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Climate Change

Climate Change Mitigation and Adaptation

Brenda Heelan Powell and Rebecca Kauffman

There is clear scientific consensus that anthropogenic climate change is happening and will cause unavoidable and irreversible impacts. Despite the full implications of climate change remaining uncertain, there is a recognized need to act locally, provincially, nationally and internationally in order to mitigate harm to people and the planet arising from these climate change impacts. While mitigation efforts are necessary to slow the rate of greenhouse gas (GHG) emissions, we are already experiencing impacts from climate change and need to build the capacity to cope with these impacts, especially as they escalate into the future. Both mitigation and adaptation efforts will be crucial going forward.

Impact of Climate Change in Alberta

Research suggests that Alberta will experience changes to its water resources (reduced snow accumulation, glacier retreat, decreased water quality, increased extreme hydrological events), ecosystems (decreased biodiversity, phenological mismatches) and soil (increased landslides, wind erosion and desertification), among other changes.

The extent to which Alberta (and the rest of the world) experiences climate change impacts will depend upon the extent of global warming. The Intergovernmental Panel on Climate Change (IPCC) stresses that in order to prevent huge damage to people and the earth, we must strive to limit global warming to only 1.5 degrees Celsius. A recent IPCC report found that the world outcomes will be vastly different in a 1.5-degree world or in a 2-degree world (the latter of which is a real possibility without immediate action).

What is Climate Change Mitigation?

Mitigation focuses on lowering our GHG emissions to prevent further global warming. Often, mitigation focuses on two categories – increased energy efficiency and a transition to renewable energy.

Implementation action [of adaptive measures] is hampered by limited resources, gaps in knowledge and technology, and a lack of political will.

Increased energy efficiency means using less energy to accomplish the same tasks. For example, this could mean updating building codes so that houses use less energy to heat and cool rooms or regulating higher standards for appliances. This category is often purported to be the most cost effective way to mitigate our effects on the climate.

While important and effective, improved energy efficiency will only do so much toward mitigation. As our population continues to grow, we will use more energy and resources, especially as climate change increases extreme weather events. This is where renewable energy comes in.

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Renewable energy usually refers to solar, wind, geothermal, bio power and hydropower – each of which comes with a different environmental pedigree. For example, while hydropower has a long history in Alberta, other forms of renewable energy will likely start to take its place as high quality hydro locations are built up and as river flows change along with our changing climate.

In 2017, the provincial government put out a call for bids for new renewable energy projects in the province. In the end, the bid went to 4 wind energy projects and the province received the cheapest wind energy price yet. In addition, solar continues to gain market share across the province, including in the far north. However, despite their cost effectiveness, it is unlikely that solar and wind (without future technological advances in storage and generation) will be sufficient to fully replace our fossil fuel generators. This is in large part due to their variability (as we all know the sun doesn't always shine and the wind doesn't always blow). This means that while we work to improve storage solutions for wind and solar power – which are improving – we need to ensure that another energy source will be able to step in and fill any gaps. One example of this energy type is geothermal, which is finally starting to take off in Western Canada. For example, the first power purchase agreement with a geothermal company was agreed to in Saskatchewan and development on a geothermal project started in 2018. Geothermal is promising because it can produce energy 24 hours/day 365 days/year, making it a great option to fill any gaps in solar and wind production.

Mitigation efforts raise many legal questions. How do we encourage energy efficiency? How do we regulate new forms of energy like geothermal? How do we incorporate solar and wind projects into our assessment and clean-up regulations that previously focused on oil and gas? And how do we streamline the approval process for technologies that are changing every day? Although these questions are complex, they are also very important. Every year that passes without substantial changes to our energy use means one less year to ensure our mitigation keeps us below that 1.5-degree ceiling.

What is Climate Change Adaptation?

Adaptation is a necessary complement to climate change mitigation. The IPCC defines adaptation as:

> *The process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects.*

The law can be used as a powerful tool for effecting climate change adaptation. Government can enact legislation directly for the purpose of climate change adaptation, or it may incidentally address matters pertinent to adaptation. In addition, common law tools (such as contract or negligence law) may be used to manage climate change risk or promote adaptation. Other quasi-legal measures that may be used to implement climate change adaptation include voluntary

industry-based codes, market/financial mechanisms, collaborative partnerships and information-based tools (such as disclosure standards imposed by the Alberta Securities Commission).

All levels of government play a role in advancing adaptation measures. As well, industry, non-governmental organizations, Indigenous peoples and members of the general public can contribute to the development and implementation of adaptation measures. There are a variety of risks and opportunities that arise in the face of climate change, and a variety of adaptive measures could be adopted in response. Given the potential impact of climate change on all aspects of our social and natural environment, along with the broad range of risks and opportunities, it is helpful to examine these within discrete subject areas such as natural resources, industry, infrastructure, biodiversity and human impacts.

The extent to which Alberta (and the rest of the world) experiences climate change impacts will depend upon the extent of global warming.

This approach is illustrated by an examination of Alberta's forests and the associated climate change risks, opportunities and adaptive measures. Climate change is expected to cause changes to species distribution, with trees shifting northward in latitude and upslope in altitude. As well, disturbance regimes – such as fire, pest and disease outbreaks, and drought – are likely to increase. This will impact the quality and quantity of timber supply, thereby negatively affecting the timber industry. On the other hand, warmer climates and longer growing seasons may create new opportunities for forestry in more northern communities.

Adaptation for Alberta's forests could be achieved, in part, by updating and incorporating adaptive measures into our forest management practices. These might include measures such as assisted tree migration, developing drought tolerant and pest resistant genotypes, and *ex situ* preservation of rare populations. It is important to note that any such measures are closely linked with biodiversity issues and so must be implemented with caution. Adaptive measures could be put into place via legislative changes (for instance, to the *Forests Act* and its regulations) and quasi-legal instruments (such as forest management certification standards).

Adaptation is a necessary complement to climate change mitigation.

Adaptation can provide a path to deal with the risks and use the opportunities created by climate change impacts. Some progress is being made especially in terms of engagement, awareness and planning. However, there is still limited implementation of adaptive measures. Implementation action is hampered by limited resources, gaps in knowledge and technology, and a lack of political will. In order to maintain the capacity of Alberta's social, economic and environmental systems, we need continued efforts to address these barriers and implement adaptive measures.

Conclusion

Climate change is undeniably a complex and multi-faceted crisis, and success will need to take many forms. This is where a strong regime of both mitigation and adaptation efforts will be required. What these efforts will look like will depend on location and sector, but Alberta, with its strong history of energy production and vast natural resources,

will have a strong upper hand – if we put our minds to it. The sooner, the better.

For further information on climate change mitigation and adaptation, see the Environmental Law Centre's publications: *Climate Change and the Law: Part One – An Introduction to Mitigation in Alberta* and *Climate Change and the Law: Part Two – An Introduction to Adaptation in Alberta*.

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Canada's Carbon Tax Laws: Where are we now?

Jessica Steingard

On June 21, 2018, Canada's *Greenhouse Gas Pollution Pricing Act* (the Act) came into effect. Part 1 of the Act imposes a surcharge on fuels such as gasoline, fuel oil, propane, kerosene and methanol. Distributors of the fuel pay the surcharge though the cost would likely be passed down to consumers. Part 2 of the Act applies to large industrial facilities that emit greenhouse gases (GHG). Facilities have a limit on the amount of GHG they can emit each year. If they go over that limit, they must pay through a credit system or an excess emissions charge or both. Government and media have affectionately referred to these fees as a carbon tax.

But here's the kicker – Part 1 or Part 2 or both only apply to provinces that do not have a scheme that is acceptable to Canada. That is, the provinces can create their own carbon tax scheme but it must meet Canada's goals. If a province does not have an acceptable scheme (or no scheme) in place, then the federal Act kicks in as a backstop.

Three provinces – Alberta, Saskatchewan and Ontario – asked their respective appeal courts to review the Act and provide an opinion on whether it is constitutional. Specifically at

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issue was whether Parliament has the power to enact this legislation under the *Constitution Act, 1867* or if the power to enact this type of legislation rests with the provinces. We call this type of issue a division of powers issue.

The Alberta Court of Appeal released its decision on February 24th of this year. A majority of the justices who heard the reference held that the Act is not constitutional. Before this, appeal courts in the other two provinces had held that the Act is constitutional.

The Saskatchewan and Ontario governments have already appealed their courts' decisions to the Supreme Court of Canada. The Supreme Court of Canada will hear Saskatchewan's appeal on March 24, 2020 and Ontario's the next day.

Why do we care?

We care about these decisions because they impact the federal and provincial governments' response to climate change. But we also care about these decisions because of what they say about our judicial system and how we engage with it. Let's break down the numbers:

- A total of 15 justices across the three appeal courts heard the matter. Eight sided with Canada – that the Act is constitutional. Seven justices held that the Act is unconstitutional.

- Eight different opinions were provided – 3 majority decisions, 2 concurring opinions (agreeing with the respective majority) and 3 dissenting opinions (disagreeing with the majority).
- The opinions total 543 pages of text.

... whatever the Supreme Court of Canada decides is what all Canadians must live with, whether we agree with the outcome or not.

To be frank, this is a complicated matter. And I don't just mean climate change. I also mean what power each level of government has to make laws about certain topics. In this case, the topic happens to be the environment and greenhouse gas emissions. But the same legal principles apply regardless of the topic. One hopes, anyways.

When read together, the 8 opinions are a fascinating study of legal reasoning and passion. They are difficult even for a lawyer to understand, let alone someone with very little, or no, legal training.

The Legal Principles

For the most part, the three courts discuss two major legal principles:

1. federalism;
2. the national concern doctrine.

Federalism refers to Canada having two levels of government: provincial and federal. Under our constitution, each level of government has power to make laws about certain areas. Section 91 of the *Constitution Act, 1867* sets out a list of areas (called heads of power) over which the federal government has jurisdiction to make laws. Section 92 lists heads of power which the provincial governments have jurisdiction to make laws applicable in their own provinces. Federalism is a "foundational feature of Canada's constitutional architecture and defining characteristic of Canada as a nation" (at para 130 of the Alberta Court of Appeal decision). When there is confusion over whether the federal or provincial governments have jurisdiction over a certain area, this is a division of powers problem.

The opening words to s. 91 of the *Constitution Act, 1867* say that Canada has the following power, in addition to the heads of power listed:

> *to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.*

We call this power "POGG" (peace, order and good government). POGG is a residual power that the federal government has to make laws about the heads of power not specifically listed in s. 92 of the *Constitution Act, 1867*. The provinces also have a residual power over all matters of a local or private nature in the province, set out in s. 92(16). The drafters of the constitution realized there would be new things that would come up that they couldn't think of then. How right they were! Climate change was not on anyone's radar in 1867.

Each of these decisions comes down to how the justices characterize the subject matter of the Act.

Canada's POGG power has three branches:

1. the gap branch – assigning matters to the federal government that the drafters of the constitution would have undoubtedly assigned to the federal government when it was drafted had they thought of it.

2. the national concern branch – allowing the federal government to make laws on matters that are of a national concern.
3. the emergency branch – making temporary laws in emergency situations, such as wartime provisions.

Any new heads of power assigned to the federal government under the national concern branch of POGG must have three characteristics: singleness (not too broad of a focus), distinctiveness (must be qualitatively different from the other listed heads of power), and indivisibility (must be a head of power that Parliament should obviously have).

Canada argued in each court that the Act is constitutional as a valid exercise of its power under the national concern branch of POGG.

Where the Justices Agreed

Let's start with where all three courts agreed. First, neither Parliament nor the provinces have exclusive jurisdiction over the environment. The Supreme Court of Canada has made this clear in previous decisions.

Second, the process for determining whether a law is constitutional or not requires answers to two questions:

1. What is the pith and substance of the law (i.e. what matter does the law address, both in purpose and effect)? At this step, the court **characterizes** the subject matter of the Act.
2. Which level of government has jurisdiction over that matter? This is a **classification** process, but it is not perfect. A matter may overlap several heads of power described in ss. 91 and 92 of the *Constitution Act, 1867*. It's a balancing act.

Third, the court has no place in commenting on the usefulness of a law. That is a policy decision left to governments. The topic of climate change is a contentious one, with many opinions all over the board. But ultimately, our governments (provincial and federal) must create policies and laws that outline Canada's response to climate change. In reviewing whether these laws are valid, the court is not examining the usefulness of the law or the government's choice of policy in addressing the issue. The court simply focuses on the legal principles at play.

Where the Justices Disagreed

Each of these decisions comes down to how the justices characterize the subject matter of the Act. This characterization is necessary to answer the first question of the test described above.

Saskatchewan

The Saskatchewan Court of Appeal took the first kick at the can. The Saskatchewan government filed their request for review of the Act before the Act became law. The Court didn't hear from provincial and federal lawyers though until after the law came into effect.

Five justices heard the reference. Three justices found the Act to be constitutional while two justices found the opposite.

Saskatchewan presented two lines of argument:

1. The Act imposes a tax, which offends federalism (because the Act only applies in some provinces depending on how provinces decide to exercise their legislative authority) and s. 53 of the *Constitution Act, 1867* (how tax laws are made).
2. The Act is concerned with property and civil rights and other matters of a purely local nature falling within exclusive provincial legislative authority.

Canada argued that the Act was constitutional under its national concern power. It characterized the Act as being about "the cumulative dimensions of GHG emissions."

Federalism refers to Canada having two levels of government: provincial and federal.

The Court rejected Saskatchewan's arguments. It also rejected Canada's characterization of the Act for being too broad. Instead, the Court characterized the Act as being about "the establishment of minimum national standards of price stringency for GHG emissions". Using this new characterization, the Court found that this matter could become a new head of power under the national concern branch of POGG. In other words, this characterization was focused, distinct and indivisible.

In the dissenting opinion, two justices found the surcharge under Part 1 of the Act to be a tax with a broad purpose of bringing about behavioural changes to reduce GHG emissions. They found Part 2 to be a regulatory charge for the purpose of regulating GHG emissions. In their opinion, the Act is unconstitutional.

Ontario

Next up, Canada defended its Act before the Ontario Court of Appeal. Five justices heard the appeal. Four justices found the Act to be constitutional while one justice dissented.

Canada argued in each court that the Act is constitutional as a valid exercise of its power under the national concern branch of POGG.

The majority of the justices also rejected Canada's characterization of the Act as being about the "cumulative dimensions of GHG emissions". Instead, the Court characterized the Act as being about "establishing minimum national standards to reduce greenhouse gas emissions."

One justice wrote a concurring decision – she came to the same conclusion but for different reasons. She would have characterized the Act as being about "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions."

In the dissenting opinion, a fifth justice characterized the Act as simply being the regulation of GHG emissions.

Alberta

Finally, it was Alberta's turn. The province argued its case before the Alberta Court of Appeal in late December, 2019. Five justices heard the appeal. Four justices found the Act to be unconstitutional (one with a concurring decision). One justice dissented.

Canada asked the Court to recognize "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions" as a new head of power under the national concern branch of POGG. The Court found that the national concern doctrine only applies to s. 92(16) of the *Constitution Act, 1867* – the province's residuary power. It does not apply to other listed heads of power specifically reserved for the provinces in the constitution.

The majority characterized the Act as being "at a minimum, regulation of GHG emissions". The majority reasoned that if it gave Canada the power to make laws about the regulation of GHG emissions, then Parliament could make laws that would certainly step into provincial jurisdiction, including the provinces' power to develop and manage its non-renewable resources under s. 92A of the *Constitution Act, 1867*.

One justice wrote a dissenting opinion, that the Act is constitutional. In his opinion, the pith and substance of the Act is to "effect behavioural change throughout Canada leading to increased energy efficiencies by the use of minimum national standards necessary and integral to the stringent pricing of greenhouse gas emissions".

... the court has no place in commenting on the usefulness of a law. That is a policy decision left to governments.

Conclusion

Are you starting to see how problematic characterizing the Act is? And how it is not an exact science? The legal challenges to the Act have nothing to do with climate change as a policy. Rather, the three appeal courts were tasked with providing an opinion as to whether Parliament had the authority to make laws about the GHG emissions scheme detailed in the Act. Or if the *Constitution Act, 1867* gives the provinces authority over this area instead. Fifteen justices from three appeal courts across the country couldn't reach a consensus.

At this point, there is no other option but for this matter to go to the Supremes. And they'll say, "Stop!" That is how our justice system works. Is it perfect? No. Does it mean that the Supreme Court of Canada justices are smarter than the other justices who have written opinions on this topic? No. But they do have the final say. And whatever the Supreme Court of Canada decides is what all Canadians must live with, whether we agree with the outcome or not. Stay tuned!

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Searching for Hopeful Signs in a Dark Wood, Rapidly Shrinking: Laws to address the climate emergency

Rob Normey

Missing In Action

Donald Trump continues to audition for the job of World's Greatest Practical Joker. You may have heard about the pending release of a new book by Edward Russo, entitled *Donald J Trump: An Environmental Hero*. Russo is a consultant who has advised Trump. He is also a staunch Trump loyalist. Recently, when the President announced yet more rollbacks of environmental regulations at the White House, he added that he looks forward to reading the book. Trump has in the past referred to climate change as "mythical" and "nonexistent". His administration has already began the process to withdraw the U.S. from the Paris Agreement, which commits the U.S. and 186 other countries to keep global temperature increases below 2 degrees Celsius. The Climate Deregulation Tracker (run by the Sabin Center for Climate Change Law) documents 129 other steps that the Trump administration has taken to scale back laws and policies designed to fight climate change.

Photo from Pexels

In Brazil – the other major nation of the Americas – the situation is even direr, if that is possible. We all watched the news this past summer with horror as large swathes of the mighty Amazon rainforest burned to a crisp. This rainforest is the most biodiverse place on the planet, being home to 3 million species – 10% of all plants and animals on Earth. The Amazon is also home to over one million Indigenous peoples, thousands whom have sacrificed their lives in recent years defending the forest against commercial interests. Given its ability to absorb millions of tonnes of carbon dioxide yearly, the rainforest is a vital element in regulating the Earth's climate.

During the term of Lula de Silva and his Worker's Party, the rate of deforestation in the Amazon declined and conservation measures appeared to be working. Since the election of the far-right leader Jair Bolsonaro in 2018, often dubbed the "tropical Trump", protective measures have been gutted. Bolsonaro, also called "Captain Chainsaw", has since provided

complete support for agribusiness, mining and logging, including in the sensitive and protected areas of the Amazon. Because of this we have witnessed alarming rises in deforestation rates. He is also hostile towards Indigenous rights to land and pledges to scale back protections previously affirmed and strengthened. This clearly represents a dramatic setback for environmental justice.

Since the election of the far-right leader Jair Bolsonaro in 2018, often dubbed the "tropical Trump", protective measures have been gutted.

The destruction of the rainforest in 2020, significantly increasing the devastation over 2019 levels, ensures that the situation lurches towards a tipping point. Combined with the ongoing failure to defend Indigenous land subject to protective designations from illegal economic activity, there is a distinct prospect of the rainforest being unable to sustain itself. Large swathes of forest may turn into a dry savannah. An indication of the "climate nihilism" – the term that critics say best captures the approach of both Trump and Bolsonaro – might be found in the attitudes of one of Bolsonaro's key cabinet ministers. Foreign Minister Ernesto Araujo has described climate change as a "plot by cultural Marxists" to suffocate the economy. Trump, likewise, reveals his disdain for environmental activists, who he considers "hoaxters" or "perennial prophets of doom".

A Landmark Court Ruling: *Urgenda*

In light of such overwhelming neglect of duty to citizens in the U.S. and Brazil, and indeed around the world, we must avoid lapsing into despair. Let us, then, turn to a hopeful sign from arguably the most important court decision in environmental matters of the past decade. On December 20, 2019, the Dutch Supreme Court rendered its decision in the appeal by the Netherlands State against the Dutch Urgenda Foundation.

The Supreme Court examined again the evidence presented respecting the massive effects of climate change and the urgent need for the Dutch government to take immediate, decisive action to address and mitigate it. Evidence of the harmful effects of climate change was undeniable. Climate science and the international community largely agree that the warming of the Earth must be limited to no more than 2 degrees Celsius. In fact, according to more recent studies, that should be no more than 1.5 degrees Celsius. To meet this target, we must reduce greenhouse gas emissions. Otherwise, we can expect extremely dire consequences, such as extreme heat, drought and precipitation, a disruption of ecosystem resulting in a jeopardizing of the food supply, and a rise in the sea level resulting from melting of glaciers and the polar ice caps. These developments will threaten the lives, welfare and living environment of many individuals around the world, including the Netherlands.

The Netherlands and other states in the European Union have made clear commitments to reducing greenhouse gas emissions. The nation is a party to the United Nations Framework Convention on Climate Change. The Convention's objective is to ensure that the concentration of greenhouse gases in the atmosphere remains within necessary limits. Staying within those limits means that human action will not be responsible for major disruptions to our climate.

Regular reports from the Intergovernmental Panel on Climate Change (IPCC) helped guide the Dutch Supreme Court on what commitments to reducing emissions are necessary to meet the climate emergency. In addition, the Paris Agreement of 2015 expressly indicates that states must strive to limit warming to 1.5 degrees Celsius.

Given the abundance of evidence, the Court determined the Netherlands had a clear duty to its citizens to safeguard their right to life and right to home life and private life (Articles 2 and 8 of the European Convention on Human Rights (the ECHR)). The Supreme Court builds on earlier decisions from within the E.U. Just as a state must take action where a serious environmental hazard is foreseeable, so the principle applies to the unprecedented threat occasioned by climate change in our time. The Urgenda Foundation met the necessary standard of a risk, being a genuine and imminent risk. Case law on Article 8 dictates that the state protect its citizens through reasonable and sufficiently stringent measures, which will avoid serious damage to the environment.

Articles 2 and 8 of the ECHR protect not just individuals who can demonstrate a threat of immediate harm to themselves but also protects the Dutch population as a whole. Further, Urgenda could and did establish that a substantial danger existed even if the precise materialization of that danger might be uncertain (i.e. it could not be proved that a flood will occur in 2020). This line of reasoning is consistent with the precautionary principle. Finally, Articles 2 and 8 require a state to take either mitigation or adaptation measures (measures to lessen or soften the impact of the threat), or a combination of the two.

… the Court determined the Netherlands had a clear duty to its citizens to safeguard their right to life and right to home life and private life …

Article 13 gives a right to an effective remedy to those who prove a human rights violation. Accordingly, the Netherlands is required to establish practical and effective safeguards. In the Court's view, this required a declaration to reduce emissions through state action by a minimum of 25% (in comparison with 1990 levels) by the end of 2020. An international consensus has developed in light of the clear findings published in IPCC Reports that various nations in the developed world (Annex I countries) are to achieve a 25% to 40% reduction in greenhouse gas emissions.

The extraordinary nature of this judgment, and its capacity to give hope and inspiration to many in these desperate times, is captured in statements issued by prominent human rights advocates. Mary Robinson, former UN High Commissioner for Human Rights and former President of Ireland, stated that the decision "affirms that governments are under a legal obligation, as well as a moral obligation, to significantly increase their ambition on climate change. Our human rights depend on it." David Boyd, the UN Special Rapporteur on Human Rights and the Environment, referred to this as the most important climate change court decision in the world so far. It confirms that wealthy nations are legally obligated to achieve rapid and substantial emission reductions. Concerned citizens around the world will watch for the Dutch government's new legislation.

Proactive Programs: Denmark and New Zealand

Rather than waiting for litigation or ongoing demands by citizens for action, two governments deserve particular credit for taking action now.

Denmark's new government has proclaimed that a new era is unfolding. Immediately after the left-wing Social Democrat leader Mette Frederiksen took power last June, she pledged to make the climate change struggle a top priority. She reached an agreement with others in her coalition to introduce binding decarbonisation and strengthen its 2030 target, which is now to reduce emissions by 70% below 1990 levels. In a news conference, the alliance warned that the world and Denmark are in a climate crisis. Limiting global

temperature rises is, in Frederiksen's and the alliance's view, "not just the right thing to do, it's also the most economically responsible one."

… Ardern calls the climate emergency her generation's "nuclear-free moment."

Denmark is also moving forward with energy efficiency improvements and a broad electrification strategy. Sales of all new diesel and petrol cars will be banned as of 2030. Cooperative efforts with neighboring countries are underway to develop offshore wind potential.

The election was fought in the shadow of a petition signed by 65,000 Danes. The petition demanded that the previous (conservative) government take more robust action on climate change. It also helped to ensure that debates on proposed environmental policies were central to the election. Polls showed that citizens voiced overwhelming support for much more aggressive measures in the fight for a sustainable future. For more information on this bold new legislative era, visit The Danish Environmental Protection Agency website.

On the far side of the globe, in New Zealand, Jacinda Ardern's Labour government has moved decisively to address climate change as well. Floods and bushfires severely affected the country last summer. Recently, Ardern announced a firm commitment to applying a climate change lens to all major government decisions. In December, Minister James Shaw emphasized that cabinet routinely considers the effects of its decisions on human rights and the Treaty of Waitangi (the treaty with the Maori). Now climate change will become an essential part of decision-making. "Climate impact assessments" are mandatory for proposals designed to reduce emissions. Ardern calls the climate emergency her generation's "nuclear-free moment." In November, the government enacted a zero carbon bill, committing it to reductions of emissions to net zero by 2050. The Climate Change Response (Zero Carbon) Bill has passed into law. The legislation received support from both sides of the political divide. The bill also establishes an independent Climate Change Commission to advise government on how to achieve targets and to produce "carbon budgets" every 5 years.

Canada and other nations will want to examine the efforts made in Denmark and New Zealand as they move forward to address the vital issue of climate change.

Rob Normey

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Do Natural Objects Have Legal Rights?

Myrna El Fakhry Tuttle

In 1972, Christopher D. Stone wrote an article entitled "Should Trees Have Standing? – Towards Legal Rights for Natural Objects". This article is still, even today, mentioned every time there is a discussion on legal rights and natural objects.

In his article, Stone suggested that we give legal rights to natural objects such as forests, oceans, rivers, etc. In other words, to the natural environment as a whole.

Stone stated that:

> *It is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems. One ought, I think, to handle the legal problems of natural objects as one does the problems of legal incompetents – human beings who have become vegetable. If a human being shows signs of becoming senile and has affairs that he is de jure incompetent to manage, those concerned with his well being make such a showing to the court, and someone is designated by the court with the authority to manage the incompetent's affairs. The guardian … then represents the incompetent in his legal affairs. Courts make similar appointments when a corporation has become 'incompetent' – they appoint a trustee in bankruptcy or re-organization to oversee its affairs and speak for it in court when that becomes necessary. (See: Stone at p 464.)*

Taking this concept into consideration, many countries have enacted laws that recognize natural objects as legal entities. Courts in different countries have also granted legal rights to natural objects.

Photo Credit: Jessica Steingard

Philippines

In 1993, Tony Oposa, a Filipino citizen, sued the Philippine government on behalf of 43 Filipino children for neglecting the country's forest resources. The trial court ruled that there was a lack of legal personality to sue and dismissed the case. However, the Philippine Supreme Court supported the legal standing and the right of the children to start the lawsuit on their behalf and on behalf of future generations.

Ecuador

In 2008, the new Ecuadorian Constitution incorporated a chapter called Rights for Nature. This chapter acknowledges that nature has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. It also states that all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature (article 71).

New Zealand

In 2014 in New Zealand, the *Te Urewera Act* declared the land that comprised Te Urewera National Park as a legal entity with an "identity in and of itself" and encouraged people to take care of it. The Act established a board to manage Te Urewera and to represent its interests. The board has representatives of the Crown and of Tūhoe, the tribal group exercising *mana whenua* (traditional status, rights and responsibilities) over most of the national park land. The Act settled the historic grievances of Tūhoe.

Moreover, in 2017, the New Zealand government enacted the *Te Awa Tupua Act* (Whanganui River Claims Settlement) in order to settle the historical claims of Whanganui *iwi* (indigenous descent groups) as they connect to the river. The Act recognized that Te Awa Tupua was as "an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements". The Act declared Te Awa Tupua a legal person and established the office of Te Pou Tupua. The office includes two persons with interests in the Whanganui River: one nominated on behalf of the Crown, the other nominated by *iwi*. Te Pou Tupua will act on behalf of Te Awa Tupua.

India

Inspired and encouraged by New Zealand laws, a court in the northern Indian state of Uttarakhand gave the Ganges and its main tributary, the Yamuna, the status of living human institutions. The court declared that the Ganges and Yamuna rivers and their tributaries would be "legal and living entities having the status of a legal person with all corresponding rights, duties and liabilities". Therefore, contaminating the rivers will be legally equivalent to hurting an individual. In order to protect the rivers and their tributaries, three officials are appointed as legal custodians. The court ordered that a management board be established within three months.

In Canada, natural objects do not have legal personality.

Moreover, a few days after declaring rivers Ganga and Yamuna as legal persons, the Uttarakhand High Court held that the Himalayan mountain ranges, glaciers, rivers, streams, rivulets, lakes, jungles, air, forests, meadows, dales, wetlands, grasslands and springs are also legal entities.

O'Donnell and Talbot-Jones stated:

> *The Yumanotri and Gangotri glaciers feed the Yumana and Ganges rivers, both of which the court considered to be "sacred and revered… central to the existence of half the Indian population". The court stated that both the Yumanotri and Gangotri glaciers are receding quickly and there is a "moral duty to protect the environment and ecology" from the severe risks of climate change and pollution. (See: Erin O'Donnell and Julia Talbot-Jones, Will giving the Himalayas the same rights as people protect their future?)*

The Uttarkhand High Court declared that "climate change was one of the major threats to the glaciers that required giving them personhood". The Court added that "the very existence of the rivers, forests, lakes, water bodies, air and glaciers is at stake due to global warming, climate change and pollution".

Colombia

Furthermore, in Colombia, 25 plaintiffs – ranging in age from 7 to 26 and supported by the human rights organization Dejusticia – filed a lawsuit against the Colombian government requesting protection of their right to a healthy environment. They stated that the government failed to stop the deforestation of the Amazon, threatened their future, and violated their constitutional rights to a healthy environment, life, food and water.

In 2018, Colombia's highest court sided with the plaintiffs and ordered the government to take urgent action to protect the Amazon and its increased deforestation. The court said that "Colombia saw deforestation rates in its Amazon region increase by 44 percent from 2015 to 2016". The court added: "it is clear, despite numerous international commitments, regulations … that the Colombian state has not efficiently addressed the problem of deforestation in the Amazon".

The judges said that "the Amazon's destruction leads to imminent and serious damage to children and adults for both present and future generations". They stated that "deforestation is a key source of greenhouse gas emissions driving climate change, which damages ecosystems and water sources and leads to land degradation".

… many countries have enacted laws that recognize natural objects as legal entities.

The court added that "for the sake of protecting this vital ecosystem for the future of the planet," it would "recognize the Colombian Amazon as an entity, *subject of rights*, and beneficiary of the protection, conservation, maintenance and restoration" that national and local governments are obligated to provide under Colombia's Constitution. The court asked the President and different ministries and administrative agencies "with the participation of the plaintiffs, affected communities, and the interested population in general" to submit action plans within four months to fight deforestation in the Amazon.

Conclusion

Governments and courts in other countries should consider these laws and rulings. In Canada, natural objects do not have legal personality. However, according to scientists, climate change is causing glaciers in Alberta, British Columbia and Yukon to melt quickly, threatening to raise water levels and create deserts.

Extending legal personality to natural objects used to be unthinkable. Not anymore. We can see how far we have come by considering natural objects as legal persons. Granting legal rights to natural objects will strengthen their protection by allowing legal remedies for damages to them. Thus the questions we pose here are: Are we going to see more legal actions on behalf of nature? If so, will these actions improve the environment's protection?

Myrna El Fakhry Tuttle

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Kids facing effects of climate change are taking their governments to court

Margot Young

In November, more than 11,000 scientists declared that the climate emergency has arrived and drastic action is required. Frustrated by government failure to respond adequately, citizens are taking to the courts.

The Sabin Center for Climate Change Law reports at least 1,390 legal challenges to governments and fossil fuel corporations in more than 25 countries since 1990. These cases are forging a new legal discipline: climate change law.

In October 2019, a second Canadian challenge was launched: La Rose vs. Her Majesty the Queen, filed in Federal Court.

At the head of the pack is the landmark case Urgenda vs. The Netherlands. In 2015, the district court of The Hague decided the government has a legal duty to strengthen its emissions reduction target for 2020.

The court of appeal reaffirmed the decision in October 2018. Although the case is on appeal to the Dutch Supreme Court with a final ruling due on Dec. 20, the case has already changed government policy.

Photo from Pexels

In the past year, millions of children and teenagers around the world have crowded the streets to protest government inaction on the climate crisis. But youth are also increasingly in the courts, suing governments for their failure to preserve a healthy environment for current and future generations of children.

Youth challenges

In United States, the most prominent case, Juliana vs. United States, was filed in 2015. In it, 21 young people assert that the U.S. government, by aggravating climate change, has violated constitutional rights to life, liberty and property.

In Canada, two cases bring these issues home. A Québec case brought by ENvironnement JEUnesse (ENJEU) invoked the Constitution on behalf of all Québec residents aged 35 and under to hold the federal government accountable for environmental degradation.

The Québec Superior Court threw out the challenge by denying class-action status,

stating that the group or "class" ENJEU sought to represent was arbitrary and inappropriate.

However, the court also found that the issues raised by the challenge were justiciable. This means that the claims of constitutional rights infringement are legally appropriate for courts to decide. This is an important judicial conclusion because courts will consider only questions that are proper in this manner for adjudication. Whether a question is "justiciable," or subject to resolution in a court of law, is always a significant hurdle for litigation that raises complex, costly and political questions.

In October 2019, a second Canadian challenge was launched: La Rose vs. Her Majesty the Queen, filed in Federal Court. La Rose has 15 individual plaintiffs, which avoids the difficulties in the Québec case of certifying a diverse class.

The differences among the young plaintiffs are legal strengths, demonstrating the range and scale of the impact that the climate crisis is having on on young people. The general claim, however, is the same as ENJEU: the federal government's actions — and inactions — have fuelled climate change, putting Canadian children in peril and breaking the law.

The legal case of La Rose

The La Rose challenge rests on two legal bases: first, government obligations under Sections 7 and 15 of the Canadian Charter of Rights and Freedoms and, second, the government's common law and constitutional responsibility to preserve common resources and lands.

Charter rights

Case law on the Charter rights is complex. Courts have turned the sparse language of constitutional text into lengthy, elaborate doctrine. But what counts in this case, with respect to the first legal basis, is simple.

Section 7 states:

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

The plaintiffs argue, in various ways, that climate change threatens their physical and psychological well-being and development and impedes their ability to make key personal decisions, thus compromising their life, liberty and security of person.

And the existential — or extreme — character of this threat is incompatible with any notion of fundamental justice. Or, in simpler language, furthering climate change's threat to the survival of the human species is incompatible with the key commitments of our legal and political system.

Section 15 reads:

> *"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."*

All the plaintiffs, by virtue of their youth, have pre-existing, distinct and intense vulnerability exacerbated by the government's failure to address climate change. They argue that this amounts to discrimination on the basis of age.

The Indigenous plaintiffs, in addition, assert that they face race-based discrimination. So this challenge links climate change to Indigenous rights and colonialism. The details of the effect on Indigenous youth signal the central ways in which the health and culture of Indigenous Peoples and communities erode as ecosystems are destroyed and species vanish.

None of these rights infringements can be, the plaintiffs argue, justified under Section 1 (the limitation clause) of the Charter. The plaintiffs also point out how Canada's international human rights commitments oblige this expansion of Charter rights.

Public trust doctrine

The second legal basis rests on the claim that the public and common resources of Canada's land, waters and air are the government's responsibility, a duty imposed in common law and by the Constitution.

This trust-like relationship — captured by the public trust doctrine — requires Canadian governments to respond in a dynamic way to the changing threats of the climate crisis in order to protect and preserve these resources for all Canadians now and into the future.

According to this challenge, the government has breached this duty by failing to act appropriately as climate change threatens "public trust resources," including the water, air and permafrost that are destroyed by a warming planet.

La Rose sets out novel claims in the Canadian legal system, but these are claims increasingly common internationally. And the Canadian Supreme Court has stated that novel claims are how our Constitution stays relevant as Canadian society and the world evolve.

In the past year, millions of children and teenagers around the world have crowded the streets to protest government inaction on the climate crisis.

Whether this case succeeds or not — courts sometimes follow rather than lead — the persuasive message and public profile of this legal challenge strengthen a burgeoning political movement, promising significant enrichment to mainstream political debate. We are getting used to the idea that a healthy environment is a human right.

As the world gears up for the United Nations Climate Conference in Madrid, Spain this December, Canadian lawyers and the youth they represent are busy trying to ensure that the Canadian government walks its international climate action talk back home.

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Margot Young

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Special Report Children's Stories and the Law

Do Books Relieve Children's Pain During Divorce?

Myrna El Fakhry Tuttle

Families are no longer as secure as they used to be. The process of divorce and separation can deeply affect children, as can exposure to new types of family structures. Children may feel stressed, frustrated and confused.

When parents separate or divorce, children may:

- have difficulties accepting the situation;
- struggle to accept that their parents will no longer live together;
- get angry and feel they have lost the absent parent;
- blame themselves for the separation.

(See: Pardeck & Pardeck, Using Bibliotherapy to Help Children Cope with the Changing Family at pp 110-111 [Pardeck & Pardeck].)

Divorce may also cause developmental problems in children, negatively impacting their academic, social, behavioral and physical well-being. This can lead to a decline in school performance, maladjustment issues such as depression and low self-esteem, and problems in peer interactions. Teachers usually acknowledge that children who experience divorce have more behavioral problems than children who have not.

Moreover, divorce can lead to transitional periods, challenges, feelings of insecurity, and disturbances of significant relationships. After the divorce, children can be overwhelmed living in different family situations and under two different sets of rules. Many things will be changing in their life, such as dinnertime, bedtime, homework, etc. Also, one parent might be more tolerant of certain behaviours than the other.

Photo from Pexels

What is bibliotherapy?

One method that can assist children in understanding divorce is bibliotherapy — the use of literature to deal with personal problems. Children normally have trouble showing their emotions. Bibliotherapy helps them understand the changes that are taking place in their lives.

The use of books encourages communication between parents and their children.

Most children of divorce experience a grieving process similar to what follows a death. This process, lasting approximately 2 years following the divorce, includes a sequence of denial, anger, depression and acceptance. These emotions are actually considered to be a normal and healthy reaction to divorce. Bibliotherapy, appropriately used within the classroom, can help children make transitions through these stages. (See: Kramer & Smith, Easing the Pain of Divorce Through Children's Literature at p 90.)

The term bibliotherapy comes from the Greek words for book "biblion" and healing "therapeia". In ancient civilizations, library entrances featured inscriptions stating that there was *"healing for the soul" inside the building*. In 1946, Sister Mary Agnes was the first to publish a study on using bibliotherapy with socially maladjusted children in order to overcome their problems.

There are two types of bibliotherapy:

1. Clinical bibliotherapy is used in clinics by therapists and counselors.
2. Developmental bibliotherapy is used in classrooms by teachers to encourage children to express themselves and talk about what they are going through.

Bibliotherapy has three principle process stages:

1. Identification takes place when children relate to a character or situation in a story.
2. Catharsis happens when children connect to the characters in the story and show feelings that they previously restrained.
3. Insight is when children understand and see the situation in a new way and feel confident and inspired to make good behavioral changes.

Bibliotherapy has proven to be effective in therapeutic, educational and community situations. It is useful for teachers, counsellors and parents to help children understand their feelings and the new changes happening in their life. In addition, books are accessible tools. Bibliotherapy does not require a skilled and qualified adult or parent to read with a child.

Books help children relate to characters and manage their own feelings.

What are the benefits of bibliotherapy?

The divorce process is difficult for both parents and children. It is a transitional period where many things might change in children's lives. They may have changes in their feelings, family, friends and home life. Therefore, parents need to talk to their children about these changes. Good relationships between the children and parents are an important factor in dealing with this difficult situation. But despite that, divorce can have negative effects on those relationships. Children can get confused and fear losing the love of their parents. Also, some children feel overwhelmed or helpless and become reserved.

The use of books encourages communication between parents and their children. Through reading and discussion of the book's content, children can:

1. *Learn s/he is not alone. Reading about other children going through the same situations will alleviate feelings of isolation or of being an outsider.*
2. *Identify with characters in a way that s/he understands and be able to relate to characters, particularly those of the same gender.*

3. *Gain insight and knowledge and apply that knowledge to real life. This teaches the child ways of coping with the divorce.*

(See: Maridith Jackson, Why Use Books With Children During Divorce?)

The right story encourages discussions between children and parents about difficult topics such as divorce. Reading with children requires physical contact, such as parents sitting next to their children, but it does not request a lot of eye contact. The focus is on the book, which decreases the tension of discussing tough topics and provides relief for both children and parents.

Children can read about other children who have dealt with similar problems. This can help them find solutions for themselves. Books can also show children how others have overcome anxieties and frustrations, hopes and disappointments, failures and successes, and they can apply that to their own situations (Pardeck & Pardeck at p 108).

Real life requires books that give information, relief and models for dealing with difficult situations. Books help children relate to characters and manage their own feelings. Usually readers look for a solution to their own personal life situation and feel better when they find out that they are not the only ones dealing with such a problem.

One method that can assist children in understanding divorce is bibliotherapy — the use of literature to deal with personal problems.

Moreover, literature encourages children to use their imaginations. Conversation is much harder on children than reading books about the lives of others. Children can talk about their feelings using characters in a story. Parents can discuss the content of the book with their children, which help the parents understand what their children are going through. It will also encourage children to ask questions about and discuss divorce.

Children should also be given the opportunity to select their own books. They should be able to pick a book that they like so they better relate to the story characters.

Danielle F. Lowe stated:

Appropriate books encourage readers to forget, to escape from the pressures of daily life, and lose themselves within the pages of a story. Literature invites us to remember personal tribulations, encourage importance of hope, offer avenues of practical support, and teach life lessons to assist us through our own obstacles. Children's books can help the child to escape the chaos of his/her own life, in addition to providing the opportunity of discussion of text and perceptions. (See: Danielle F. Lowe, Helping Children Cope through Literature at p 5.)

Other benefits of bibliotherapy include:

- helping reduce stress within the family;
- helping children express feelings and ideas about a problem or difficulty;
- giving children vocabulary to express themselves, since they do not have the reasoning or ability to control their complexities;
- encouraging parents and children to spend time together to soften a hard situation, especially since it is important for children to know the divorce was not their fault but rather their parents' choice.

Conclusion

Bibliotherapy is effective because it allows children to step back from their issues and look at them from an objective point of view. Discussions and silences that take place around the story allow children to reflect and compare themselves and their feelings to the characters in a story. This can help children overcome their anxiety, anger and uncertainty.

Bibliotherapy can assist children in resolving their problems by reading stories about characters who have overcome similar situations. Books can provide children important skills that will help them learn appropriate behaviors for different emotions and situations.

Myrna El Fakhry Tuttle

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Criminal Acts in Children's Stories

Charles Davison

Many years ago I defended a young man on a charge of "criminal harassment". This was shortly after the federal government added this crime to our *Criminal Code*. The offence involves repeatedly following or communicating with another person when you know that the other person does not want to hear from you or for you to be around them. The offence also requires that the accused person know their conduct is causing the other person to be fearful for their safety or that of any other individual. My client was a student who had become enamored with a fellow student and had taken to following her around. He would also leave notes for her, even after she had clearly rejected his advances a number of times.

Property crimes are frequently depicted in children's stories.

I remember thinking – and making it part of my sentencing argument to the judge – that a young man such as my client had likely grown up hearing popular stories with similar storylines. The message of these stories is that if a young woman at first rejects one's advances, all it takes is persistence and "she will come around". Similar modern tales portray both genders in each role, but at the time popular stories most often seemed to have the female in the role of the "pursued" and the male as the "pursuer". Popular literature and Hollywood productions are full of such stories, which almost always end with the couple getting together and, as the fairy tales put it, "living happily ever after."

Real life is not always like that though. If a "jilted" would-be suitor continues in their unwanted advances, the results may include serious legal consequences. These include being charged and prosecuted, possibly convicted and then sentenced for "criminal harassment". The punishment is often prison time. Criminal "peace bonds" and civil restraining orders may also be used to keep an individual away from the target of their attention.

This scenario – of real life not being as it is portrayed in common folklore and children's tales – is hardly a unique or isolated example. The values and morals of society at the time when many of these stories came into being are often no longer the values and morals of communities today. If we consider some of the most popular traditional children's stories and fairy tales in the context of modern Canadian criminal law, serious concerns can arise: precisely what are we teaching our children?

Not So Innocent Examples

Property crimes are frequently depicted in children's stories. Perhaps one of the most serious (for our purposes) is that of "Jack and the Beanstalk". In this tale, Jack climbs his beanstalk and enters the home of a giant. He steals various valuable possessions, including a bag of gold and a goose which lays golden eggs. In the end, as the giant chases Jack to try to recover the property Jack has stolen from him, Jack chops down the beanstalk. The giant falls and dies.

Legally, Jack is the criminal in all of this: he commits the offence of "breaking and entering" when he sneaks into the giant's

home and steals from him. In Canada, "breaking and entering" into a residence carries a maximum punishment of life imprisonment. That Jack does this repeatedly turns a single episode of criminal behavior into a longer "spree" or pattern. That he ultimately kills the giant would likely lead to Jack being convicted of manslaughter, if not murder. And given the emphasis the story places on the physical characteristics of the victim – he is only ever called "the giant" – one would also have to wonder if Jack was targeting him as a result of his size or similar factors. If so, this would make the offence even more serious. In Canada it is considered particularly reprehensible to target another person based on their personal, physical or mental characteristics (as well as race, religion, gender, sexual orientation, and other similar factors).

The values and morals of society at the time when many of these stories came into being are often no longer the values and morals of communities today.

A more minor example of property crime is found in the story of "Goldilocks and the Three Bears". Goldilocks, being lost in the woods, comes upon and enters into the home of the three bears. Inside, she eats some of their food, (accidentally) breaks one chair and ends up falling asleep in one of the beds. Arguably, under Canadian law, she might not be guilty of committing any crimes in all of this. It is not a crime to enter another person's home if you are not intending to commit a criminal offence once inside. It is also not a criminal offence to accidently destroy property (such as breaking a chair when trying to sit on it). Sampling some food could be considered "theft". Theft is committed when one person takes the property of another without any right to do so and with the intention of depriving the owner of that item. Similarly, sleeping in someone else's bed might be a form of "mischief", which includes any act by which the owner's enjoyment of their property is disturbed or interrupted. However, both the eating of the food and the sleeping in the bed are likely so minor as not to warrant prosecution. And in fact, much in this scenario might depend upon local custom and habits. In many parts of rural and remote Canada (including the North), cabins are deliberately left unlocked so as to ensure lost and needy travellers will have shelter (and food) in an emergency.

Photo from Pexels

At least two of the oldest and most popular stories – at least as Disney retells them – involve princes who find apparently-sleeping princesses: Snow White and Sleeping Beauty. In each of these stories, princes wake the unconscious princesses by kissing them. Especially given present-day society's awareness of, and emphasis upon, the crimes committed by powerful men against more vulnerable younger women, the endings to these stories must give rise to concerns.

In Canada, a man who kisses a sleeping or unconscious woman – especially a woman to whom he is a stranger – would likely be considered to have committed a "sexual assault". An assault is any intentional physical contact by one person with another person where the other person has not consented. The act becomes sexual if it is done for a sexual purpose or in a manner which infringes upon the sexual integrity of the victim.

While a kiss is likely a fairly minor form of sexual assault, an unwanted, uninvited kiss is nonetheless a crime. Furthermore, in Canada, this type of offence is considered to be especially serious when the victim is asleep or unconscious at the time. And of course, in both stories, Snow White and Sleeping Beauty ended up "asleep or unconscious" as a result of another crime which in Canada is called "administering a noxious substance." Anyone who administers, or causes another person to take, poison by any means – swallowing, eating or being pricked with a needle – commits a very serious offence. The punishment for this offence is up to 14-year imprisonment. If the intention in giving the victim poison is to kill them, the perpetrator could even be guilty of "attempted murder" and imprisoned for life.

The message of these stories is that if a young woman at first rejects one's advances, all it takes is persistence and "she will come around".

Moving Forward

The stories mentioned here are merely a few examples of traditional tales which, upon their continued retelling, come with the risk of teaching children in our present-day society lessons which we might do better to avoid. However, a review such as this must also include acknowledgement of the efforts of present-day storytellers (including those who write for the large movie studios which produce current stories for children) to present more modern and balanced (at least in terms of gender roles) tales for the consumption of our younger generations. Authors such as Canada's own Robert Munsch have provided our latest generations with many stories which avoid the old stereotypes and which have female characters in positions and doing things which in earlier times would have been considered solely "men's jobs." And stories which include the violence and death of earlier tales seem to be rarer. Just as traditional tales from the American south – replete with stunning examples of extreme racism and stereotyping – are now, thankfully, a thing of the past, so too is much of the other older children's fiction. Their replacements are more modern, positive and helpful stories which will hopefully provide better role models and useful guides to values and behavior in our 21st-century world.

Charles Davison

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Bear With Me: Law for little ones

Teresa Mitchell

Children, even from infancy, learn about rules. They are told not to run with sharp objects, not to touch a hot stove, and that when darkness falls, they will be expected to go to bed. As children grow, they learn about the rules that govern the world around them. They begin to learn that they exist in a society with other people and that rules will help them to get along with others.

How do we teach children about complex and multi-layered concepts such as justice and laws as embodied in the legal system? One of the best ways to accomplish this learning is with stories. There are innumerable excellent storybooks aimed at every age of child, from early elementary school to Grade 6, which help with this task. Let's look at some options.

The Wise Owls

A good starting place when looking at the making of laws could begin with a book published by the Senate of Canada called *The Wise Owls*. Published in 2018, this book is aimed at elementary school children and explains our parliamentary system. It begins with a group of animals in the forest who begin to wonder if they need to be ruled by a lioness who, although much loved, lives far away across the ocean. They had learned that they accomplished more when they worked together than if they worked alone. They decided to create a Council of Animals that would elect members to make rules and decisions for the good of them all. However, as the years passed, they learned that what's good for one animal is not necessarily good for all of them. A bear says:

> *The Council is a good idea, but I wonder – maybe we could ask the owls to help. They can travel to parts of the forest where we cannot go. Could the Owls give their views on the council's decisions to make sure the needs of all the animals everywhere in the forest are met?*

The animals thought this was a very good idea and they made up a name for this group – the Senate of Owls. When disputes arose, the Wise Owls helped. One Wise Owl said:

> *The Senate of Owls is here to help you … In our journeys, we have watched you and spoken to you and listened to you. We have seen that the needs of Foxes are not those of Rabbits and that your differences are what make this Forest such a beautiful place to live. We will carry your voices from the four corners of the Forest to the Council of Animals.*

The story concludes:

> *As the years passed, different animals came and went from the Council. But the Senate of Owls remained to give the Council of Animals the benefit of its perspective so that the Council truly acted for the good of every animal in the forest.*

The book is beautifully illustrated. As befits a group of owls, many pictures feature a luminous night sky, with stars and constellations. For those who choose to outsource story reading, there is a wonderful video version.

Photo from Pexels

The Supreme Court: a Guide for Bears

From the making of laws by a government body, we can move to the court system. There is a charming and humorous book from the United Kingdom called *The Supreme Court: a Guide for Bears*. Isabell Williams authored and illustrated this book, published in 2017. As the title suggests, a group of teddy bears guide children through Britain's Supreme Court. The teddies explain that the nine justices examine only points of law. They point out that the justices do not rule on guilt or innocence. They do not hear from witnesses and there are no juries. Canada's Supreme Court is modelled on this Court so the information is transferrable across the pond.

Canada's Supreme Court is modelled on this Court so the information is transferrable across the pond.

The illustrations in this book are hilarious. The book describes various portraits and works of art within the building. In each portrait, the subject from the 18th or 19th century poses with a teddy bear. A picture of the justices shows each justice looking with some consternation towards a little bear in a huge chair, whose head and ears are barely visible over the desk. The text points out that there are Supreme Courts in many other countries, including the U.S.A. This is illustrated by the Statue of Liberty, torch aloft and clutching a teddy bear! These illustrations will delight grown-ups and children alike.

You Decide: Charter Challenges

Children in the upper grades of elementary school can begin to explore more complicated aspects of the law. One of the most important parts of Canada's legal history and law is the *Canadian Charter of Rights and Freedoms*. Canada's *Charter* protects fundamental rights such as equality, freedom of speech, assembly and religion. These are important and complex ideas that shape Canada. But, children are still children, and so several Canadian books explain *Charter* rights in a way that makes sense to them.

The Canadian Centre for Public Legal Education Alberta (CPLEA) produced a series of booklets that explain these basic rights to children using stories and fanciful animals caught in interesting legal dilemmas. You Decide: Charter Challenges is a series designed for grade six classes. It explores four sections of the *Charter*:

- mobility rights;
- search and seizure;
- equality rights; and
- freedom to associate.

Available in English or French, the series contains resources for teachers and students.

The children may choose to visit a fictional land called Adinak or a fictional planet called Beebonk. In Adinak, Morley Moose wants to move his family to a different part of the country that he thinks will improve his family's quality of life. Eva Reindeer wants to be able

to play hockey with the boy reindeers and is looking for equal opportunity and treatment. Rufus Raccoon is appalled to learn that his backpack might be searched on a school fieldtrip. He wants the law to protect him from unreasonable search and seizure. Attila Raven is trying to prevent workers from meeting to discuss their working conditions and threatens them with losing their jobs. This violates his employees' *Charter* right of freedom to associate. Similar dilemmas trouble other creatures on the fictional planet of Beebonk.

Available in English or French, the series contains resources for teachers and students. The series comes with teachers' guides, questions for discussion, classroom activities and a fictional legal case set in modern Canada to ground the information for children. Teachers can access this series online through CPLEA.

Teresa Mitchell

Teresa Mitchell is the former Editor and Legal Writer for LawNow at the Centre for Public Legal Education Alberta.

BenchPress

Challenges to the *Constitution, Canada Labour Code* and an insurance policy

Jessica Steingard

Constitutional Challenge: Third parties can profit from sex work

***R v Anwar*, 2020 ONCJ 103**

Hamad Anwar and Tiffany Harvey were charged for running an escort service in London, O.N. They employed several adult women, providing vacation time and benefits. Specifically, they were charged with offences under the following *Criminal Code* provisions:

- 286.2(1) (receiving a material benefit from sexual services)
- 286.3(1) (procuring a person to offer or provide sexual services)
- 286.4 (advertising sexual services).

The accused challenged the constitutionality of these provisions. They claimed that:

> *... the effect [of the legal regime created by the provisions] is, at a basic level, to deprive sex workers of those things that are natural, expected and encouraged in all sectors of the economy. As a result, sex workers, who are more likely in need of protection than more workers, are denied the benefits accorded to mainstream labour. (See para 3.)*

The Ontario Court of Justice (Ontario's lowest court) found that:

- 286.2 and 286.3 violate s. 7 of the *Charter* (life, liberty and security of person)
- 286.4 violates s. 2(b) of the *Charter* (freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication).

The Court determined that none of these violations could be saved under s. 1 of the *Charter*. The Court noted that the effect of s. 286.2 is to make sex work more dangerous "by discouraging all third parties other than the criminal element from becoming involved in the sex industry." The Court also noted that s. 286.3 was arbitrary because it criminalized individuals offering administrative and safety services to sex workers that are provided to people in other industries. Finally, the Court concluded s. 286.4 fails to meet the minimal impairment requirement as it "imposes criminal liability on third-parties even if they are in non-exploitative commercial relationships with sex workers offering services at the same cost that they generally make available to the public."

What's next? Charges against the two accused are stayed. The Crown has not indicated whether they will appeal the decision. The decision was met with mixed reviews from the public.

Labour Code Challenge: Canada Post need not inspect mail routes

***Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67**

Canada Post is a federally-regulated employer. It must follow the provisions of the *Canada Labour Code*. Section 125(1)(z.12) requires that the work place committee or health and safety representative inspect every work place at least once per year.

A representative of the Canadian Union of Postal Workers, who also sat on the Local Joint Health and Safety Committee at the Burlington Depot in Ontario, filed a complaint with Human Resources and Skills Development Canada. "The complaint stated that the safety inspections should include letter carrier routes and locations where mail is delivered ('points of call'), and not just the Burlington Depot building." This complaint was significant because it could have national consequences. Canada Posted estimates that "letter carriers travel 72 million linear kilometers delivering mail to 8.7 million points of call."

A Health and Safety Officer completed an investigation and concluded that Canada Post had not complied with s. 125(1)(z.12) of the *Code*. Canada Post appealed the Officer's decision to the Occupational Health and Safety Tribunal Canada. The Appeals Officer at the Tribunal found that the inspection obligation only applied to the parts of the work place that the employer could control. He noted "Canada Post cannot alter nor fix the locations in the event of a hazard." Therefore, Canada Post was not required to inspect letter carrier routes and points of call.

The Union applied to the Federal Court for judicial review of the Tribunal's decision. The Federal Court dismissed the application for judicial review but the Federal Court of Appeal allowed the appeal and reinstated the original Health and Safety Officer's decision. Canada Post appealed to the Supreme Court of Canada, which upheld the Appeal Officer's decision. The Court found that the Appeals Officer's decision was reasonable as it "followed from a clear line of reasoning."

After all of that? Canada Post only needs to conduct safety inspections at its buildings, not on letter carrier routes or at points of call.

Life Insurance Challenge: No payout due to past terrorism

***Mohammad v The Manufacturers Life Insurance Company*, 2020 ONCA 57**

The deceased applied for a life insurance policy on April 10, 1987. Purchasing life insurance was required to get a mortgage. The deceased answered all of the questions posed. None of the questions asked about the

deceased's past, and so the deceased did not reveal that he was a member of the Popular Front for the Liberation of Palestine (PFLP).

The PFLP is a terrorist entity. The deceased had been involved in storming an El Al civilian aircraft in 1968, moved to Lebanon shortly after, and then came to Canada in 1987 using an alias. Canadian immigration officials discovered his past, and he was deported to Lebanon in 2013. He died in 2015 from lung cancer.

The life insurance company refused to pay out the life insurance policy (worth $75,000) to the deceased's wife because of the deceased's past. The trial judge determined that the insurance company had not asked questions about the deceased's immigration status or other past activities on the application form. This signaled this information was not material to assessing a candidate's application for life insurance.

The Ontario Court of Appeal overturned the trial judge's decision. The Court noted that it is a "principle of long standing that an applicant for insurance has an obligation to reveal to the insurer any information that is material to the application." The Court concluded the "past actions of the deceased were material to the risk that he posed for the purpose of having his life insured."

The result? The deceased's wife doesn't get the $75,000 life insurance payout.

Jessica Steingard

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

New at CPLEA

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

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.

How Old Do I Have to Be In Alberta – Poster

Perfect to hang in classrooms, offices or waiting rooms, this poster states at what age certain activities are legal in Alberta.

How Old Do I Have To Be In Alberta – Tipsheet

Answers to some common "how old do I have to be" questions that young people have. This resource is great for teachers and youth workers. Pairs perfectly with the How Old Do I Have To Be poster.

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:

Top 10 Housing Law Issues

Date: **Wednesday, March 18, 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? Do your clients rent a home? There are a wide variety of issues that may pop up in housing ranging from human rights and public health to privacy concerns. To help your clients get the right help and referrals to deal with a housing problem, it's important to understand the housing (and housing-related) laws that may apply to their situations.

Workshop registration includes continental breakfast, coffee and tea.

Register online at Eventbrite by March 16, 2020.

Sexual Violence: What does the law say?

Date: **Wednesday, April 22, 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 victims of sexual violence? Sexual violence can include domestic violence of a sexual nature, trafficking, exploitation, sexual harassment or assault, and more. This session will provide an overview of the law as it relates to sexual violence – from the Criminal Code provisions and human rights law to legal options available to victims.

Workshop registration includes continental breakfast, coffee and tea.

Register online at Eventbrite by April 20, 2020.

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.

Columns

Employment

Peter Bowal

What to do with Your Conscience at Work?

We hear a lot today about people following their conscience. Conscience is more than mere preferences and choices. It is about one's values, spiritual worldview and visceral sense of right and wrong. Few employees want to compromise on their deepest conscientious beliefs for their jobs. These beliefs often arise from religious convictions but are technically independent of religion. How is one's conscience protected at work?

Constitutional Freedom but Not a Regulatory Human Right

To follow one's conscience is a fundamental freedom on par with equality and free speech in the *Charter of Rights*. That means that government employers at all levels throughout Canada must accommodate their employees' consciences.

However, most people do not work for a government entity. They work in the private sector which is governed by provincial and territorial law. The human rights legislation at this level does not require employers to preserve employees' freedoms of conscience. The only human right at this private sector level of employment is essentially equality and freedom from discrimination on enumerated grounds (such as race, gender, disability, age, etc.) unless there is a *bona fide* occupational requirement to discriminate on any of those grounds.

Even in the private sector, one also finds some inherent protection for conscience. If, for example, a worker is asked to do something illegal or unreasonably dangerous, the worker may refuse and will be protected by both regulation and the common law. No employer, when challenged in a legal proceeding, will get away with disciplining workers in such scenarios.

Photo from Pixabay

Conscientious Refusal to Perform Legal Acts

The more complicated question is when one can refuse to do something that is *legal* but still against one's deeply held convictions. A current example involves medical professionals such as nurses, physicians and pharmacists who may personally object to counselling or assisting in abortions, gender conversions or medically-assisted deaths. Since the government regulates these professions, the *Charter* freedom of conscience is in play.

So how should we address this conscience issue? The correct approach is accommodation.

Last year, in *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, the Ontario Court of Appeal considered physicians' policies in the province that allow doctors to refuse to perform services for conscientious reasons

but state the doctor must provide all patients with an "effective referral". The Court ruled the policy struck a proper constitutional balance and was enforceable. The policies define an effective referral as "a referral made in good faith, to a non-objecting, available, and accessible physician, other health-care professional, or agency." Obviously, those physicians and other medical professionals with similar directives think this duty is too great a violation of their consciences. They risk professional discipline if they do not obey. Or they could quit the profession.

Alberta's Bill 207 would have given a small number of conscience-bound health care providers the right to decline work that genuinely conflicts with their deepest personal beliefs. The matter is controversial, and the private bill did not get enough support to pass. It died when the last legislative session ended.

The private sector equivalent has played out with cake decorators or wedding photographers who conscientiously refuse to participate in same sex weddings. Waxing salons have been recently added to the list of refusers after Jessica Yaniv famously targeted them. B.C.'s Human Rights Commission tossed out her complaints on the grounds that she attempted to use the equality provisions of B.C.'s *Human Rights Code* as a sword "for improper purposes."

The Collision of Equality and Conscience Rights

What is solved by legally forcing competent conscience-bound medical practitioners to do something that they consider fundamentally wrong – to the point of driving them out of their profession? Or forcing some bakers and photographers out of business?

No same sex couple today will remain unwed due to a lack of bakers and photographers willing to serve them. With a quick internet search, one can find willing medical providers for abortion, gender transition and medically-assisted death. There are referral agencies to assist. Equality activists claim that people will be harmed or die because one doctor might refuse to refer a patient to an abortion, a gender conversion or a medically-assisted death. However, these procedures are conducted by specialists who are very easy to identify and locate today. There is not a single instance in Alberta history of anyone going without care as the result of the exercise of conscience by any health care provider. Every same sex couple can find a willing baker or photographer.

The more complicated question is when one can refuse to do something that is* legal *but still against one's deeply held convictions.

Opponents of Bill 207 framed the issue in terms of hypothetical harm to them and their equal outcomes. At the same time, they demand blanket suppression of the providers' conscience, even if it is an equal constitutional right.

When we hasten to strengthen equality rights at all costs, we sacrifice other co-equal *Charter* rights in the process. Equality activists seek to effectively amend the constitution to subordinate and repeal freedom of conscience. In the recent debate on Bill 207, opponents did not seek to balance conscience rights. They preferred rather to assert their own rights and deny the rights of others.

The Solution: Accommodation

So how should we address this conscience issue? The correct approach is accommodation. Patients need or want the medical procedure but they do not need *every* medical professional to serve them. Both

patient needs and professionals' conscientious beliefs can be satisfied. Abortion providers will not object to performing abortions. Why force the conscience of another medical professional to make a referral if abortion providers are readily identifiable by an internet search or phone call? If a professional is reasonably available to perform the procedure – which is virtually always the case – patients should not compel other professionals to act against their conscience. Where service delivery is unaffected in practice, professions must not be closed to conscience-convicted Canadians.

An example of sensible accommodation is the licensed marriage commissioner program in several provinces. A couple may choose a civil wedding or a religious wedding, or both. The two forms are equally legal. There are more than 250 licensed Marriage Commissioners in Alberta who advertise their services, and there are also many religious officiants. Everyone is accommodated and no religious or secular wedding officiant is required to act contrary to one's conscience. This same accommodation of conscience and equality can easily be achieved in all professions.

***To follow one's conscience is a fundamental freedom on par with equality and free speech in the* Charter of Rights.**

Conclusion

We would never deny equality to anyone on the basis that it might offend another's conscience. Likewise we should not destroy one's conscience to achieve equality. Conscientious objection has long been widely recognized around the world. Yet our constitutional conscience rights are far too readily discarded.

Although Bill 207 is gone for now, the human conscience has not vanished. With no legislation to balance the rights of equality and conscience, cases will crowd Alberta courts for adjudication under the *Charter*. These equal, co-existent rights must be reconciled through accommodation.

Peter Bowal

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

Family

Sarah Dargatz

The Legal Status of the Spousal Support Advisory Guidelines

The *Divorce Act* sets out the factors that a judge considers when ordering one ex-partner to pay spousal support (also knows as "partner support" or "spousal maintenance") to the other ex-partner. The factors in provincial family law legislation that applies to unmarried couples, such as Alberta's *Family Law Act*, often mirror the *Divorce Act*.

Before spousal support is ordered, one ex-partner must show that they are *entitled* to spousal support. Entitlement is a big topic that we might cover in another issue. You can find basic information on entitlement in CPLEA's Financial Support booklet.

If one ex-partner is entitled to spousal support, the next question is how much should they receive (the "quantum") and for how long (the "duration"). Lawyers, judges and ex-partners often use the **Spousal Support Advisory Guidelines (the "SSAGs")** to help determine the quantum and duration of spousal support.

Two law professors, Carol Rogerson and Rollie Thompson, developed the SSAGs based on how courts were practically applying the *Divorce Act* factors. The Federal Department of Justice published the SSAGs. The SSAGs include a set of calculations used to determine quantum and duration of spousal support as well as a User Guide to provide practical assistance in using the calculations. The SSAGs provide consistency and predictability to spousal support awards. They focus on income sharing rather than analyzing each partner's budgets. The Federal Department of Justice released a draft proposal in 2005 before releasing a "final" version in 2008. The User Guide was updated in 2010 and 2016.

Photo from Pexels

Unlike the Federal Child Support Guidelines, the SSAGs are truly guidelines. They are not law. They are not part of any piece of legislation or regulation. So what are they? Does a judge need to follow them?

When making a decision, a judge must follow the applicable legislation and regulations. Judges must also consider the decisions that other judges have made, particularly the decisions of judges at higher levels of court. This is what we call "precedent" or "caselaw". Judges are also welcome to consider other helpful resources, such as textbooks written by respected legal academics. However, these other resources should not override the judge's discretion and application of the legislation and caselaw.

There is good reason to believe that the Court's comments in* Wild *will lead to greater confidence in the use of the SSAGs in Alberta.

From early on, appeal courts across Canada referred to the SSAGs as a "useful tool", just like a well-researched textbook. However, there was inconsistency on what weight courts would give to the SSAGs. Appeal courts across Canada had to decide if it was an error for a

judge to put too much, or too little, weight on SSAGs calculations.

When the SSAGs were still only in draft form, the British Columbia Court of Appeal released its decision in *Redpath v. Redpath*, 2006 BCCA 338:

> *Now that [the SSAGs] are available to provide what is effectively a "range" within which the awards in most cases of this kind should fall, it may be that if a particular award is substantially lower or higher than the range and there are no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention.*

In other words, if a judge did not use the SSAGs, or put too *little* weight on them, it could give rise to an appealable error. Given this decision, the SSAGs are used consistently in British Columbia as a starting point to determine the quantum and duration of spousal support.

All cases point out that the SSAGs calculations should not be used blindly without consideration for what makes a particular family unique.

On the other hand, in the early days of the SSAGs, the Alberta Court of Appeal said that a judge was only required to consider the factors set out in the *Divorce Act* (see *Sawatzky v. Sawatzky*, 2008 ABCA 355 or *Taylor v. Taylor*, 2009 ABCA 354). The Court said judges should use the SSAGs as merely *guidelines*, a "starting point" or a "cross-check", and such use should not "fetter a judge's discretion". The Court noted that "there remains more than one route available to trial judges in arriving at an appropriate result." In Alberta, lawyers and litigants did not have confidence that their assigned judge would consider SSAG calculations. It was much more difficult to predict spousal support outcomes.

This is not to say that the Alberta Court of Appeal rejected the SSAGs altogether. Rather, they used the SSAGs as that "useful tool" and a "cross-check" to measure the appropriateness of spousal support awards. But using this tool was not considered a required starting point.

However, in January 2019 the Alberta Court of Appeal wrote that the SSAGs "have developed a certain strength in this jurisdiction over a period of time" (in *Thompson v. Thompson*, 2019 ABCA 7). And then, in April 2019, the Court went a step further and encouraged lawyers to provide SSAG calculations to judges and to think carefully about the appropriate inputs to the calculations and the relevant considerations under the Revised User Guide (in *Wild v. Wild*, 2019 ABCA 159). And, for the first time, the Alberta Court of Appeal affirmed the decision of the British Columbia Court of Appeal in *Redpath*. The Court said that a judge not explaining why their award falls outside of the SSAGs could be a basis for appellate review.

Since the release of the *Wild* decision, several subsequent Alberta Court of Appeal decisions have cited it. There is good reason to believe that the Court's comments in *Wild* will lead to greater confidence in the use of the SSAGs in Alberta. Though the SSAGs are still not law, they are something more than a respected textbook. They are a *required* starting point.

All cases point out that the SSAGs calculations should not be used blindly without consideration for what makes a particular family unique. The calculations should not used without reference to the considerations in the Revised User Guide. The calculations provide a *range* of amounts and durations. Consideration must be made for which numbers within that range are most appropriate.

Lawyers, judges and ex-partners often use the Spousal Support Advisory Guidelines (the "SSAGs") to help determine the quantum and duration of spousal support.

Most people want to avoid court and settle instead. However, an ex-partner needs to know what the alternative to settlement (i.e. going to court) might look like. If it is difficult for a lawyer to predict what a judge would order for spousal support, it is difficult to advise their clients about how to settle. If we can have confidence that the court will start with the SSAGs, it is much easier to predict a likely outcome and therefore, much easier to reach an agreement outside of court.

Sarah Dargatz

Sarah Dargatz has been practicing family law since 2009. She is currently a partner at Latitude Family Law LLP.

Famous Cases

Peter Bowal and
Mackenzie Bowal

Provinces Leaving Canada Part II: The *Clarity Act*

> *The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken.*
>
> *– Reference Re Secession of Quebec, [1998] 2 SCR 217 at para 153*

Introduction

In the last issue of this column, we looked at the 1998 *Secession Reference* decision of the Supreme Court of Canada as a result of Quebec's razor thin "no" vote in late 1995. This decision laid down a few broad principles. Afterwards, the federal government stepped up and legislated a framework for provincial secession.

This article describes the *Clarity Act*, which must be considered in any legal understanding of provincial secession from Canada.

The Morning After: the *Clarity Act*

Both the Quebec and federal governments were pleased with the *Secession Reference* decision, and both claimed victory. Quebec's referendum strategy was validated, and the issue was judged political, not legal.

Quebec was comforted to know the rest of Canada would have to negotiate after a winning 'leave' referendum. The federal government was happy that Quebec could never declare independence unilaterally and that succession referenda needed to pose a clear question.

Within a year of the Quebec *Succession Reference* decision, Parliament enacted the sprawling-titled *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*. It is known by the over-simplistic name, "*Clarity Act*". In it, the federal government seeks to take control of the referendum and secession process. The *Clarity Act* is regular federal legislation and can be amended or repealed anytime in the future.

… after the* Clarity Act *was passed, the separatist Parti Québécois enacted its own form of clarity statute …

The *Clarity Act* sets pre-conditions for the federal government before it will recognize the referendum and before negotiating. The House of Commons will decide the clarity of the question by whether it "would result in a clear expression of the will of the population of the province" (section 1(3)). A question will not be acceptable that:

- "merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population" or
- "envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population" (see section 1(4)).

The views of other political parties and Aboriginal peoples, and statements or resolutions by any other Canadian government, will be considered in the clarity determination. This determination expands the notion of *clarity* and overlaps with expression of will.

Photo from Pexels

Apart from the referendum question itself, the House of Commons will scrutinize the vote outcome to see if a "clear majority" have expressed the will to secede. The Court did not define what a clear majority mean. It left that to the politicians. The *Clarity Act* does not add much, well, clarity to this either. Presumably, a 50%+1 vote will not always carry the day. To the House of Commons, the "clear expression of a will by a clear majority of the population of a province" will include reviewing:

- the size of the majority of valid votes cast in favour of the secessionist option;
- the percentage of eligible voters voting in the referendum; and
- any other relevant matters or circumstances (see section 2(2)).

Again (as with the clear question itself), the *size* of the 'leave' vote will be qualified by views of other political parties and Aboriginal peoples, and statements or resolutions by any other Canadian government. Some have referred to this as a "supermajority" vote requirement.

The votes by the House of Commons on whether to accept the referendum question as clear or the majority in support of succession as clear – while governed by legally-prescribed guidelines – are ultimately *political* votes. Members of Parliament will be free to vote their own preferences and instincts which can deny recognition to an otherwise-compliant secession process or grant recognition to a non-compliant one. In that sense, the *Clarity Act* confers on the House of Commons a *de facto* veto over legal secession if it wants to use it.

If the House of Commons fails to find both the referendum question and the majority in support to be clear according to these statutory definitions, it will not negotiate the terms of secession. Technically, from a legal perspective, the succession project ends at that point. Presumably and practically, however, a province could still declare independence on its own anyway. If it does so without Canada's blessing, it may not receive sovereignty recognition it will need from the international community.

The* Clarity Act *sets pre-conditions for the federal government before it will recognize the referendum and before negotiating.

If the referendum question and its leave results are accepted by the House of Commons, the federal government would negotiate the divorce on behalf of the rest of Canada. This complex and difficult process would deal with economics, division of assets and liabilities, minority rights, national institutions and installations, Aboriginal peoples, and borders. Any desired forms of association with the remaining Canada, such as defence, currency and trade, could also be worked out at this point.

Finally, the Constitution of Canada (1867) would have to be formally amended to reflect the secession. The federal government and all the provincial governments would be involved in that.

To complete this story, after the *Clarity Act* was passed, the separatist Parti Québécois enacted its own form of clarity statute: *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*. This was Quebec's interpretation of the *Secession Reference* case and its own roadmap to secession. Not surprisingly, this Quebec legislation focuses on its right to self-determination under international law, the integrity of its territory, as well as English language and Aboriginal rights. It is essentially a separatist proclamation. Article 13 explicitly rejects the federal *Clarity Act*:

> *No other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future.*

Conclusion

Once an actual secession referendum is put to the vote in any province, the constitutional validity of the federal *Clarity Act* will be challenged and tested. (In the case of Quebec, that province's own opposing 'clarity legislation' will also be tested). Until then, the status of both clarity statutes remains uncertain.

Currently, provincial secession from Canada would be – as arguably it *should* be – an emotionally wrenching and politically daunting, drawn out, acrimonious project. There are many ways in which the most meticulous provincial plan could legally and politically fail. The extra-legal, unconstitutional unilateral option may be even worse. Provincial secession is not for the faint-hearted.

Peter Bowal

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Mackenzie Bowal

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Housing

Judy Feng

Alberta's New Condominium Regulations: Rental deposits

This article is part of a multi-part article series on Alberta's new condominium regulations. Stay tuned for our next article on condominium insurance.

On January 1, 2020, revised condominium governance regulations came into effect in Alberta. One of the changes has to do with rental deposits. As you may already know, whenever you (the condominium owner) rent out a condominium unit, the condominium corporation has the right to ask you for a rental deposit. Previously known as a "security deposit" under the *Condominium Property Act*, a "rental deposit" covers two things:

- repair and replacement of the corporation's real/personal property or common property and
- maintenance or repair of any common property.

The rental deposit cannot be more than $1000 or one month's rent, whichever is greater. The condominium corporation must hold the rental deposit in trust and repay it along with interest earned (if any) at the end of the rental period.

Tip: *Did your condominium corporation collect a rental deposit from you before the changes came into effect (on January 1, 2020)? If so, then the corporation can retain it during the remaining tenancy of your unit. For example, if you rented out a condominium on July 1, 2019 and the corporation collected a $1500 rental deposit from you, then the corporation can still keep the deposit during the remaining tenancy of your unit.*

The regulations also provide additional guidance on what the corporation must do with any interest earned on the rental deposit. When you give notice that you are no longer renting your unit to a tenant, the condominium corporation must deliver to you a statement of account and any unused portion of your rental deposit, along with interest earned (if any). The corporation must do so within 20 days of you giving notice. If the corporation used some of the rental deposit, then it must provide a statement of account with the following information:

- the amount used and interest earned, if any
- the balance of the deposit not used and interest earned, if any
- an itemized list of deductions from the rental deposit and why the deductions were made.

... whenever you (the condominium owner) rent out a condominium unit, the condominium corporation has the right to ask you for a rental deposit.

If a condominium corporation needs additional time to determine the amount to be deducted from the deposit (e.g., a contractor needs to provide an estimate of costs), the corporation must provide an estimated statement of account to you within 20 days of receiving notice from you. Within 60 days of delivering to you the estimated statement of account, the corporation must also deliver to you:

- a final statement of account showing the amount used and interest earned (if any) and
- the balance of the deposit not used and interest earned (if any).

Another key addition is the explicit recognition of the corporation's right to recover the rental deposit from you. If you owe the corporation a rental deposit, the corporation has legal rights to recover the deposit from you (for example, by suing you). It may also recover the amount from you as if it were a condominium contribution.

Tip: *A rental deposit under the Condominium Property Act is separate from the security deposit that you collect from your tenants under the Residential Tenancies Act. When you collect a security deposit form your tenant, you cannot use that money to pay the condominium corporation's rental deposit. You must put the tenant's security deposit into a trust account within 2 banking days of receiving it.*

Reminder: If you are planning to rent out your condominium unit, you are responsible for providing the condominium board with certain written information. The condominium board cannot prevent you from renting your unit but they are legally entitled to the following information:

- Your intention to rent your unit, including an address where you can be personally served with documents and how much rent you will be charging the tenant.
- The name of the tenant renting the unit. You must provide this notice within 20 days of the tenancy starting.
- When you decide to stop renting your unit. You must provide this notice within 20 days of the tenancy ending.

To learn about the latest changes to Alberta's *Condominium Property Act* and *Regulation*, go to our website: www.condolawalberta.ca.

Judy Feng

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

Human Rights

Linda McKay-Panos

Solitary Confinement is a Human Rights Issue

Mahatma Ghandi once said: "A nation's greatness is measured by how it treats its weakest members." Canada has used solitary confinement for prisoners for decades. In the past several years, solitary confinement has been the subject of criticism from civil libertarians and mental health advocates.

Photo from Pixabay

Usually, solitary confinement involves isolating inmates in a small cell without human contact for 22 hours per day. Often called "administrative segregation", solitary confinement has been the subject of increased scrutiny because of suicides and mental health issues suffered by prisoners who may be held for years in isolation. In *A Sourcebook on Solitary Confinement*, Dr. Sharon Shalev (2008), a leading international authority on solitary confinement, states that between one-third and 90% of prisoners experience some negative impacts of long-term solitary confinement. The symptoms may include insomnia, confusion, feelings of hopelessness and despair, distorted perceptions and hallucinations.

For over 20 years, the Correctional Investigator has criticized the overuse of solitary confinement in Canada. For example, see the *Annual Report of the Office of the Correctional Investigator 2014-2015* (*Annual Report*, 2014-2015). The Correctional Investigator notes that solitary confinement is overused particularly for women with mental health issues, and for Indigenous and Black inmates.

In 1992, the *Corrections and Conditional Release Act*, SC 1992, c 20 (CCRA), originally provided procedural safeguards for administrative segregation in sections 31 to 37. These may be summarized as:

- Release from administrative segregation at the earliest appropriate time.
- Reasonable alternatives to administrative segregation must first be explored and exhausted.
- Inmates in administrative segregation have the same rights as those in the general inmate population, except those that cannot be exercised due to limitations specific to administrative segregation or security requirements.
- The Correctional Service Canada shall take into consideration an offender's state of health and health care needs in all administrative segregation decisions (*Annual Report*, 2014-2015).

The practice of administrative segregation is now called "Structured Intervention".

There are also international guidelines called the *UN Standard Minimum Rules for the Treatment of Prisoners* (also called the Nelson Mandela Rules). Rules 43 to 45:

- prohibit indefinite or prolonged solitary confinement (over 15 days);
- provide that solitary confinement is to be used only exceptionally; and
- prohibit use for prisoners with mental or physical health disabilities that will be exacerbated by it.

While not legally binding, Canadian courts will turn to these rules for guidance.

In *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228, the B.C. Court of Appeal considered whether solitary confinement violates a person's s. 7 *Charter* right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The Court confirmed that the 1992 CCRA provisions authorizing indefinite and prolonged solitary confinement, and internal rather than external review of decisions to segregate inmates in solitary confinement, violated these rights. The Court suspended the declaration of invalidity for one year.

For over 20 years, the Correctional Investigator has criticized the overuse of solitary confinement in Canada.

In *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243, the Ontario Court of Appeal provided, among others, that the CCRA provisions permitting administrative segregation for over 15 consecutive days violated a person's s. 12 *Charter* right to freedom from cruel and unusual punishment. The Court found the violation could not be saved by s. 1 of the *Charter* (reasonable and justifiable violations).

The Supreme Court of Canada recently granted leave to the federal government to appeal these two cases (jointly). (See February 13, 2020 case nos. 38574 and 38814.)

Sections 31 to 37 of the CCRA were amended in November 2019. The practice of administrative segregation is now called "Structured Intervention". The Canadian Civil Liberties Association notes:

> *These [structured Intervention] units continue to house inmates in situations of extreme isolation, however inmates are now supposed to be provided four hours daily out of cell and (or including) two hours daily of meaningful human contact, subject to certain exceptions and exclusions. In addition, after hearing from CCLA and others, the law now includes a system of independent decision-makers to review decisions concerning keeping inmates in the SIUs, to consider their conditions, and to review the situation of people with mental health issues in the SIUs. The new law also addresses certain mental health supports and supports for Indigenous inmates.*

However, prisoner's advocates argue that these amendments do not adequately address the concerns about solitary confinement. For example, the new provisions do not set a time limit on solitary confinement. Thus, the federal government did not adequately address concerns about the harms. Advocates do not believe a new name is adequate to

address the consequences of the practice of solitary confinement. (See: J. Bronskill, (13 Feb 2020) National Post "Supreme Court of Canada to examine solitary confinement in federal prisons".)

Many inmates return to society eventually. It is in all of our interests to ensure they do not suffer irreversible harms while in indefinite solitary confinement.

Linda McKay-Panos

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

Law & Literature

Rob Normey

Democracy in Ruins: Flaubert's *Sentimental Education* and the fate of radical Democrats

I recently read Peter Brook's book *Flaubert in the Ruins of Paris: The Story of a Friendship, a Novel and a Terrible Year*. The book provides a fascinating account of the composition and the literary and wider political history of Gustave Flaubert's 1869 novel *Sentimental Education*. Brook's book led me to return to Flaubert's difficult literary classic at least 30 years after first reading it. This time, I inevitably focussed on different aspects of the work and was rewarded with a rich experience. One should of course turn to Brooks' intriguing account only after reading *Sentimental Education* itself.

The novel focusses on a rather hapless, albeit somewhat sympathetic, protagonist, Frederic Moreau. Frederic tries and tries but fails in fulfilling his various dreams. He fails because he is too passive at critical moments and really lacks the resolute character that would be required to find genuine success and happiness. The setting is shortly before and during the revolutionary events of 1848 in and around Paris, France. The novel wraps up with a long denouement covering the next two decades.

For me, a minor character, Dussardier, offers one of the few glimmers of hope for a somewhat brighter future.

I want to sketch out a few key themes that struck me and convinced me of the great significance the novel possesses for us today.

Much of the novel focusses on Frederic's relationships, particularly his romantic entanglements. The great love of his life is a married woman, Madame Arnoux. His love for her is unrequited, at least in any meaningful sense. Throughout his relentless pursuit of Madame Arnoux, he has a succession of mistresses. Running parallel to the plot of Frederic's romantic affairs are important political and social aspirations, held by many of his friends and acquaintances.

The novel is a full-bodied account of a generation, as it aims to significantly reform the France of the Second Republic in the years leading up to the 1848 revolution. Flaubert skillfully develops the theme of failure in relationships with the theme of failure of a generation to achieve its political and social goals. At the end, all seems to be for naught. Society is resistant to the well-meaning efforts of socialists and liberals to bring about a properly functioning democracy. And indeed, by novel's end, the conservative forces of reaction and repression command the field.

At various points in the novel, Frederic's friends attend meetings and clubs, such as the Club de I'Intelligence in Rue Saint-Jacques. Vigorous debates on the best way to advance a radical change in the declining France of the day take place. Worker's rights, an enhanced role for women and the end of the death penalty are all proclaimed as necessary for the building of the good and just society. One persistent goal is that of universal suffrage. A country built on the goal of equality – and the removal of all previous efforts at disenfranchisement and exclusion – is at the heart of a modern democracy. While a worthy goal, Flaubert is attentive to the various ways in which divisions can materialize in society – both between left and right, and within a progressive movement of liberals, anarchists and socialists.

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We can focus though on Frederic's relations with two different friends: Charles Deslauriers and Dussardier.

Deslauriers is Frederic's law classmate, close friend and sometimes foe. Both have come to Paris to study law with a goal of making a name for themselves in a highly competitive world, whether in the fields of law, politics or art. But the training the two friends have received equips them to develop a series of well-considered positions on the right to vote and its role in forging a democratic society.

Neither of the two friends proves to have all that impressive a career in the law. However, they are afforded the opportunity to pronounce on the ways in which reformers can use the law to advance a progressive agenda. In thinking through the indispensable aspects of modern liberal democracies, it is important to bear in mind that the right to vote, as conceived in contemporary Canadian legal circles, involves far more than the bare ability of each person to cast a vote every 4 years or so. Our Supreme Court of Canada has affirmed that denying a person a meaningful right to vote detracts from their dignity and sense of self-worth. The right protects the ability of each citizen to play a meaningful role in the electoral process. It further includes the idea that all citizens should have a voice in the deliberations of government and have the opportunity to bring their concerns to their governmental representative. These potentially radical democratic ideas help the reader appreciate the efforts of the characters in *Sentimental Education* to achieve a wider suffrage in their society.

Despite their eloquence and their relatively privileged position in society, Frederic and Charles, in their separate ways, both largely fail to put forth a convincing vision of the inclusive nation they wish to construct. Frederic, in keeping with his irresolute character, is easily defeated and disillusioned by his attempts to gain an audience. This is marvellously captured in a scene in Part Three. At the Club de I'Intelligence, his radical friend Dussardier sponsors Frederic to give a major presentation. Frederic attempts to present again and again. A harsh and puritanical chairperson, who considers Frederic lacking in "man of the people "credentials (too much the bourgeoisie), first shuts him down. Frederic makes one last effort to give his carefully rehearsed speech but is surprised when a young Spaniard jumps up, rolls his eyes and energetically offers a speech in Spanish. Frederic's efforts to interject lead the dictatorial chair to rule him out of order. Frederic leaves the Club in total dejection. Rather than considering how best to advance his position, he takes a meagre comfort by dining with his mistress and largely retreats from the playing field.

Running parallel to the plot of Frederic's romantic affairs are important political and social aspirations, held by many of his friends and acquaintances.

Flaubert leaves the reader with a pessimistic reflection on the immense difficulties of making progress in a world lacking in any genuine sense of fraternity and vulnerable to counter-attack. However, we cannot leave it there if we continue to have faith. For me, a minor character, Dussardier, offers one of the few glimmers of hope for a somewhat brighter future. Frederic encounters this shop assistant and deliveryman at various points. Early in the tale, Frederic and other law students see

an uprising in the streets (the first stirrings of what will become a full-blown revolution). A policeman strikes a heavy blow at a young child, sending him sprawling. Dussardier defends the lad and knocks the officer to the ground. He is arrested. Dussardier is described as a "sort of Hercules, whose hair, like a bundle of hemp, spilled out from under an oilcloth cap". Frederic and Charles assist Dussardier and encourage him to join a loose alliance of progressive figures who hope to make a difference.

I will leave other scenes of note for the reader to discover in the vivid and exacting realist style that Flaubert offers. (The new translation by Helen Constantine in the Oxford World's Classics edition is lively and scrupulously accurate.)

As 2020 shapes up to be a time when autocrats grow stronger and the modern democratic model appears wobblier than ever, Flaubert's overriding pessimism may become a common sentiment. Yet we need radical democrats as well. While their voices are in danger of being drowned out by noisy reactionary figures, they remain our last and brightest hope. Perhaps Dussardier's efforts may not have been in vain after all.

Rob Normey

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

Not-for-Profit

Peter Broder

What's a member and what rights does a member have?

A recent Ontario Court of Appeal case, *Aga v. Ethiopian Orthodox Tewahedo Church of Canada (Aga)*, provides some insight into the vexing question of the extent of "member" rights in not-for-profit organizations. Although the idea of such rights seems straightforward, it is anything but.

The litigation in *AGA* came about because the membership status of a number of congregants in a religious parish was stripped after they questioned decisions by a church Archbishop. The congregants were not corporate members of the legal entity under which the group was constituted and operated. Given that, it was in dispute whether they could rely on the internal disciplinary procedures that the church had established. A broader concern is the extent of procedural fairness required in circumstances of this sort, but that issue was not dealt with in the ruling.

The case suggests that, at least in certain situations, individuals who are not formally part of a group's corporate governance structure may have some protection from being treated unfairly by the organization.

The confusion around this issue comes partly from different uses of the term "member" by not-for-profit groups. In its legal sense, the term is used to refer to stakeholders with voting rights in an organization's corporate structure. However, it is not always used in that way.

Many not-for-profit groups have corporate structures that are quite different from the operational structures they use to engage with their stakeholders. The term "member" often gets used as part of that engagement. In the *Aga* case, the litigants were not part of the Church's corporate structure but were part of a Congregation.

All this speaks to the need for not-for-profit organizations to exercise care in who they describe as members, and in how they treat them.

It is certainly not uncommon for faith-based organizations to take this type of approach to their governance. But it also pops up in other contexts as well. For example, advocacy groups sometimes count those who financially support them (even where their contributions are relatively modest) as among those they speak for, while drawing their corporate governance from a narrower base. When making representations to government or the public, it is obviously valuable to assert the broadest possible backing.

And federated bodies may have a structure that gives members say in local decisions but where governance at the national level is driven by input from local leaders rather than from grassroots members. Being called a "member" of a sports league, or fitness or social club won't necessarily involve you in the corporate structure of the organization.

When the *Canada Not-for-Profit Corporations Act* (CNCA) became law in 2009, it specified that all "members" – as that term is used in the CNCA – were entitled to vote on fundamental changes to the organization (winding up, amalgamation, etc.), while still permitting

classes of membership with different voting rights on other matters. So, a member may be able to vote on winding up, but not for purposes of electing the board. The CNCA also sets out several member privileges and protections, such as the right to examine the organization's membership list.

… the precision with which the term "member" is used varies considerably.

For groups incorporated at the provincial level, sometimes the equivalent statutes mirror the federal approach. Other provincial incorporation statutes are silent on privileges and protections for members, other than setting out that they are empowered to choose the Board of Directors and have certain rights and responsibilities to an Annual General Meeting.

Given this legislative framework, the precision with which the term "member" is used varies considerably. CNCA corporations, and those incorporated under similar provincial legislation that use the term loosely, may find that they have unintentionally created rights where they did not mean to do so.

As well as the applicable statute, bylaws and other corporate documents may also come into play in determining what, if any, rights someone considered a "member" has.

Which brings us back to the *Aga* case. The litigants in *Aga* were not formally part of the Church's corporate structure, and there was a question whether they were even aware of the provisions in the organization's Constitution and Bylaws. The expulsions, which stemmed from a theological dispute, concerned their ability to participate in the Congregation.

The litigants submitted that they had not received due process when the disciplinary measures were administered. Although not members of the corporation, the litigants had completed and submitted "membership application forms" to join the Congregation. The application forms did not reference the Constitution or Bylaws.

In overruling the trial judge, who held there was no contractual link between the parties, the Court found that:

> *Voluntary associations do not always have written constitutions and bylaws. But when they do exist, they constitute a contract setting out the rights and obligations of members and the organization.*

The Court held that the litigants' rights to procedural fairness, whose form turns on the circumstances and gravity of the discipline, arose from this contract – i.e., the Ethiopian Orthodox Tewahedo Church's Constitution and Bylaws.

Having found that a contract existed and gave rise to procedural fairness expectations, the Court considered the appropriate remedy. It ordered that – the respondents not having satisfied the burden of showing that the expulsions had been carried out in compliance with the rules set forth in the applicable documents – the matter should be returned to the lower Court.

Although it found that there was an expectation of procedural fairness, it did not offer an opinion on the extent of procedural fairness that applied on the facts of the case, nor whether the procedural fairness obligation had been met.

… individuals who are not formally part of a group's corporate governance structure may have some protection from being treated unfairly by the organization.

All this speaks to the need for not-for-profit organizations to exercise care in who they describe as members, and in how they treat them. At a minimum, groups should follow the rules set out in their corporate documents, but – especially in situations involving member discipline – they should be mindful that there may be procedural fairness obligations that extend even beyond what is required by those rules.

Peter Broder

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

Plain Language

Dave Pettitt

Editing Tools

Using tools to analyze and measure language simplifies plain language writing and editing. At CPLEA, we use a combination of tools to look at where and how to clarify our writing:

1. **Microsoft Word**: The most common plain language editor has some powerful built-in features.
2. **Hemingway Editor**: Loyal to its namesake, the Hemingway Editor helps you draft clear and precise language.
3. **WriteClearly**: A simple plain language browser bookmark that highlights complex legal writing.

The following chart compares the three tools:

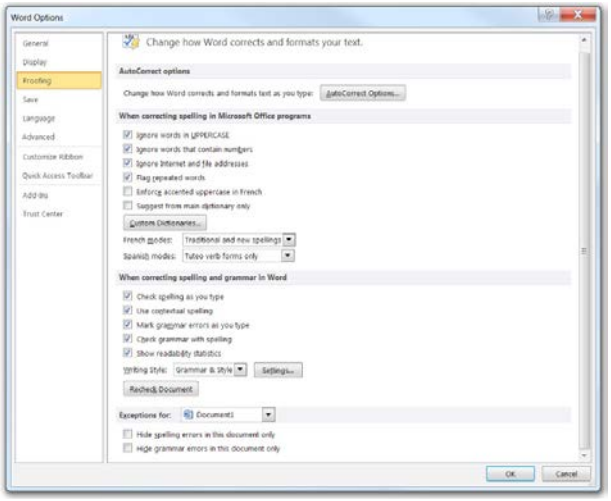
	Microsoft Word	Hemingway Editor	WriteClearly
Grammar	✓	✓	✓
Wordiness	✓	✓	✓
Punctuation	✓	✓	✓
Passive Voice	✓	✓	
Flesch-Kincaid	✓	✓	✓
Canadian English	✓		
Legal Terms			✓

Microsoft Word

Almost every office in Canada uses Microsoft Word. It is the most common format for sharing documents. It is also an excellent tool for identifying problems and solutions to common plain language issues such as language comprehension level, punctuation, grammar and overuse of passive voice. Word is not a plain language editor out of the box – it requires changes to some settings.

To set up Word for plain language editing, you must change the proofing settings:

1. Go to File, then Options and then select Proofing.
2. Beside the Writing Style heading, select "Grammar & Style" and click the "Settings" button. You will get another list of items to check off.
3. Under Grammar, select everything.
4. Under Style in the same dialog box, make sure every box is checked. This is where you will find the settings for passive voice, misused words, jargon, wordiness and other important plain language style measurements.

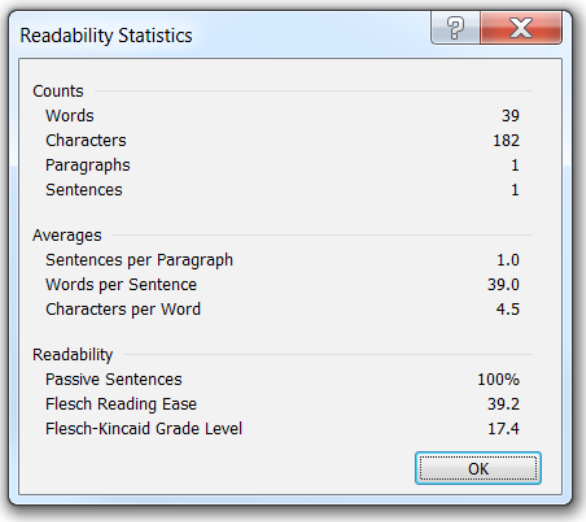


Before starting work on plain language editing a document, it is a good idea to measure your starting point. To do this, select "Review/Spelling & Grammar." After checking the spelling and grammar, Word will give you a score.

As a simple test, we will use the text from the Rogers' "Million Dollar Comma" case. This is a good test as the wording is grammatically correct but does not mean what Rogers' intended. The text reads:

> *The agreement "shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party."*

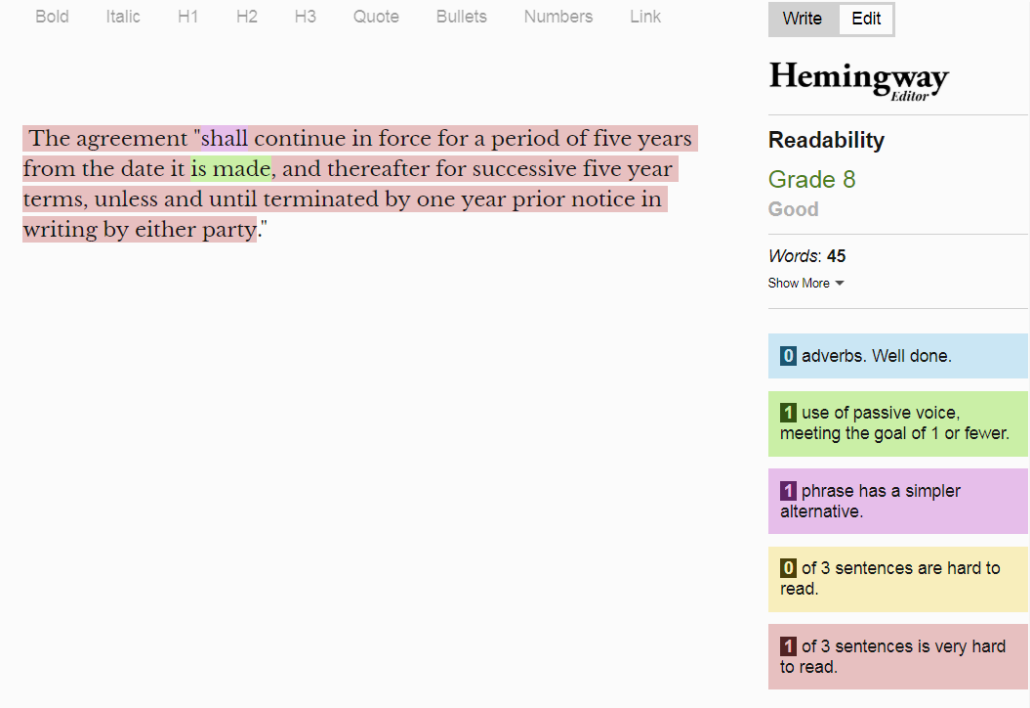
Word clearly thinks this sentence is passive and hard to read with a Flesch-Kincaid Grade Level of 17.4!



Once you have recorded the Flesch-Kincaid Grade Level and Passive Sentences scores, go back to File > Options > Proofing and click on "Recheck Document." This time, go through each suggestion and fix any issues. Once finished, you will get a new score showing any improvements.

Hemingway Editor

The Hemingway App markets itself as making your writing bold and clear. When trying to describe plain language to anyone, I have always said, "Write like Hemingway" as Hemingway is known for his clear and precise language. The Hemingway Editor is a free web browser-based editor that embraces Hemingway's way with words.



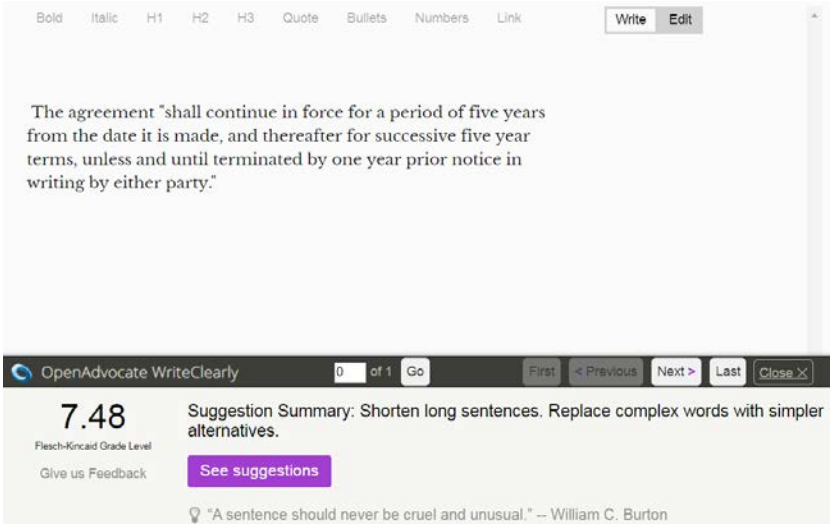
To use the Hemingway Editor, go to the Hemingway App website and copy and paste the document you are working with onto the page. Hemingway will immediately give you a Readability score on the right side of the screen. Hemingway checks your document for important readability factors such as adverb usage, passive voice, complex words and hard to read sentences.

Hemingway highlights parts of the text in different colours. For example, the part of the sentence that is passive will be in green and complex phrases are in purple.

Hemingway does not identify the famous sentence as incorrect. However, the editor shows that the sentence is very hard to read, is passive and uses complex words. Clicking on the purple "shall" will give the alternatives "must" and "will." Hemingway scores the sentence at a Grade 8 level, which is much better than Word.

WriteClearly

WriteClearly is a simple browser-based tool created by OpenAdvocate for legal plain language writers and editors. It will analyze the readability and provide suggestions for improving the Flesch-Kincaid score.



Installing WriteClearly on your computer is very easy. Go to WriteClearly's website and drag the blue "WriteClearly" button onto your web browser's bookmark bar.

To use WriteClearly, you need to get your text into a web browser. If you have already used Hemingway, click the "write" tab at the top right to remove highlighting and select the WriteClearly bookmark. You will get the results at the bottom of your web browser. If there are multiple suggestions, you can click through using the next and previous buttons.

Using our Rogers' Million Dollar Comma text, WriteClearly finds the sentence to be too long and suggests simplifying it. It does not identify the passive language in this sentence or the complex words like the Hemingway Editor. WriteClearly's strength is giving alternative wording to complex legal language.

These tools work together to help plain language editors do their job quickly and efficiently. By identifying problem areas and recommending fixes, editors are able to measure their work and improve readability. Since each tool provides a different readability score, it is important to stick with one for measurements. Although Word has the strictest scoring system for Flesch-Kincaid readability, it is consistent and accessible in a format that is familiar to all editors. Plain language editing can be challenging but the end result is a better document. Happy editing!

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.

Youth & the Law

Jessica Steingard

Social Media Terms of Use: I agree?

We've all done it. Scrolled quickly through legal terms and clicked "I Agree" without reading a word. If you're like me, you think, well how bad can these terms and conditions be? Everyone is using this app. But what exactly are you agreeing to?

In this column, we'll look at the terms of use for Facebook, Instagram and Snapchat. (We'll refer to these sites as 'platforms'.)

The Documents

Each platform has its own terms and conditions and other policies:

- Facebook's Terms of Service (last updated July 31, 2019) apply to your use of Facebook and Messenger.
- Facebook's Data Policy (last updated April 19, 2018) applies to your use of Facebook, Messenger and Instagram.
- Instagram's Terms of Use (last updated April 19, 2018) apply to your use of Instagram.
- Snapchat's Terms of Service (last updated October 30, 2019 and apply to users outside the United States) and Privacy Policy (last updated December 18, 2019) apply to your use of Snapchat, Bitmoji and Spectacles.

There are other terms and policies that may apply to you if you are using other features or add-ons, or running a business. Check each platform's website for more information.

Photo from Pexels

The Terms

By using the services provided, you and the company have entered into a contract. But this contract is not one where you can negotiate the terms with the other party. Facebook will not change some of their terms just for you. If you don't like the terms and conditions, then don't use the platform!

User Restrictions

You must be at least 13 years of age to use Facebook, Instagram or Snapchat. Convicted sex offenders cannot use the platforms. You can only create one account on Facebook for your personal use.

Facebook, Instagram and Snapchat have data policies to let you know what information they collect and how they use it.

Ownership of Content

You own the intellectual rights in your content. For example, if you post a photo that you took, you automatically own the copyright in that photo. Owning the copyright means others cannot use your photo without your permission. However, by using Facebook, Snapchat or Instagram, you give them permission to use your photo. Technically speaking, you grant them a license to host, use, copy, change, publish and distribute your copyrighted materials. All three platforms state that the purpose of this license is to provide and improve their services and products.

Activities Not Allowed

You cannot use the platforms for corrupt purposes, such as:

- Violating or infringing on someone else's rights (including copyright and privacy rights)
- Bullying, harassing or intimidating someone
- Doing illegal things or posting illegal things on the site (such as pornography, graphic violence, threats, hate speech)
- Interfering with the platform's software
- Accessing someone else's account without their permission.

Facebook, Instagram or Snapchat can delete any of your content that violates their terms and conditions. These companies can also share your information with police or lawyers as requested.

Each platform has also created its own community guidelines or standards that outline other unacceptable behaviors, such as:

- No nudity or sexually explicit content.
- No hate speech, degrading or shaming content, blackmail or harassment, and repeated unwanted messages.
- No violence or encouraging violence, including threats or against anyone based on race, ethnicity, national origin, gender, gender identity, sexual orientation, religion, disabilities or diseases.
- No glorification of self-harm.

Resolving Disputes

If you have a dispute with Facebook, Instagram or Snapchat, try contacting them first to resolve the issue. If that doesn't work, then each platform's terms say how the dispute will be resolved. For example, if you have a dispute with Facebook, you can start a lawsuit where you live. If you have a dispute with Snapchat, the law of England and Wales applies and a judge in England will hear the dispute. That could be an expensive lawsuit!

Exclusion of Liability

Each platform's terms try to limit the company's liability to you for any losses (money or otherwise) you suffer from using their services. For example, if Instagram deletes your content, information or account, you probably won't be successful if you try to sue them for losing all your photos.

Advertising

All three platforms are free to use. But there's a catch.

By using the services provided, you and the company have entered into a contract.

Ever wonder why you see so many ads that are eerily similar to things you buy or like? That's because Facebook, Instagram and Snapchat

make money from selling ads to businesses and other organizations that want to promote their products. Advertisers tell the company which audience they want to see the ads. And the company shows the ads to users who fit that description, based on users' activities and interests.

Facebook, Instagram and Snapchat have data policies to let you know what information they collect and how they use it. The platforms may collect the following information:

- information and content you provide on the platform
- your activity (including people, accounts, hashtags, groups, use, etc.)
- information about transactions made on the platform (such as Facebook donations)
- things others do and information they provide about you (such as others sharing or commenting on photos of you)
- information about the device you use to access the platform
- information from third party providers who have a right to provide the platform with your information.

The companies use this info to show you ads, report back to advertisers and make their services better. They also collect this info to promote safety and security on the platforms.

Facebook shares this information as non-identifying information. This means that whoever receives the information would not be able to identify you. You can change your privacy settings in Facebook to control what information Facebook and Instagram can access. To do so, go to your "Settings" and then click on "Ads".

Snapchat may share public information about you, such as your name, username, Snapcode and profile pictures. To change how your data is collected and used for advertising, follow Snapchat's step-by-step instructions.

All three platforms are free to use. But there's a catch.

Other Privacy Concerns

In addition to what information the platforms share about you to advertisers, you should also think about:

- How are other users sharing your information? Are your friends sharing your photos or other information about you? What are your friends' privacy settings?
- What other companies are you interacting with on the platforms? For example, if you buy a game through Facebook, that game company may not be connected to Facebook and may have its own privacy policy.

Conclusion

The takeaway? If you don't agree with these terms, delete your accounts!

Jessica Steingard

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Thank You

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