permitted to use" the roads traveled by Mr. Adams on Paul First Nation. He found Mr. Adams not guilty of the offence of driving while prohibited.

Interestingly, Judge Shaigec did not find the officer's actions to be unreasonable. And so he did not allow a claim for costs under s. 24(1) of the Charter for a breach of s. 8 (right to be secure against unreasonable search and seizure).

Employee's Bad Attitude: Manageable or cause for termination?

SaskTel v Unifor, Local 2S, 2019 CanLII 57057 (SK LA)

The employee began work for SaskTel in 1993. She worked in various positions, eventually ending up as a senior clerical associate in the Assignment Centre until her termination in March 2017. In her role, she provided technical and administrative support to SaskTel's residential and commercial installers.

In her first 20 years of service, SaskTel never disciplined the employee. Then, in May 2013, the employee received a warning letter about her conduct – that her "angry, offensive tone, language and disposition in the workplace was unacceptable." For example, the employee swore aggressively, calling people names and belittling them, and was openly critical of management. The manager described the employee's behaviour as constituting bullying. Following that, the employee received two one-day suspensions relating to her tone on two different service phone calls.

SaskTel then hired an external investigator to "verify the [employee's] behaviour and its

impact on others and to provide conclusions about the work environment". The investigator concluded that the employee's conduct was "consistent with personal harassment and bullying and the prospect for change was low."

SaskTel terminated the employee's employment. The union grieved the warning letter, the suspensions and the termination. The matter went before an arbitrator.

The arbitrator heard evidence from managers and past employees. The witnesses described the employee as the office bully. The arbitrator concluded that the employee's behaviour was "unacceptable and would not change" and so termination was warranted. The arbitrator also noted that even though SaskTel had not followed its harassment policy, this failure did not compromise the decision to terminate the employee.

Jessica Steingard

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

New at CPLEA

In this issue of LawNow we are highlighting a few updated resources and two upcoming workshops.

Updated Resources

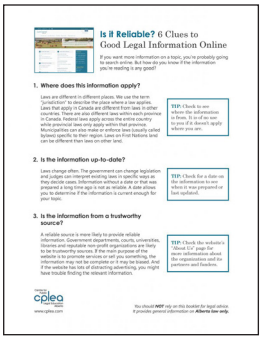
The following CPLEA resources have been updated. They are available for download from our website or for order (for free!) from our store.

Domestic Violence: Toolkit for Landlords

A toolkit providing landlords with basic information for dealing with domestic violence.

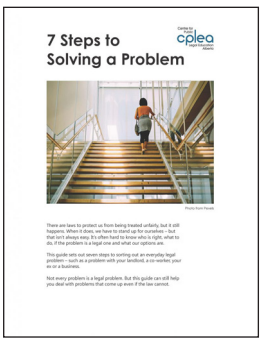
Legal Information vs. Legal Advice: What is the difference? – TIPSHEET

This tipsheet explains some of the main differences between legal information and legal advice.



Is it Reliable: Seven Clues to Good Legal Information – TIPSHEET

This tipsheet gives an outline of how to tell if the information you are getting is good. Is it up-to-date, from a reliable source and applicable to the province in which you reside?



7 Steps to Solving a Legal Problem – TIPSHEET

There are laws to protect us from being treated unfairly. It's often hard to know who is right, where to start, or what to do if the problem isn't easily solved. This information guide identifies seven steps to help sort out any legal problem and provides tricks you can use to solve problems quickly and efficiently.

For a listing of all CPLEA publications, see: **www.cplea.ca/publications**

Upcoming Workshops

Every year CPLEA leads workshops for front-line service providers, teachers, librarians and other information service providers. Building on our past successes, CPLEA is pleased to offer several new workshops for Winter/Spring 2020. Upcoming workshops include:

Workshop registration includes continental breakfast, coffee and tea.

Register online at Eventbrite by January 13, 2020.

Date: **Wednesday, February 5, 2020**

Time: **8:30 am – 10:30 am**

Location: **Compass Place Boardroom**
(2nd Floor, 10050-112 Street, Edmonton, AB, T5K 2J1)

Does your work include helping people who occasionally face legal problems? Are your clients going through separations or divorces? On January 1, 2020, Alberta's *Matrimonial Property Act* became the *Family Property Act*. Under the *Family Property Act*, the rules for dividing property when a marriage breaks down have been extended to the breakdown of an adult interdependent relationship.

Workshop registration includes refreshments.

Register online at Eventbrite by February 10, 2020.

Date: **Tuesday, February 11, 2020**

Time: **2:00 pm – 4:00 pm**

Location: **Compass Place Boardroom**
(2nd Floor, 10050-112 Street, Edmonton, AB, T5K 2J1)

Does your work include helping people who occasionally face legal problems? Are you unsure of what you can and cannot say about the law to a client? Only certain people are authorized to give legal advice while many other people can provide legal information. It is important to recognize when a client is dealing with a potential legal issue so that they can get the resources and help that they need.

For a listing of all CPLEA workshops, see: **www.cplea.ca/workshops**

Lesley Conley

Lesley Conley is a Project Coordinator with the Centre for Public Legal Education Alberta.

ViewPoint

The Supreme Court of Canada Changes Its Mind

Peter Bowal

> *[on the Supreme Court of Canada being 'the most progressive in the world'] I would say so, yeah, and I must say I'm very proud of that.*
>
> *– Richard Wagner, Chief Justice of the Supreme Court of Canada (June 2018)*

Introduction

In an article for *LawNow* a few years ago, I was staggered to see how quickly the Supreme Court of Canada had changed its own test for sniffer dog evidence in interpreting the *Charter of Rights* "search and seizure" provision (section 8). Four new judges had joined the Court, and quietly the Court significantly changed the law in the next case only five years after its first pronouncement. There was no acknowledgement by three of the judges from the earlier case that they had even changed their position, much less any reasons for doing so.

In 1901 the Supreme Court of Canada decided it was not bound by its previous decisions. Obviously, the Court occasionally will need a do-over but the Court's modern near indifference to its own precedent is a concern. We need stability, certainty and predictability, especially in *Charter* cases where human rights are enduring and not subject to frequent change. The Court cannot give and take rights away according to whim and changing ideologies of new judges. Respect for both the *Charter* and the Court will decline and litigation will rise steeply if rights depend more on the politics of judges than *Charter* text. Precedent is a foundational pillar of our legal system, indispensable to the Rule of Law. It must be venerated.

Our top Court is theoretically accountable to no one. The judges decide the scope of their work, their workload and their pace. They interpret the very legislation under which they are appointed. They can overrule an appointment by the prime minister to their Court. They have a hand in all aspects of our lives.

Photo from Pixabay

The legislatures may have wiggle room to override some decisions under s. 33 of the *Charter* but, in practice, this has become an illusion. The judges of the Supreme Court of Canada effectively possess complete discretion and final say about the *Charter* without the burden of real checks and balances. For example, they can set out the principles of mootness (when a case should not be heard) and yet freely hear and decide their choice of moot cases.

They enjoy personal immunity for their work and tenure to age 75. They let their decisions speak for themselves, which decisions are not always easy to penetrate even for lawyers. For example, in *Thomson Newspapers v Canada*, the five judges on the case gave five different opinions on the applicable "basic tenet" of the legal system, which was "fundamental justice".

Virtually everyone in the legal system – lawyers, litigants, lower court judges, journalists, parties, law clerks, academics, staff, politicians – desire to please this Court. They hesitate to challenge or cross it. Indeed, the legal profession may punish lawyers for being too critical of the Court.

Canada has a Supreme Court where as few as four or five individuals unilaterally fashion and preside over enormous social change.

Although our *Constitution Act, 1867* preamble calls for us to have "a Constitution similar in Principle to that of the United Kingdom", our top court invalidates far, far more democratically-enacted legislation than its British counterpart, or any other court in the world. The Supreme Court of Canada is not invested in finality like the UK Supreme Court, where judgments are the law of the land until and unless varied by Parliament.

Our Supreme Court shows rather meagre deference to lower court judges and to each other on the same Court. It is not surprising, then, that it fails to show deference to elected legislators. To other judges in the western world, the degree to which our Supreme Court invalidates or re-writes legislation is astounding.

When the Court so frequently re-interprets and re-declares *Charter* rights, did the Court get it wrong the first time(s) or is it essentially and arbitrarily legislating over time? In both cases, we should be uneasy with judicial activism – when such a small number of unaccountable judges on the Court wield so much governance power over our society.

Judging is about respect for the democratic process, sound objective principles and the Rule of Law, which includes valuing judicial precedent. The judges' personal political ideologies should not overrule precedent. In other words, *who* the judge is should not ultimately determine *what* the law is.

This article provides some examples of the Supreme Court of Canada disregarding its own precedent. We see how this contributes to the impression that decision-making is driven by judicial ideology.

The Court Reverses Itself

Shortly after the *Charter* came into effect, the Court declared in *Re British Columbia*

Motor Vehicle Act that it can disagree with and overturn the very substance of a law or regulation. Judges could enter contested public debates and replace legislation with their own judgment. This led to as few as four or five judges imposing on the whole country the most compelling social policy without vote or debate.

In a *LawNow* article two years ago, we cited five examples of the Supreme Court doing a complete about-turn on its own rulings. Across all legal subjects, the Court has overruled itself more than five hundred times, and in several thousand instances when one includes the Court's shifts from previous doctrine. Ten percent of the reversals have come in the last decade.

In 1901 the Supreme Court of Canada decided it was not bound by its previous decisions.

In the *Charter* realm alone, in addition to sniffer dog evidence, the Court has reversed itself in collective bargaining *and* freedom of association, in physician-assisted suicide (which was first not a *Charter* right but was later found to be so), and in workplace strikes (which were first not a *Charter* right but then they were). The framework for criminal trials within a reasonable time was also massively overhauled.

Prostitution-related crimes used to be *Charter*-compliant but later the same crimes were tossed out for violating the *Charter*. Christian teachers from Trinity Western University were accredited but later Christian lawyers from the same institution were not.

Do equality rights (s. 15) in the *Charter* apply to government discretion delegated by law? First, a unanimous Supreme Court of Canada declared 'no' in two companion decisions. *Only six months later,* the same Court shredded these precedents. Comprised of the same judges, the Court reversed itself and held that any action taken under the authority of law is subject to equality protection. The Court did *not* even refer to its two recent cases that came to the opposite conclusion much less explain the about-face. Years later, it went even further and ruled that the mere grant of discretion to government violated the *Charter*.

Brooks overturned *Bliss* (a *Bill of Rights* case that pre-dated the *Charter* by three years) on equal compensation for those who missed work due to pregnancy. The Court was unsympathetic to same sex rights in *Egan* in 1995 where it upheld the traditional definition of "spouse" in the existing *Old Age Security Act*. The Court wrote:

> *Marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual." (emphasis added).*

Four years later, the Court was virtually unanimous in concluding that the same definition of 'spouse' in other legislation was unconstitutional.

Much of this social revolution occurs by stealth. In the 2018 *Vice Media* decision, five judges purported to tweak two 1991 precedents, again without robust explanation. Arguably, the tweaks were substantial. There was the pretence of following precedent while quietly amending it. The remaining four

judges, while concurring in the result, would have abruptly (and without it having being argued in the courts below) carved out a new distinctive "right for the press" even though the *Charter* does not do that explicitly. It is a matter of time before a majority of the Court unearths and proclaims that new right.

Since the* Charter *was enacted in 1982, we have seen the rise and the further rise of the judicial role in policy-making.

The Court has denounced the "frozen concepts" approach to constitutional interpretation of social policy but readily upholds to frozen concepts in trade, institutions and commerce. Precedent is "not a straitjacket that condemns the law to stasis," Chief Justice McLachlin wrote in *Carter*. Only social policies must be freed from their historical straitjackets.

While the Supreme Court of Canada decrees consistency and predictability as "principles of fundamental justice", the Court has been inconsistent and unpredictable with respect to its own *Charter* interpretations. In every case, the Court consistently and predictably moved to the ideological left – to become more socially progressive – a development about which the current Chief Justice is "very proud".

Charter *Rights* versus Charter *Values*

The *Charter* contains written rights that the Court must interpret and apply. This is critical work but the Court also has birthed and nurtured the philosophy of "*Charter* values" to add to constitutional interpretation. These values include "respect for the inherent dignity of the human person, commitment to social justice and equality …" – starting points which reflect the changing moral and social fabric of the country.

Such unfettered authority and dubious sourcing of these apocryphal "*Charter* values" reminds one of the Australian film classic, *The Castle*. There the lawyer pleading his case channeled: "It's the vibe of it. It's the Constitution, it's justice, it's law, it's the vibe. And … no, that's it! It's the vibe. I rest my case."

Recommendations and Conclusion

An aphorism reckons that one really does not want to know "how laws and sausages are made". The Court reverses itself for a variety of reasons, including changing social norms, turnover of judges, slim majorities in the original precedents, undesired impacts, an emerging sense that the precedent was wrong, activism to effect change, and new arguments, evidence and issues that arise after the precedent was made.

Nevertheless, *stare decisis* is the quasi-constitutional principle that the law "stands decided" when declared by the highest court(s) in the country. The authority of the Supreme Court of Canada, indeed the orderly functioning of our legal system, depends on courts following their decisions.

The Supreme Court of Canada, by the instrument of the *Charter*, has become the dominant lawmaker over complex social issues in the last four decades in Canada. We are governed in these matters by a tiny clutch of progressive judges who are practically unaccountable to any broad electorate.

To other judges in the western world, the degree to which our Supreme Court invalidates or re-writes legislation is astounding.

Other countries engage national debates, referenda and elections on big social issues. Canada has a Supreme Court where as few

as four or five individuals unilaterally fashion and preside over enormous social change. This work is not technical "black letter law" but policy – putting into effect their own worldviews to a degree seen nowhere else on the planet. Do judges have the capacity or the moral legitimacy to make the kinds of policy decisions they are making?

Since the *Charter* was enacted in 1982, we have seen the rise and the further rise of the judicial role in policy-making. Judges can choose restraint or activism. Rather than following the law or deferring to the legislature in policy-making, activist judges ordain the law to conform to their own progressive ideology. Our judges will occasionally profess "deference to the legislature", but they have not embedded this as constitutional principle and there is rather little in practice. The reality of the Court "changing its mind" is often due to judges rotating and bringing with them new independence and ideology and less fondness for – and commitment to – the views of their predecessors.

The Supreme Court of Canada could take steps to ensure it does not become a runaway court. When the Court changes its mind about what a *Charter* right entails, it should expressly state this. Under *Charter* section 52(1), it should declare that its previous pronouncement was "inconsistent with the provisions of the Constitution … and of no force or effect". The Court declares this to legislatures when it finds they acted unconstitutionally. It should equally and honourably declare its own unconstitutional miscalculations.

When the Court seeks to *amend* its precedent in any way, it should only be able to do so with an enriched two-thirds majority (six of the nine judges on the Court). If it seeks to *reverse* one of its previous rulings, it should only do so unanimously. This is consistent with all other constitutional change, which obliges an enriched majority in support of the change.

Minimal deference to the democratic legislative process must be elevated to constitutional status. The Supreme Court should not re-write or strike legislation without this two-thirds majority or unanimity on the Court, respectively.

None of these changes require formal constitutional amendment. They all represent easy retrenchment from powers the Court has voluntarily chosen to arrogate to itself to date.

Peter Bowal

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Columns

Employment

Peter Bowal and
Sareena Samra

Opening the Legal Profession: The *Andrews* case

> *While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.*
>
> *– Andrews v Law Society of British Columbia, [1989] 1 SCR 143*

Introduction

In the recent federal election, a party leader campaigning to be prime minister was criticized for holding *dual* citizenship. He was criticized, though not disqualified. The minimum requirements to run in a federal election under the *Canada Elections Act* are 18 years of age and Canadian citizenship (sections 3 and 65).

Andrews was the leading case during the first decade of Charter section 15 jurisprudence.

Millions of people living and working in Canada are permanent residents, not citizens. Permanent residents enjoy virtually the same rights and responsibilities as Canadian citizens, including the right to live, work and study anywhere in the country. They are entitled to the same social benefits that citizens receive, including public pensions and universal health care, and they can sponsor relatives to Canada.

Photo from Pixabay

Permanent residents may apply for Canadian citizenship – which gives them the right to vote and run in elections – after living in Canada for three years out of the five years preceding their application. Many permanent residents choose to never become citizens.

Until 1989, provincial law societies required lawyers to be citizens. This article is about a permanent resident who challenged that requirement under the *Canadian Charter of Rights and Freedoms*.

Role of Lawyer

Lawyers are trained and qualified to do many things. They are experts in substantive and procedural law and skilled in legal procedures. They advise and represent others across the total spectrum of legal matters where financial, reputational and liberty stakes for the client are the highest. They occupy one of the most prominent esteemed socio-economic professional perches in society.

Lawyers are bound to exacting character, educational, professional and conduct standards. They must submit to continuing education and be insured for their errors. Being a lawyer is not a right, but a privilege.

Must they also be Canadian citizens?

Mark David Andrews

Andrews was a British citizen and a permanent resident in Canada. With a British law degree, he tried to become a lawyer in British Columbia. He met all requirements for admission to the British Columbia bar except one. Section 42 of B.C.'s *Barristers and Solicitors Act* limited membership to Canadian citizens.

Andrews sued the Law Society of British Columbia, arguing the citizenship requirement violated his equality right under the *Charter*:

> *15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

The Court's Decision

This was the first major *Charter* equality case and six judges of the Supreme Court of Canada took 16 months to decide it. A majority agreed with Andrews and struck out the citizenship requirement for lawyers.

1. Two-Step Approach

The *Charter* requires a court to determine whether a law created an inequality on one of the enumerated grounds – such as race, religion or disability – or on an analogous ground which is similar and related to an enumerated ground. The person alleging the inequality must prove actual differential treatment based on an enumerated or analogous prohibited ground which creates a disadvantage.

The second step of the analysis determines whether the infringement can be "demonstrably justified in a free and democratic society" under section 1 of the *Charter*. The state must justify the infringement.

2. Judicial Analysis

The judges disagreed about whether this discrimination was sufficiently justified. The B.C. government and the Law Society argued that the role of lawyers begets a special commitment to the community which citizenship embraces. They said practical familiarity with the country and its customs is needed. Citizenship evinces a real attachment and connection to Canada.

***Andrews sued the Law Society of British Columbia, arguing the citizenship requirement violated his equality right under the* Charter ...**

Moreover, they said lawyers should be citizens as they play a role in Canadian governance since they are officers of the court and are entrusted with significant private and public powers. They are uniquely involved in the processes or structure of government. The government argued that certain state activities should be confined – for both symbolic and practical reasons – to those who are full members of our political society: citizens.

The majority four judges disagreed. They said citizenship itself does not make for better lawyers, and lawyers are not really part of public governance anyway. They found that there was no sufficiently reasonable connection between the citizenship requirement and working as a lawyer. Accordingly, the provincial government and Law Society failed to justify the discriminatory nature of the citizenship requirement and it was struck out.

Where is Andrews Now?

Andrews became a citizen before his case was even argued in the Supreme Court of Canada. He is a litigation partner now in a large national law firm in British Columbia. After judgment in his favour in the B.C. Court of Appeal, Andrews became a lawyer on June 13, 1986.

Conclusion

Foreign-trained professionals encounter tremendous obstacles to having their education and skills transferred to, and being accredited, in Canada. This case does not help them much because mere permanent residency is not their hurdle.

Until 1989, provincial law societies required lawyers to be citizens.

Likewise, if citizenship is not required to become a lawyer or a judge in Canada on the basis that it does not ensure greater commitment or practical understanding of the society, should it be an issue for those running in elections, or even for voting? Why should it matter today if a politician holds dual citizenship?

Andrews was the leading case during the first decade of *Charter* section 15 jurisprudence. The Supreme Court of Canada has stated that section 15 equality rights are the most expansive and challenging rights in the *Charter*. The next Employment column will offer a critique of this *Andrews* decision.

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Famous Cases

Peter Bowal and
Mackenzie Bowal

Provinces Leaving Canada Part I: The Quebec Secession case

> *. . . a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.*
>
> *– Reference Re Secession of Quebec, [1998] 2 SCR 217 at para 150*

Introduction

The possible withdrawal of one or more provinces from the Canadian federation ("Wexit") have led people to ask, "What does it take for a province to leave Canada and go its own way?" So we dedicate this Famous Cases column to the unanimous 1998 Supreme Court of Canada case *Reference Re Secession of Quebec* (referred to as *Secession Reference*).

The Supreme Court of Canada added that a province cannot, even with a clear referendum result, assert self-determination rights to dictate the secession terms.

In the next column, we follow up with discussion of the so-called *Clarity Act* that purports to set the federal ground rules for provincial secession. Both of these columns together provide a primer on what it would take, from a constitutional perspective, for any province to separate ("secede") from Canada.

First, a disclaimer. This is a brief legal analysis only for general public awareness. It is not a political or economic assessment of the issue, nor a statement of personal preference. This case should also be seen in its context. Constitutional pronouncements should survive more than two decades but the Supreme Court of Canada is well known to revise its previous proclamations.

Moreover, *Secession Reference* arose from an extremely close Quebec referendum outcome in 1995, followed by considerable political plotting at both levels of government in the free-space of a new constitutional enigma. This is to say – and this is readily apparent from the decision itself – that not all issues around provincial secession have been answered in the *Secession Reference*. Future cases will elicit more details.

Background

When the Constitution was repatriated from the United Kingdom in 1982, the new amending formula that was incorporated did not contain any provision specifically for the withdrawal of provinces from Confederation.

In the aftermath of the 1995 referendum, lawsuits were launched questioning the legality of secession. The Parti Québécois premier promised another referendum when "winning conditions" presented. In September 1996, the federal government sent the issue to the Supreme Court of Canada for constitutional answers.

Secession Reference Decision

The Court considered the legality of a unilateral secession of Quebec under both

Canadian and international law. The following three specific questions were addressed (we have broadened the focus to *any* province).

1. Under the Constitution of Canada, can any province secede from Canada unilaterally?

The federal government argued that provinces could withdraw only after proper constitutional amendment which would require a sturdy measure of national consensus. Quebec did not participate in the reference but an agent (*amicus curiae*) was appointed to make sovereigntist arguments. The *amicus* said the reference was invalid as it was a purely political one that was none of the Court's business to answer. Alternatively, Quebec's right to self-determination came exclusively from the *Charter of the United Nations* and required only majority consent of Quebecois.

The Court concluded that a province's unilateral secession was *not* legal under the Constitution of Canada. However, if an independence referendum were to succeed, the rest of Canada "would have no basis to deny the right of the government of Quebec to pursue secession" and negotiation of terms would have to follow. Though it was not tasked to answer the "how" question, the Court stated a requirement of a 'clear majority voting in favour of a clear secession question.'

The Court famously asserted the Constitution, composed of written and unwritten principles, stands on four fundamental interactive tenets: federalism, democracy, the Rule of Law and the protection of minorities.

2. Does international law give any province the right of self-determination to secede from Canada unilaterally?

The Court suggested that provinces cannot benefit from international law which "does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state." It envisioned self-determining provinces generally to seek a solution – for example, by negotiation – within the framework of Canada:

> *The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states . . . a state whose government represents the whole of the people . . . is entitled to the protection under international law of its territorial integrity.*

Under international law, the right to secede was intended for people under colonial rule or foreign occupation. As long as a province can meaningfully strive for self-determination within Canada, there is no right to secede unilaterally.

The Court considered the legality of a unilateral secession of Quebec under both Canadian and international law.

The Supreme Court of Canada added that a province cannot, even with a clear referendum result, assert self-determination rights to dictate the secession terms. A strong favourable referendum outcome carries no

legal effect on its own. It cannot override the principles of federalism, democracy in the other provinces or in Canada generally, the Rule of Law and protection of minorities.

3. If Canadian and international law disagree on the right of a province to secede from Canada unilaterally, which takes precedence?

The Court found no conflict between Canadian law and international law on the question of a province's unilateral right to withdraw from Canada so no answer was needed here.

Conclusion

The creators of our Constitution never envisaged one or more provinces leaving Confederation. They included no procedure for provincial secession. Nor is it specifically ruled out. This article describes how the Supreme Court of Canada's 1998 *Secession Reference* decision lays out the broad rules for a province withdrawing from Canada in the absence of a written formula.

In the regard, the Court assigned significant burdens to both the province desiring to secede and the federal government. In our next column, we look at how the federal government has specifically operationalized the *Succession Reference* rules in its *Clarity Act*.

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Law & Literature

Gold Dust Nations: The Ayn Rand effect

Rob Normey

In 1977, Stevie Nicks of Fleetwood Mac sang "Gold Dust Woman, … take your sliver spoon, dig your grave." A mere two years later, Margaret Thatcher was elected prime minister of Britain. She declared there is no such thing as society, and progressive politics based on democratic socialism must be defeated at every turn. Shortly thereafter, Ronald Reagan, a huge fan of the scriptwriter-turned-novelist Ayn Rand, became President in the biggest performance of his acting career. Although the Reagan Revolution entailed a war on drugs, the use of illicit drugs such as cocaine skyrocketed in the decade whose catchphrase was "greed is good." However, it is my contention that Reagan and his circle didn't need cocaine – they had the writings of the cult novelist Ayn Rand to offer a high every bit as exhilarating and potentially lethal (for their society).

The message that clangs through loud and clear is that any attempt to regulate the lives of men and business interests is simply an impediment to freedom.

Indeed, the legions of Rand fans must be inhaling some mysterious essence to continue propelling her novels *The Fountainhead* and *Atlas Shrugged* to the top of the "most influential novels of all-time" charts. Sadly, in my view, such crude political (and legal) romances – which from start to finish extoll a 'survival of the fittest' mentality – have had a truly dangerous influence. This influence stretches beyond the attitudes of many readers to undoubtedly the practical philosophies

Photo from Pexels

of an astonishingly large number of powerful men and women in the worlds of politics and business.

After reading an excellent work of cultural criticism, I have gone back to struggling to work through the 1946 novel, *The Fountainhead*, with its uber-macho hero, architect Howard Roark. Before analyzing the role that the law and the wider legal system plays in Rand's novels, I want to first explore the massive influence a mere cult novelist has been able to exert. This is so even though her writing skills are mediocre at best. Nonetheless Rand injects directly into the bloodstream of readers a cascading, super-charged plot, and populates her novels with isolated, elitist protagonists. These apparently afford those under her spell the ultimate dopamine hit. Although said to be novels of idea, it is really their appeal below the surface of rational argument that one must dissect in order to make sense of the Rand phenomenon.

I want to focus on political developments in two of the major nations in the Anglophone world, the U.S. and Britain, and the significant role of Rand's novels in understanding the worldview of the Donald Trump and Boris Johnson teams.

Trump is no great reader but he has gone out of his way to praise *The Fountainhead* and to

express his admiration for its ability to "relate to everything." Rex Tillerson (fantastically wealthy oil executive turned Secretary of State) and Mike Pompeo (Tillerson's replacement after he joined the lineup of those ejected from the Trump Team's Tilt-A-Whirl ride) are huge Rand fans. Further, when we examine the type of judges that Trump will appoint in droves to the various courts, right up to the Supreme Court, we can look no further than Clarence Thomas. Thomas has sat on the Court for 18 years and has done much to mould America's understanding of the Constitution as a document that assists the wealthy and powerful. Thomas each year reportedly requires that all of his law clerks watch the film version of *The Fountainhead* as a primer on the ideal approach to matters of law and morality. He is one of many justices who marry a fanatical commitment to neoconservative social views with market fundamentalism. He has ruled, for instance, that regulation of child labour is beyond Congressional oversight and is better left to the market. Under his theory of the Constitution, civil rights laws banning whites-only lunch counters would also be invalid. Further, he is a strong advocate of interpreting free speech as trumping any attempt to limit campaign spending during elections (see *Citizens United*, the 2010 decision of the Supreme Court).

Turning our gaze across the Atlantic to Britain, we find another nation that has embraced a corporatist neo-liberal agenda more aggressively than the majority of democratic nations since the onset of the Thatcher Revolution of the 1980s. This month sees the winning of power by a confirmed Thatcherite, Boris Johnson. As with his good friend Trump, so too we note in the Johnson cabinet a number of confirmed Randians who give every indication of wishing to pursue an astonishing anti-egalitarian agenda. Johnson himself is fresh off the recent prorogation debacle. The High Court dealt a mortal blow to his attempt to prevent other members of Parliament in the House of Commons from weighing in on the merits or otherwise of his Brexit arrangements by peremptorily shutting down the institution. It ruled that he had violated constitutional norms as there was no reason offered and certainly no valid reason for his autocratic move. The High Court ruled the prorogation to be completely illegal.

Trump is no great reader but he has gone out of his way to praise* The Fountainhead *and to express his admiration for its ability to "relate to everything."

Johnson's cabinet will feature several individuals who favour a dog-eat-dog ethos. One such individual is Priti Patel, a lobbyist for Big Tobacco who was recently Home Secretary and who repeatedly calls for extreme punishment for criminals, ignoring the value of rehabilitation of offenders. Further she contributed to the Tory pamphlet, Britannia Unchained, which denigrates British workers as "amongst the worst idlers of the world." There is also Sajid Javid, most recently the Chancellor in the Theresa May government. He is an unabashed advocate of a "greed is good" economics philosophy and specifically seeks to channel the character Howard Roark to spur his vaunting ambitions. With hard-faced men and women with these attitudes dominating the new government, perhaps we will see a return to Dickensian levels of inequality, with fewer and fewer supports for the most vulnerable.

Reading *The Fountainhead* now is a rather jaw-dropping experience. For a novel that has inspired countless leaders in politics, law and business, it is rather, well, appalling. A romance – very much of the love then hate then lust variety – sees the tempestuous

Dominique Francon fall for the strong and silent "lone rider" Howard Roark, once she has submitted to him. By submission, I mean a literal rape. The language gets to the point with remarkable candour: "He did it as an act of scorn. Not as love, but as defilement. … One gesture of tenderness from him – and she would have remained cold." Rand goes on to describe the violent intercourse as the act of a master taking shameful, contemptuous possession.

The villain of the novel, Ellsworth Toohey, is a complete caricature of the committed socialist thinker who believes the state can better the lives of citizens through social welfare initiatives. But of course, the journalist and architecture critic is not committed to genuine socialist ideals. Rather, he uses these as a cover for his insatiable quest for more and more power. The message that clangs through loud and clear is that any attempt to regulate the lives of men and business interests is simply an impediment to freedom. Somehow the free exchange of services through contract is all that is magically needed to solve all problems. Those needing assistance from the state are mere 'second-raters' whose whining is best ignored and whose envy threatens the ability of towering geniuses like Roark to build their bold, visionary works.

For a novel that has inspired countless leaders in politics, law and business, it is rather, well, appalling.

A ludicrous trial sees the prosecutor and Roark – naturally representing himself, and naturally disdaining any need to speak with civility and consideration to the jurors – face off with long, didactic philosophical speeches. In the fantasy world of *The Fountainhead*, it is hardly surprising that Roark gained an acquittal from a star-struck jury. He does so through sheer willpower and an indefatigable belief in the innate superiority of himself and the few other geniuses who are the sole contributors to the good of society. It becomes irrelevant that he placed many lives in danger by dynamiting a large public housing project merely because certain modifications were made that, in his Olympian view, detracted from the original vision. What a man of Roark's stature wants, Roark is clearly entitled to.

As we watch the remaining period of Trump's time in office – and as he continues to display disdain for the impeachment process and otherwise runs roughshod over the Rule of Law – we can reflect on the concluding scene of *The Fountainhead*. Roark is handed a commission to design a massive skyscraper that will be an enduring monument to greatness (and to his towering ego). We read of Dominique, his ever-admiring wife, riding the elevator up, up and away. The novel ends with the two egotists towering high above the rest of the city. Trump and his entourage will no doubt continue to enjoy the "high" of contemplating that boastful conclusion and see Trump as the Howard Roark of our time. His only challenger is on the other side of the pond, as Boris Johnson and his wrecking crew prepare to mould Britain to their will.

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