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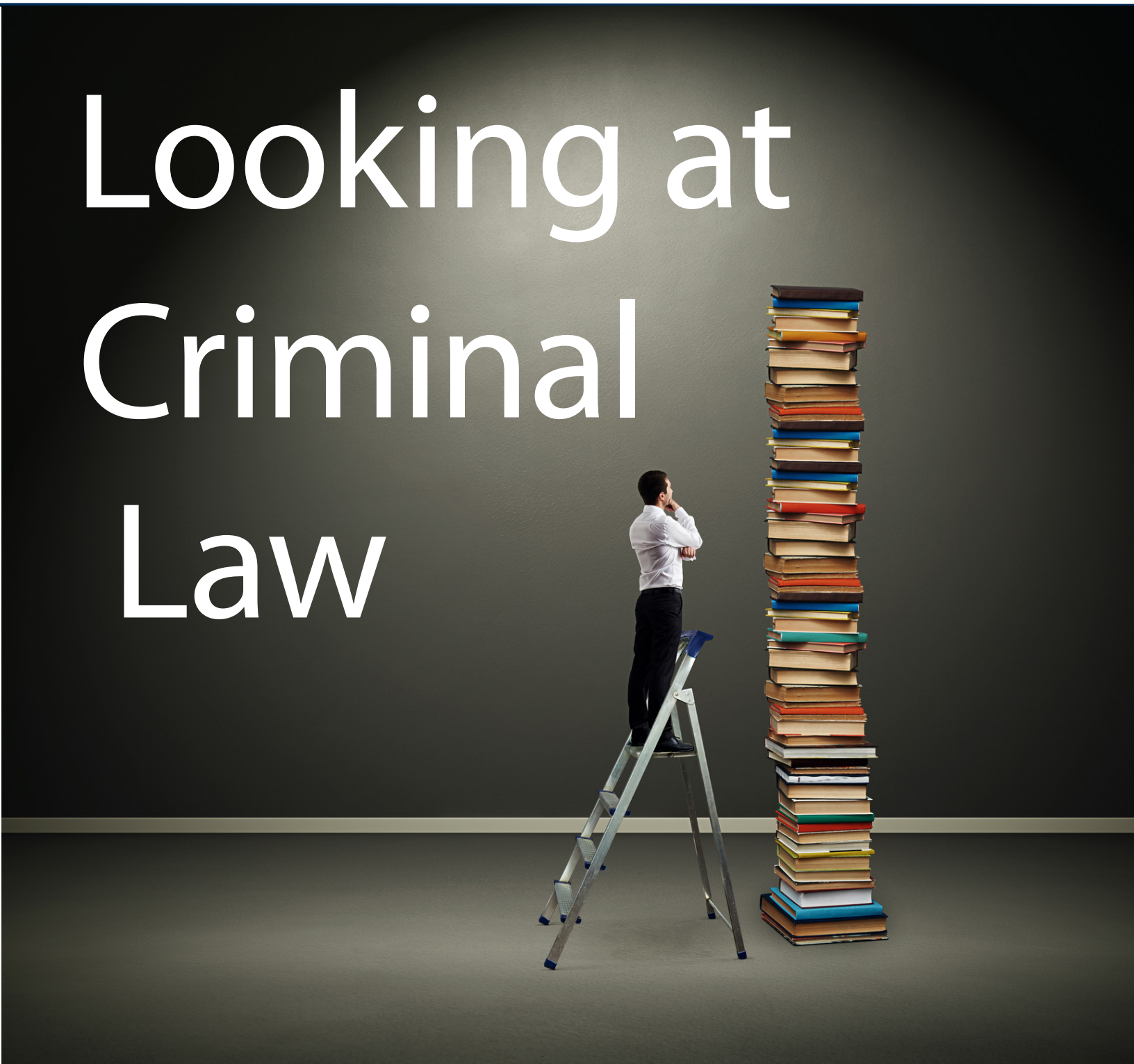
Looking at Criminal Law



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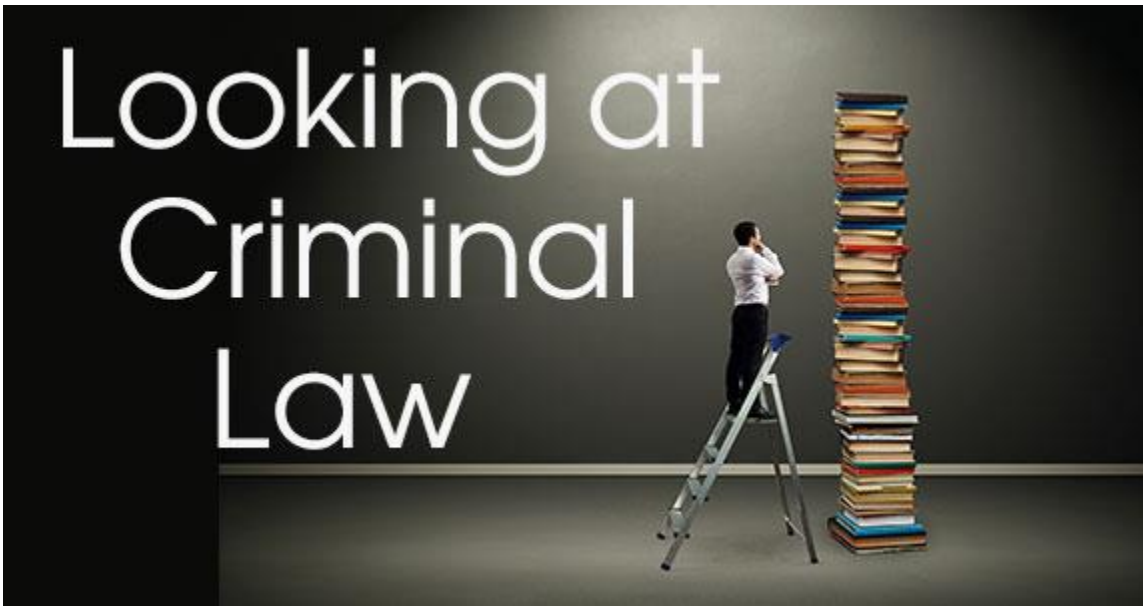

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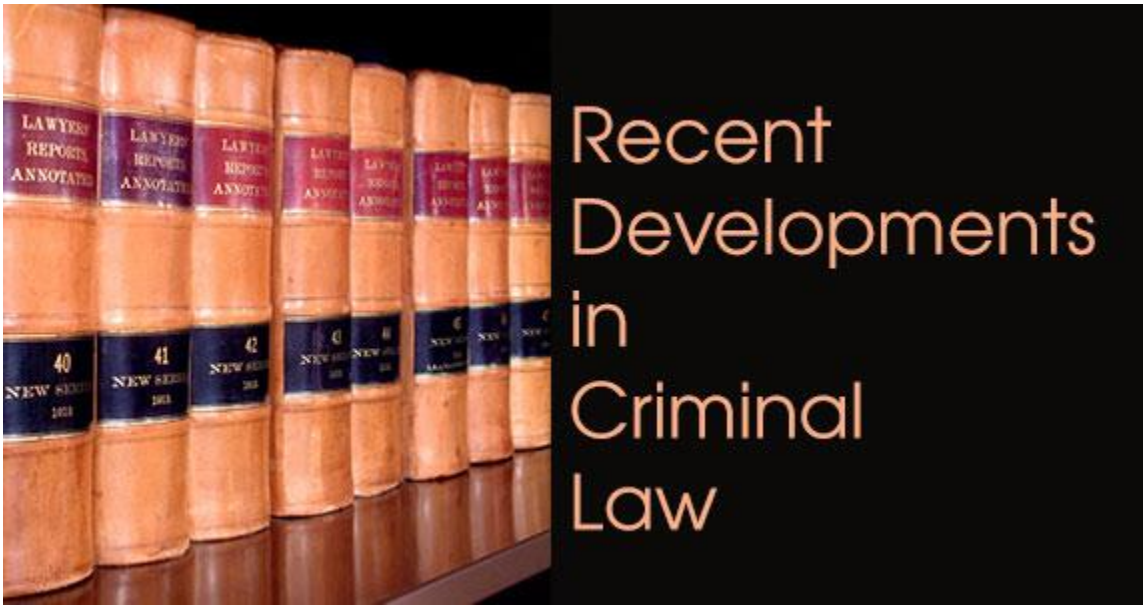
Recent Developments in Criminal Law

Posted By: *Charles Davison*



It will come as no surprise to anyone tuned into the current political situation in Canada that changes in our criminal laws over the last several years have been consistently in a single direction: that of creating more offences and imposing stiffer penalties. Relying upon its position that Canadian streets and communities are generally unsafe and dangerous places, the present Conservative government has brought in measures it claims to be necessary to address and alleviate this situation. Here are examples of some of the most notable.

Mandatory Minimum Sentences

Probably the most significant change when discussing recent changes in Canadian criminal law is the massive increase in mandatory minimum sentences. The Conservative government has limited the discretion of sentencing judges in many more situations than has ever been the case previously. And where offences already carried mandatory minimum penalties, the government has often increased the length and severity of those sentences.

Most sexual offences involving children now carry mandatory minimums. Previously, as with almost all other criminal offences, sentencing for these crimes was left to the discretion of the courts. Judges usually imposed jail sentences when sexual offences were committed against persons under the age of 18 years. However, the current government has changed the law so that almost all such offences are punishable by at least 90 days imprisonment (or to a minimum of one year imprisonment for more serious matters). More serious sexual offences against children bring with them even more severe mandatory punishments.

This government has also imposed mandatory minimum penalties where none existed previously for the production of illegal drugs. In 2012 the government enacted laws by which the growing of more than

five marijuana plants is punishable by a minimum of 6 months imprisonment (larger numbers of plants brings longer mandatory minimums). Persons involved in the production of more harmful substances (including opium based drugs such as heroin; cocaine in any form; and methamphetamines, to name only a few) are subject to mandatory minimum sentences of at least two years imprisonment.

Impaired driving offences have long carried mandatory minimum penalties but in recent years, the government has increased the severity of those sentences. Since 2005, the mandatory minimum for a first offence has increased from a $600.00 fine to one of $1,000.00. The mandatory minimum sentence for a second offence has increased from 14 days imprisonment to 30 days. A third (or higher) offence now carries with it at least 120 days of imprisonment. Previously, a third (or higher) offence carried a mandatory minimum of 90 days imprisonment, which meant judges could permit offenders to serve their sentences on weekends. This is no longer possible, however, because the *Criminal Code* does not permit such intermittent sentences where the penalty is more than 90 days.

Another change which amounts to a "mandatory minimum" form of penalty is in the area of victim surcharge penalties which are imposed upon offenders for at least the theoretical purpose of funding programs to assist victims of crime. Until late 2013, sentencing judges had the power to waive imposition of this penalty if ordering payment would cause undue financial hardship to offenders or their dependants. Now, the government has doubled the penalty amounts, and taken away the power to waive payment due to hardship. All offenders are now required to pay these amounts, or to perform community service work instead.

Restrictions on "House Arrest"

In the last few years the government has also severely restricted the use of Conditional Sentence Orders, often called "house arrest" because these sentences usually included a term requiring the offender to stay inside his or her own home except for limited, restricted reasons such as employment, shopping for groceries once per week, and so on. These Orders were created as a sentencing option which could be used in cases of persons who had committed relatively minor offences for which jail was not truly "required. While judges always had the choice of sending these offenders to "real jail", in a number of situations where the community would not be endangered, they were given the option of imposing a "house arrest" type of sentence as a less severe form of punishment where appropriate.

Now, however, the government has removed this option for a number of offences where it might previously have been considered appropriate. All offences of violence prosecuted by way of indictment (offences which might be considered to be of "moderate" seriousness or worse) are now excluded, as are many more drug offences than was previously the case. Even thefts involving property valued at more than $5,000.00 are now excluded. Someone who steals property valued at, or money in an amount, more than $5,000.00 can no longer serve a jail sentence under "house arrest" but instead must be actually imprisoned if no other penalty is considered suitable.

Sentences for Murder

The Conservative government has not tried to bring back capital punishment, but it has changed the law concerning the sentences for murder in two significant ways.

When Parliament abolished the death penalty in Canada in the mid-1970s, life imprisonment became the mandatory sentence for persons convicted of murder. Persons convicted of first degree murder (the killing of police officers; murder which is planned and deliberate; or murder which is committed in the course of certain other offences such as sexual assault and hostage taking) would not be allowed to seek parole for 25 years. However, in an effort to display compassion, and to encourage good behaviour while they served their sentences, convicted murderers subject to this penalty were offered the chance; the government also enacted legislation aimed at persons who commit more than one murder. Such persons are no longer able to apply under the "faint hope" clause, and may also now be ordered to serve the periods of parole ineligibility consecutively. After serving 15 years of their term, to apply to a jury for a reduction in the period of parole ineligibility. This so-called "faint hope" option had long outraged conservatives, and in 2011 they abolished this possibility for persons who commit murders in the future.

Under the former law, this was not possible: no matter how many persons were killed, the convicted accused could not be ordered to serve more than 25 years before being able to ask for parole. Now, a judge may order that the different periods of parole ineligibility be served consecutively ("one-after-the-other"). As of the date of preparing this article (August 2014), the only case in which this provision has been relied upon was the Edmonton armoured car murders committed in 2012. The offender in that case was ordered to serve 40 years of his life sentence before he will be able to ask for parole.

New Offences

In the last several years the government has also created a number of new offences in response to various events and incidents which it has claimed demonstrated a need for the creation of new crimes. In many situations this claim is questionable because the *Criminal Code* already contained provisions making the conduct in question illegal. Critics have often alleged the government has acted more for political and image reasons, than to address any true need for the new offences.

For example, in 2009 the government created the offences of "assaulting a peace officer with a weapon", "assaulting a peace officer causing bodily harm", and "aggravated assault of a peace officer". However, the *Criminal Code* has long included the offences of "assault with a weapon", "assault causing bodily harm", and "aggravated assault", which could be laid whether the person assaulted was a peace officer or any other member of society. The penalties for the new offences are the same as the "non-police officer" equivalents. Other than appealing to the police lobby, then, it is difficult to discern what the government actually accomplished by creating these new crimes.

Another new offence which attracted similar discussion and criticism when it was enacted is the crime of "rioting while masked", which carries with it a maximum punishment of 10 years

imprisonment. However, it has always been an indictable (that is, "more serious") offence in Canada to take part in a riot. Our laws have also long made it an offence punishable by up to 10 years imprisonment, to wear a mask or otherwise disguise oneself for the purposes of committing an indictable offence (including rioting). So one might wonder what was truly achieved by the creation of the new offence.

Self Defence Provisions

One area which the courts had long been asking Parliament to address is that involving the defence of "self defence" and "defence of others" (and "defence of property"). For many years, the *Criminal Code* contained a number of overlapping and complicated sections which described different tests to be applied where accused persons used force – and sometimes caused injury or death to others – in order to defend themselves or third parties. Judges and lawyers found the provisions difficult to understand and apply, and trying to give legal direction to lay persons who were asked to serve on juries frequently became a nightmare.

In 2012 the government repealed the old provisions and replaced them with two sections: one to apply where the accused acts to defend him/herself or other persons, and the other to apply where an accused is defending property. Now, the basic question comes down to whether the actions of the accused are reasonable in the circumstances of the case. The *Criminal Code* sets out a number of factors to be taken into account, including the nature of the threat to the individual and whether weapons were involved; any difference in size, age, gender or physical abilities or disabilities between the parties; the background of any history or relationship between them; and whether the accused had any other options besides resorting to force.

The Crime of Counseling Criminal Offences

Posted By: *Peter Bowal*

… some may argue that the publication of Shakespeare's Henry VI, *with its famous phrase "let's kill all the lawyers", should be subject to state scrutiny"*

– *R. v. Hamilton, 2005 SCC 47*

Introduction

A few years ago, a University of Calgary professor suggested on national television that someone should kill Julian Assange, the founder of Wikileaks. In a CBC interview, the professor stated:

> *I think Assange should be assassinated actually, I think Obama should put out a contract and use a drone or something … I wouldn't be unhappy if Assange disappeared.*

This comment, however flip at the time, caused a public uproar. It reverberated internationally, lit up blogs and was even raised in the House of Commons. It led to complaints filed with the police demanding the professor be charged for incitement to murder under section 464 of the *Criminal Code*. We do not take joking about killing someone lightly.

Two days after the broadcast, the professor made a public apology for his remark :

> *It was a thoughtless, glib remark about a serious subject … I never seriously intended to advocate or propose the assassination of Mr. Assange. But I do think what he's doing is very malicious and harmful to diplomacy and endangering people's lives and I think it should be stopped.*

The Crime of Counseling Criminal Offences

While the word "incite" is commonly used, the *Criminal Code* prefers the more neutral term, "counsel." The *Code [section 22(3)]* [5] defines "counsel" as to include "procure, solicit or incite," so it could also encompass other related actions.

For Offences Actually Committed

If the offence counseled is committed, the inciter could be charged as a *party* to the offence under section 22:

> 22 (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counseled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counseled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counseling that the person who counseled knew or ought to have known was likely to be committed in consequence of the counseling.

Deemed party status puts the inciter on the same criminal standing as the perpetrator of the offence. The inciter is liable to conviction for the same offence and for the same punishment as the perpetrator. The inciter will be a party if the inciter knew or should have known that the other person was likely to commit that crime in consequence of the counseling. It does not matter if the crime was committed in a different way from what was counseled. For one to be deemed a party to a crime that was committed, presumably there must be pre-determination that all legal elements of the crime were met.

"Offence" is not defined in the *Code* but section 464 refers to indictable offences (serious) and summary conviction offences (less serious). The last category includes most federal, municipal and regulatory offences so this crime might extend to counseling commission of relatively minor offences.

For Offences Never Committed

Counseling to commit crimes is set out in section 464 of the *Criminal Code*:

> Except where other expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,
>
> > (a) every one who counsels another person to commit and indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and

> (b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

This crime is filed under the category of "attempts, conspiracies and accessories" in the *Criminal Code* and deals only with an offence "that is not committed." The British Columbia Supreme Court said in 2005:

> *… the offence is complete the moment a person persuades another person to commit an indictable offence … those who encourage the commission of crimes are criminally responsible for their conduct by way of secondary liability. (R. v. Markovitch and Dashney, 2005 BCSC 1513)*

In order for any political or other speech to constitute incitement, the statements must "actively promote, advocate, or encourage the commission of the offence." The Supreme Court of Canada said the counseling must actively and willfully seek to persuade others to commit the crime. The statements must be made with the view to incite the crime, even if it does not take place, so that there is a clear encouragement and a high likelihood of action. The inciter must understand what he is doing and have a culpable mental state. (*Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40 (CanLII)*)

Proof of the inciter's intent (*mens rea*) is complicated. Several judicial decisions say a "dual" intent is required: that the inciter had both the intention to persuade one to commit the offence as well as intent for the actual offence to be committed (*R. v. Janeteas, 2003 CanLII 57385 (ON CA)*, and *R. v. Hamilton, 2005 SCC 47 (CanLII)*). In *R. v. Hamilton*, the accused had sent out "teaser" emails to entice more than 300 people to buy online packages of information on how to create credit cards and explosives at home. Hamilton claimed he did not know the contents of the information packages. He was acquitted of counseling four serious offences, namely: making explosive substances with intent, acting with intent to cause an explosion, breaking and entering, and fraud. The Supreme Court of Canada said the counseling must actively and willfully seek to persuade others to commit the crime. To require the Crown to prove this beyond a reasonable doubt means that there will be few charges and convictions.

What About Our Constitutional Right to Freedom of Expression?

Under the *Canadian Charter of Rights and Freedoms* section 2(b) everyone has the fundamental freedom of expression. Criminalizing speech restricts such expression. On the face of it, section 464 violates section 2(b) of the *Charter.* But can counseling crime be saved by section 1 of the *Charter*? This section seeks to balance these rights and freedoms with the public interest ("the rights and freedoms set out in the [*Charter*] are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"). Thus, freedom of expression has been constitutionally limited by legislation regulating pornography, hate, copyright, advertising, libel and slander.

The case of *R. v. Keegstra, [1990] 3 SCR 697* serves as a good illustration. The Alberta social studies teacher was convicted of wilful promotion of hatred against an identifiable group with his anti-Semitic teaching. Keegstra challenged the constitutionality of the crime. He argued for protection on the grounds of truth, good faith and relevance, and that he was a mere "harmless eccentric." The Supreme Court of Canada said the *Charter* is fundamentally meant to protect basic values and works in the mutual benefit of all Canadians. Thus, hate crimes are a valid constitutional restraint upon freedom of expression.

There has been no case yet testing the constitutionality of the counseling crime provision. When that case comes, the *Oakes* test will apply:

1. What is the pressing and substantial public policy objective sought to be achieved by the counseling crime provision?
2. Is there a rational connection between criminalizing that speech and achieving such public policy objective? and
3. Does the counseling crime provision impair freedom of expression as little as possible to achieve that objective?

The American Position

The crime of counseling crimes would not be constitutional under the American First Amendment, which is far more protective of free speech than its Canadian equivalent. While counseling a crime is reprehensible, it is constitutional. Even calls to assassinate the President are not criminal. One has to incite *imminent* violence and be a palpably serious threat for such speech to be outside the protection of the First Amendment. That is why one may target abortion doctors identifying their names, addresses and photos in conjunction with suggestive rhetoric and yet not be prosecuted for a crime.

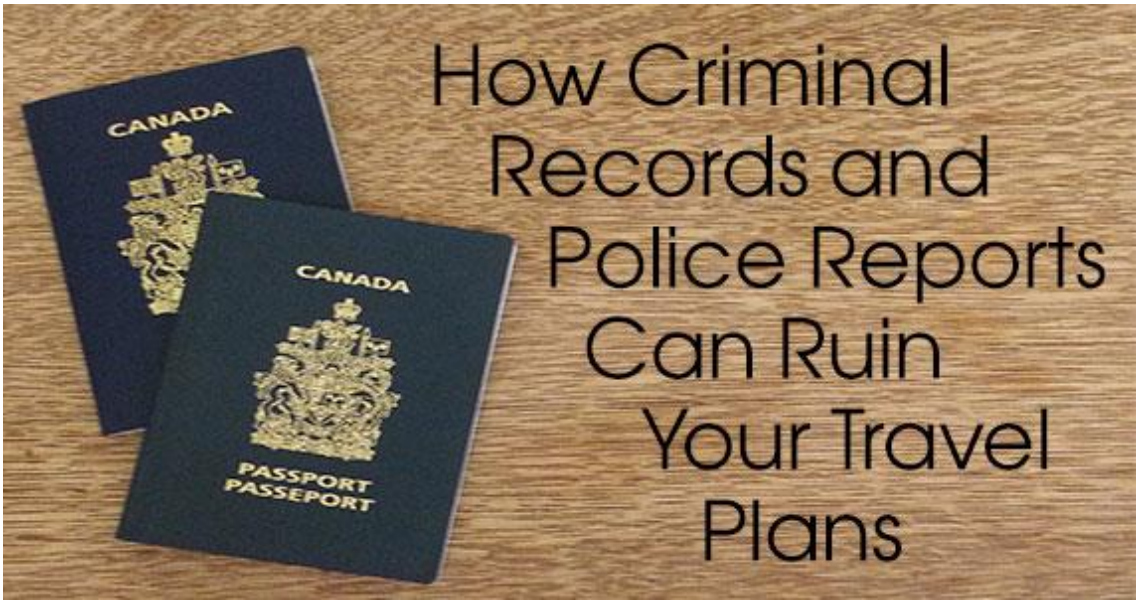
Conclusion

Our criminal law takes counselling crimes very seriously because some people can be easily influenced. Some counseling comments, like our professor's may be attempts at humour or hyperbole. If it was lightly made as a joke, others might not get the joke. What if, as in our professor's case, the passing counselling comment was made on national television, or perhaps the Internet?

Before anyone is charged with counseling a crime, Crown Prosecutors will consider whether a reasonable likelihood of conviction exists. The courts have set a very high bar to prove intent, which means prosecutions and convictions will be rare.

How Criminal Records and Police Reports can Ruin Your Travel Plans

Posted By: *Stephen Da Cambra*



There's a reason why Canadian passports are in high demand with international criminals and forgers. Our record of good international relations, history of peacekeeping and foreign aid, and the generally good perception of Canadians gives our passport holders easy entry to more countries than just about any other passport in the world. Fortunately, the federal government continues to improve passport security precautions to discourage misuse. Newer passports have built-in integrated circuits and a warning to treat your passport as an 'electronic device'. But even if you're lucky enough to have a legitimate Canadian passport, it does not guarantee your right to travel out of the country, especially if you have a criminal record – and especially to Canadians' favourite destination, the United States.

Travelling Overseas with a Criminal Record

While any country you visit can stop you from entering for any reason it chooses, the vast majority understand the importance of maintaining a healthy tourist industry, strong business connections and good international relations and they usually give permission to enter to most people who request it. But regardless of your reason for travelling, a criminal record can put a quick, unexpected and inconvenient halt to your plans. Every country has its own guidelines and rules about who can enter. For many, a criminal record isn't an absolute barrier to entry, but they will exercise discretion based on certain criteria, including the type of offence and how long ago it was committed. Before they leave, travellers need to talk to the embassies, consulates and offices that represent the countries they want to visit to learn more about entry restrictions. To give you an idea of what to expect, here's a brief list of some of the guidelines the Canada Border Services Agency (CBSA) uses to determine admissibility for visitors with a criminal record:

Conviction Judged in Terms of Canadian *Criminal Code* – Officials will equate the offence(s), for which a criminal record was given, with the Canadian *Criminal Code*. Certain offences may be more or less serious in Canada.

Impaired Driving – We usually think that the U.S. is tougher than Canada on entry requirements, but you will probably get into the U.S. with a criminal record for impaired driving. But visitors to Canada are not allowed to enter if their impaired driving conviction is for having blood-alcohol content over the Canadian limit of .08%.

Some Other Convictions that Can Prevent Entry to Canada – Dangerous driving; common assault; street racing; resisting arrest; possession, supply and/or trafficking of narcotics; shoplifting and fraud.

Traveling to the U.S. with a Criminal Record

Canada's biggest trading partner and favourite travel destination continues to tighten border security and admissibility requirements. It used to be that Canadians and Americans could cross the border with no more than valid pieces of identification like driver's licences and social insurance cards. Today, while a passport is still not absolutely required for travel by land or sea, it is highly recommended, and a requirement when travelling by air. Whether or not you can enter the U.S. with a criminal record depends on many criteria. As noted above, if your record is for an impaired driving conviction or other offences considered less serious, like disorderly conduct, especially if the conviction is an old one, there's a good chance you'll be allowed to enter. On the other end of the spectrum, if your offence was one of 'moral turpitude', and was relatively recent, you will very likely not be allowed entry. Examples of a crime of moral turpitude include: murder; manslaughter; sexual assault; theft; forgery; battery and fraud. **Every case is different.** If you have a criminal record, whether your offence was relatively simple or serious, and regardless of when it was committed, it's best to contact U.S. Customs and Border Protection (CBP) to determine if you would be allowed to enter. Another way to guarantee that you can cross the U.S. border with a criminal record is to apply for and get a U.S. Entry Waiver, which gives you advanced permission to enter the U.S. The waiver application process can take from six to 12 months and requires that you complete a number of forms, submit a U.S. Fingerprint Chart and supply a copy of an official police record of your offence(s), which you can get from the RCMP or a local police service. Due to the complexity of the waiver application process and requirements, many record holders use a waiver application service provider like Pardon Applications of Canada.

If you don't tell them, how does the U.S. CBP know you have a record?

The close relationship between the two countries, especially in the fight against terrorism, has resulted in the CBP having access the RCMP's National Repository of Criminal Records, which lists every criminal record holder in Canada. A CBP officer only has to enter your name or scan your passport to find out whether you have a record.

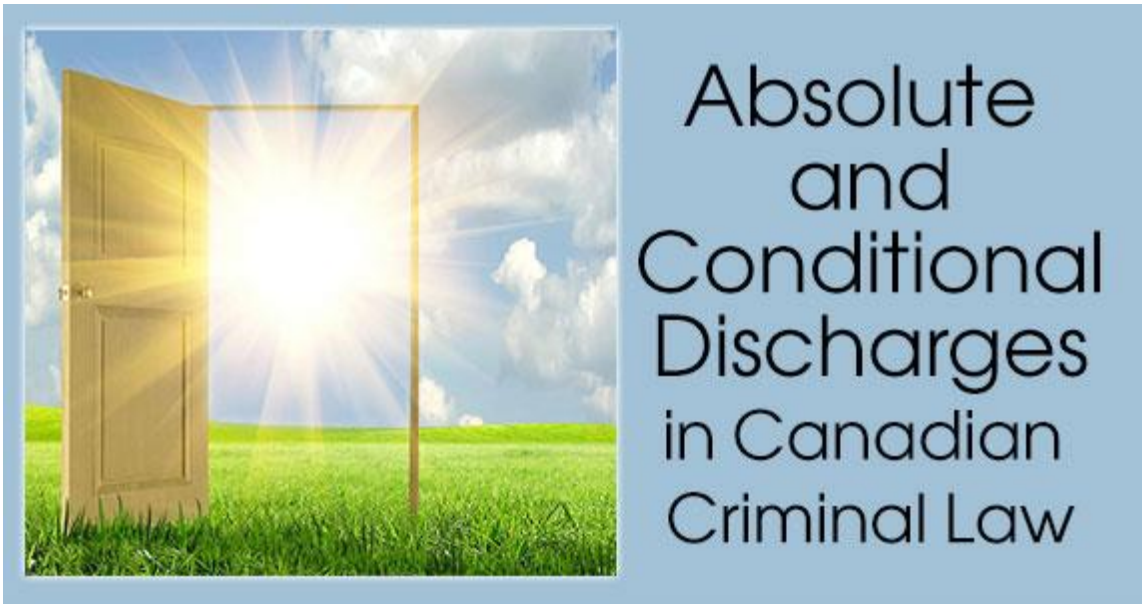
How Being Named in a Police Report Can Affect Your Travel Plans

Access to the RCMP's Criminal Record database also gives CBP access to police reports from across the country. The unfortunate result for many travellers is that they are unexpectedly detained at border crossings and/or barred from entering the U.S., even when they have no criminal record or have never been charged with an offence. As reported by the CBC, in June, 2012, a woman was told by CBP that the only way she would be allowed into the U.S. to catch a flight, which she later missed, was to get an independent doctor to vouch for her. Why? A 911 call to police that preceded a stay in hospital for clinical depression was recorded in a police report which was found by CBP during a background check. Police did not visit the woman's home after the call, no charges were laid, no conviction, no criminal record. Unless you ask your local police service or the RCMP, it is impossible to know if your name is included in a police report. If you have a criminal record, or if you have even the slightest idea that your name may appear in a police report, for example, if you gave a statement following a traffic accident that involved negligence – it is best to contact police and/or the CBP before travel to the U.S. to confirm that you'll be able to enjoy free passage.

Article Sources: ***Embassy of the United States*****,** ***Government of Canada***

Absolute and Conditional Discharges in Canadian Criminal Law

Posted By: *Peter Bowal*



Purposes of Criminal Sentencing

The principles of criminal sentencing are set out in Section 718 of the *Criminal Code*. In Canada, the fundamental purpose of sentencing is to facilitate respect for the law and to promote a just, peaceful and safe society. Sentencing pursues these six objectives:

Denunciation – to denounce the offender's criminal actions;

Deterrence – a sentence dissuades the convict and others from repeating the offence;

Separation – this punishes the offender through deprivation of contact with friends, family and others, while protecting society from the offender at the same time;

Rehabilitation – offenders are offered programs and therapy that may help them to change their lives and turn away from criminal behaviours, an objective which is thought to be most effective with young offenders;

Reparation – as restorative justice: offenders pay fines, make restitution or work in community service programs; and

Responsibility – offenders must sincerely consider the harm done by their behaviour.

Possible Outcomes to Guilt

A person convicted of a crime in Canada will receive one of the following dispositions:

- discharge – either *absolute* or *conditional;*
- alternative measures;
- fine;
- probation;
- suspended sentence;
- conditional sentence; or

In this article we explain the criminal sentencing law of absolute and conditional discharges.

Discharges

After an accused person has been found guilty by a plea or conviction after trial, a discharge may be granted by the state. This nullifies any criminal record that the guilty person otherwise would have had. Section 730 (1) of the *Criminal Code* states:

> *Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).*

An individual may be discharged if it is in the best interest of the individual and if it is not against the public interest. The effect of a discharge is that the accused does not receive a criminal conviction or a criminal record. This makes a discharge very advantageous for first-time offenders and those guilty of minor offences.

The Ontario Court of Appeal sought to interpret and apply what "best interest of the accused" means in Regina v. Sanchez-Pino, 1973 CanLII 794 (ON CA):

> *… that deterrence of the offender himself is not a relevant consideration, in the circumstances, except to the extent required by conditions in a probation order. Nor is his rehabilitation through correctional or treatment centres, except to the same extent. Normally he will be a good person of good character, or at least of such character that the entry of a conviction against him may have significant repercussions*

A discharge is granted to an individual, otherwise an upstanding member of society, who would be significantly harmed by a criminal record. To be considered in the best interests of the accused, the conviction and criminal record must have significant repercussions on the individual. This need not

necessarily be employment-related, although overall financial and non-financial costs are a factor. If the conviction would "have a prejudicial impact on the accused disproportionate to the offence committed," [1] a discharge is an appropriate disposition. Professional hockey player Todd Bertuzzi pled guilty to an assault causing bodily harm on Steve Moore during a regular season NHL hockey game and was granted a conditional discharge. (*R. v. Bertuzzi*, 2004 BCPC 472 (CanLII))

In *R. v. MacFarlane,* 1976 ALTASCAD 6 (CanLII), the court said discharges should be used sparingly. If the conviction would "have a prejudicial impact on the accused disproportionate to the offence committed," [1] [5] a discharge is an appropriate disposition. A criminal sentence is one of the strongest deterrents to criminal activity, particularly for those who have no records. The court set out the relevant factors for discharges:

- more serious offences are less likely to receive discharges;
- prevalence of the particular offence in the community;
- potential for the accused to gain at the expense of others;
- if the offence relates to property, the value of the property;
- whether the offence was planned or committed impulsively; and
- whether the offence should be on the public record as part of a conviction and criminal record.

It is obvious that a discharge will be preferred by all criminals. Virtually everyone would benefit from a discharge over a conviction. Only when the sanctions would be disproportionately out of line for the accused is a discharge an option. If so, the second test about public interest is analyzed. Again, according to the *Sanchez-Pino* case:

> *One element thereby brought in will be the necessity or otherwise of a sentence which will be a deterrent to others who may be minded to commit a like offence – a standard part of the criteria for sentencing.*
>
> *… it is common sense that the more serious the offence, the less likely it will appear that an absolute discharge, or even a conditional one, is 'not contrary to the public interest.' In some cases, the trivial nature of the offence will be an important consideration; in others, unusual circumstances peculiar to the offender in question may lead to an order that would not be made in the case of another offender.*

As for this 'public interest' consideration, would it be "… in the public interest to see that future or potential employers or social organizations know of the criminal activity and have a chance to evaluate it," or would it be against the public interest of general deterrence that a discharge might lead others to "follow his example?"

The severity of the criminal behaviour is a major factor in the discretion to order a discharge. In *R. v Fallofield* [1973] BCCA the court determined that the accused was of good character and had no

previous convictions. The court found that the weight of the public interest (deterrence and separation) did not prevent the accused from receiving a discharge.

In *R. v. Knowlton,* 2005 ABPC 29 (CanLII), the court confirmed that conditional discharges can be granted even for cases involving violence. Regarding the accused, the court said:

> *this individual has moved considerably to become a better person, reunited with his family, stopped consuming alcohol and drugs and is moving towards furthering his education in hopes of becoming a teacher. It is in the public interest overall that he achieve those goals and a discharge may, to some extent, assist in that regard. He does not have a recent record and entered a guilty plea and clearly is remorseful for his actions. In all the circumstances, in my view, the need for deterrence in the context of this offence is adequately addressed through a conditional discharge. It is in his interests and his family interests that he continue on the road to rehabilitation.*

Absolute Discharges

The discharge can be either "absolute", with no probationary conditions at all, or "conditional" which attaches probationary conditions. Absolute discharges are ordered only in the strongest cases.

Conditional Discharges

In this case, the guilty person is discharged from an offence as long as certain specific conditions, placed in probation orders, are met. All conditional discharges have terms of probation attached to them. Probation comes from the word "prove", as in the accused must *prove* himself by following stipulated conditions over a fixed period of time. Probation orders are used elsewhere in criminal sentencing, apart from conditional discharges. For example, conditions in probation orders may accompany a "suspended sentence" after conviction, or they may be added as part of the overall sentence to a fine or period of imprisonment.

The common conditions contained in a probation order are:

- keep the peace and be of good behaviour;
- appear before the court when required by the court;
- notify the court or a probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation;
- remain within the jurisdiction of the court;
- report to a probation officer;
- perform a number of hours of community service;
- remain in employment (or looking for employment) or in school; and
- (if applicable) not to have contact with named individuals, not to go to certain locations and/or not to consume alcohol.

- Failure to comply with all the conditions of a probation order may cancel the conditional discharge, lead to a conviction being registered and stricter sentencing and attract a new charge of breaching probation (ie. failing to comply with a court order).

No Criminal Record

Guilty persons granted discharges can claim they have not been convicted of an offence and have no criminal record. The federal *Criminal Records Act* states that "no record of a discharge under . . . the *Criminal Code* . . . shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister" after one year has elapsed since the offender was discharged absolutely; or after three years since the offender was conditionally discharged.

An exception occurs where an accused enjoyed a previous discharge, especially on a similar offence. In that case, the Crown may raise the previous discharge with the court. The previous discharge cannot be used as evidence to convict the individual for the new offence, but only to show thecCourt that a discharge has been given in the past and the public interest might not be served with another one.

Conclusion

Just as what is viewed as 'criminal' changes with society over time, criminal sentencing also changes with evolving social norms. One of these social justice principles is that no guilty person should be punished disproportionately to his fault. In rare cases, the sentencing objectives of denunciation, deterrence, separation, rehabilitation, reparation and responsibility can actually be met by discharging the guilty person from further criminal responsibility. The process and effect of being caught and brought to justice for the crime may be all that is necessary to achieve these objectives. Anything more may not only serve no further sentencing purpose, but it may harm the accused's and public's interests. This judicial discretion and flexibility in the system, is codified in Canadian criminal law and procedure.

Discharges are a form of discretionary sentences that address the guilty person's character and personal circumstances, and balance those with his behaviour and consequences on the community. Absolute discharges pardon the individual where the crime is not too severe, where conviction and further sentence would disproportionately impact the individual in relation to the wrongdoing, and where the discharge is in the best interests of the individual and not against public policy. If the offence is minor in nature or consequence but the individual would lose much with criminal conviction and sentence, it would be disproportionate.

Conditional discharges do not immediately pardon an individual of guilty criminal behaviour. It places the burden on the individual to prove oneself over time and in specific terms. If the probation orders are fully performed, the individual is absolved of the offence.

Notes:

1. Ruby, C., Chan, G., Hassan, N., Sentencing, 8th ed., 2012, LexisNexis Canada, p. 417-418
2. *Wigglesworth,* [1983] S.J. No. 554, 7 C.C.C. (3d) 170, at p. 176 (Sask. Q.B.)

Basic Facts in Federal Corrections

Posted By: *Irving Kulik*

Canada's incarceration rate is 117/100,000 adults and youth, while the United States' is 762/100,000 and France's is 91/100,000.

- ***The Corrections and Conditional Release Act (CCRA)*** has been in force since1992 and was amended in 2012. The **CCRA outlines the responsibilities of the Correctional Service of Canada (CSC)**, the **Parole Board of Canada (PBC)** and the **Correctional Investigator.**
- The fundamental principle underlying the CCRA and governing the CSC and PBC is that long-term safety is best ensured by the safe, gradual return of offenders to the community, albeit with conditions and under supervision as the protection of society is paramount.
    - CSC and the PBC fall under the Minister of Public Safety Canada.
    - Public Safety is Canada's lead department for public safety.
    - As Ombudsman, the Correctional Investigator is independent of the Correctional Service and the Minister of Public Safety.

The **Correctional Service of Canada (CSC)**, as part of the criminal justice system and respecting the rule of law, contributes to public safety by actively encouraging and assisting offenders to become law-abiding citizens, while exercising reasonable, safe, secure and humane control.

- In Canada all offenders sentenced to 2 years or more become the responsibility of CSC, while those sentenced to less than 2 years under the jurisdiction of the province/territory where convicted.
- The Correctional Service of Canada offers treatment and education programs for offenders. As well, educational resources for students and teachers are made available: For firsthand accounts

of CSC operations, you can watch a video, or access the text transcript, at http://www.csc-scc.gc.ca/index-eng.shtml.

- CSC's budget in 2012-13 >$3B

The CSC has

- 20,278 staff members, of whom 7.5% are Aboriginal;
- 57 institutions, 16 community correctional centres, 71 parole offices and 9 Aboriginal healing lodges;
- 14,221 inmates in institutions as of March 31, 2011, plus 8,642 offenders under community supervision; women comprise 4% and 6% respectively; in addition:
    - 90% of offenders have a previous youth or adult conviction, 80% have histories of substance abuse, 67% committed violent offences and there are serious mental health disorders among 13% of male and 29% of female populations upon admission;
    - 1 in 6 males and 1 in 10 females have gang affiliations;
    - 18% of the incarcerated offender population is age 50 or over;
    - 60% serving short sentences of 4 years or less; 22.5% serving life or indeterminate sentences;
    - Average cost of keeping an inmate incarcerated is $113,974 (2009-10);
    - Average cost of maintaining an offender in the community is $29,537 (2009-10);
    - As of April 2011, 18.5% of the Federal offender population is Aboriginal;
    - Aboriginals represent 21.5% of the federally incarcerated and 13.6% of the community population; but Aboriginal adults represent approximately 4% of the Canadian adult population.

The **Parole Board of Canada (PBC)**, as part of the criminal justice system, makes independent, quality conditional release and record suspension decisions and clemency recommendations. The Board contributes to the protection of society by facilitating as appropriate, the timely reintegration of offenders as law-abiding citizens.

View the facts about Parole, Record suspensions and Victims services at http://pbc-clcc.gc.ca/index-eng.shtml

- Average PBC grant rates in 2010-11:
    - Day parole (DP): 62%
    - Full parole (FP): 39.5%
    - Aboriginal grant rate: 53.4% for Day Parole; 24.8% for Full Parole
    - Offenders released on parole serve an average 31.5% of their sentence prior to DP and 37.8% prior to FP.

- Eligibility for **Conditional Release**:

- Conditional release eligibility periods are set by law in either the Criminal Code or the CCRA;
- Eligibility does not mean release; it is a review date;
- Every offender is eligible for review by law;
- The protection of society is paramount;
- Conditional release provides a gradual and supervised release with conditions attached;
- The PBC must review all available information about the offender, the offence and the community;
- Decisions are based on risk assessment of each case while considering behaviour in the past, the present and the probable future; both actuarial and analytical tools are used;
- Information is shared with the offender as well as reasons for decision and access to appeal;
- Usually the offender must serve the first third, or the first 7 years, whichever is less, of any sentence of imprisonment before being eligible for full parole;
- Federal offenders generally become eligible for day parole 6 months before their full parole eligibility date;
- Parole eligibility for lifers is set by law or by the court as follows:
  - 1st degree murder: 25 years
  - 2nd degree murder: 10-25 years (determined by the judge after recommendation from jury)
  - Lifers on parole are under supervision for life;
  - Parole can be revoked at any time for breach of conditions; the offender can be returned to penitentiary, but can re-apply for parole later;
  - Offenders serving life sentences are eligible for day parole three years before their full parole eligibility date.

- **Release types: Temporary Absence (escorted and unescorted); Work Release; Day Parole and Full parole:**
  - Statutory Release: Law requires that offenders be released with supervision after serving two-thirds of their sentence;
  - Statutory release is not a decision made by the PBC;
  - Statutory release does not apply to offenders serving a life or indeterminate sentence.
  - Exceptionally, “Detention” allows the PBC to detain offenders at their statutory release date upon referral from CSC if it is believed that the offender is likely to commit an offence causing serious harm or death prior to the expiry of his/her sentence;
  - Detention ends at the Warrant Expiry Date, the date the criminal sentence, as imposed by the court at the time of sentencing, officially ends
  - 252 cases reviewed in 2010-11: 94.4% detained.

- **Standard Parole Conditions**
  - Every offender on conditional release must:
  - Live only in a community approved by the parole supervisor;

- Report to the parole supervisor as instructed;
- Obey the law and keep the peace;
- Always carry the release certificate and the identity card and produce them on request to any peace or parole officer;
- Not own, possess or control a weapon, as defined in the Criminal Code, except as authorized by the parole supervisor;
- Inform the parole supervisor of any change that may affect the offender's ability to respect the conditions of release.

- **Special Parole Conditions**
  - If considered necessary, the PBC may impose additional conditions to assist the offender, control behaviour and further reduce risk; these may include curfews, restrictions on movement, agreement to counseling, prohibitions on drinking, and prohibitions on associating with certain people (such as children or former victims).
  - CSC can refer Statutory Release cases to the Parole Board for detention until the end of the sentence. The Board may, in specific cases where the legal criteria are met, order these offenders to be detained in prison until the end of their sentence.

- **Parole Results in 2010-11:**
  - The majority of releases are successfully completed
  - Day Parole: 89.1%, up from 86.1%
  - Full Parole: 75.2%, up from 73.9%
  - Statutory Release: 62.4%, up from 61.1%
  - In all categories of conditional release, the rate of reconviction for violent offences has declined since 1997-98

- **The "Faint Hope Clause" (Section 745 of the Criminal Code)**
  - Lifers convicted of 1st or 2nd degree murder prior to March 2012 may apply for judicial review after serving 15 years: the application is first screened on paper by a judge; if judgedetermines merit, the application is then heard by a judge and jury; not a PBC decision;
  - Jury decides two things: If parole eligibility date should be earlier (decision must be unanimous) and how much earlier?
  - If successful, the offender can then apply to the PBC who decides whether to grant parole or not.
  - Reviews began in 1987:
    - Eligible to Apply as of April 10, 2011: 1524 …had served at least 15 years past arrest date
    - Court Decisions made: 185
    - Reductions granted by the Courts: 147
    - Parole Granted by PBC: 135

- Legislative changes have impacted life sentences in the following fashion:
    - Effective as of December 2, 2011,
    - 745.51 — Multiple murders – Judge may impose consecutive parole ineligibility periods
    - 745.6(2) — Lifers have only 90 days after 15 years to apply for reduction of ineligibility; thereafter 90 days 5 years later; and then wait till 25 years for parole eligibility.
- Effective as of March, 2012 (Bill S-6)
    - 745.6 — "Faint Hope Clause" no longer applies for any individual newly sentenced, thus not eligible for reduction to 15 years.

The Correctional Investigator of Canada is mandated by Part III of the *Corrections and Conditional Release Act* as an Ombudsman for federal offenders. The primary function of the Office is to investigate and bring resolution to individual offender complaints. The Office as well has a responsibility to review and make recommendations on the Correctional Service's policies and procedures associated with the areas of individual complaints to ensure that systemic areas of concern are identified and appropriately addressed.

- **The Office of the Correctional Investigator**
    - Responded to 5,789 complaints in 2011-12;
    - Conducted 814 use of force reviews;
    - Reviewed 27 cases of inmate deaths;
    - Reviewed 113 incidents involving serious bodily injury, including self-harm;
    - The Office is empowered with broad authorities and had an average of 30 full-time employees in 2011-12.

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Canadian Regulation of Contests, Prizes and Games

Posted By*Peter Bowal*

Canadians like to participate in public, advertised contests and games. We compete for prizes. Most often we are unaware that the promoters of these events are governed by specific rules in relation to them.

The law on contests, prizes and games is sometimes classified under marketing law. A level playing field for these activities protects consumers from unfair or deceptive promotional activities relating to the contests and games. The state has an interest in protecting average citizens from wasting their time and energies engaged in what are essentially fraudulent activities. Reducing the incidence of fraudulent activity in commerce is not only fair to honest competitors, but it also increases confidence in, and respect for, our competitive marketplace.

This article identifies and highlights the federal and provincial regulation of contests, games and prizes.

Federal Regulation

Criminal Code

In its simplest form, gambling involves a prize, a chance and a consideration (money or other economic value) exchanged. Business promotions that are a combination of these three elements constitute a form of gambling. Most businesses circumvent the gambling characterization by removing or changing one of these three elements. For example, the business charges nothing (no consideration) for its customers to win a prize. Perhaps skill (as in answering a question) replaces random chance. These contests, prizes and games are technically not gambles. They are legal and unregulated.

In Canada all gambling-related activities – that is, those involving a prize, chance and consideration exchanged – start with the *Criminal Code* (s. 201 – 209). Given the substantial consideration that might be exchanged in pursuit of an elusive prize, serious social and moral hazards accompany gambling. Moreover, governments have enjoyed the extraordinary revenue stream that may be harvested from controlled, legalized and regulated gambling. Accordingly, all gambling is generally criminalized in Canada (see section 206).

After initially criminalizing all gambling, the Criminal Code, in the next section (s. 207), sets out exceptions. Activities which are provincially-licensed and regulated are deemed to be legal gambling. Few business promotions involving contests, games and prizes will need to be registered under provincial gambling programs.

The Criminal Code also criminalizes cheating at play and failing to comply with the provincial regulations (s. 208 and 209). The provinces have established large, complex administrative agencies such as the Alberta Liquor and Gaming Commission and the Ontario Lottery and Gaming Corporation, supported by detailed regulations and processes to implement legal gambling in their jurisdictions.

Competition Act

Any business using a contest as a promotional tool must disclose specifics of the prizes such as the number and value of the prizes, the areas in which the prizes are being distributed, and anything that affects the chances of winning. Similar to the *Criminal Code* general prohibition of gambling, section 53 begins with a blanket prohibition:

53 (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win, or will on doing a particular act win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

This provision, enacted in 2002, in complicated legal language, says that to promote itself in any way, businesses cannot send out any document that creates the impression the recipient, by paying money or incurring a cost, has won or will win anything.

Punishment is a fine for a corporation, and for a corporate director or officer a fine and up to 14 years imprisonment.

By now, readers may be wondering "how do promotions such as 'Roll Up the Rim to Win' pass muster with this general prohibition?" The answer is found in the general exception. Businesses can operate such promotions with contests, games and prizes if a recipient actually wins a prize and the business "makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the area or areas to which they have been allocated and of any fact within the person's knowledge that materially affects the chances of winning, distributes the prizes or benefits without unreasonable delay; and selects participants or distributes the prizes or benefits randomly, or on the basis of the participants' skill." (s. 53(2))

If you have not heard of any convictions under this provision of the *Competition Act*, it is because there really have not been any of note. These rules, however, can also be used as a basis for civil claims and at

least one class action settlement under this provision was approved (*Speers v. Reader's Digest*, 2010 ONSC 6366).

Canadian Anti-Spam Legislation (CASL)

Many business promotions are communicated to the public as spam messages. Since July 1, 2014, this legislation endeavours to protect Canadian consumers from spam and to increase the confidence of Canadians in the use of electronic commerce. This new legislation creates an offence to knowingly make false or misleading statements and provide false or misleading information. Any message sent by electronic communication must be received with consent, must clearly identify who sent the message, must allow the recipient to contact the sender (contact information must remain valid for at least 60 days), and permit an unsubscribe option where opting out can be done at no cost and up to at least 60 days later. Opt out requests must be processed within 10 days.

The law adopts an opt-in approach that requires a positive and explicit expression of consent for each new commercial electronic message. No longer will marketers be able to pre-check a box to receive messages or bundle consent with general terms and conditions of sale. The law also prohibits false or misleading subject lines or sender information. (Editors Note: The Centre for Public Legal Education has published a set of FAQs about CASL.)

Personal Information Protection and Electronic Documents Act (PIPEDA) and *Privacy Act*

This federal legislation regulates the collection of personal data for marketing purposes. It applies to provinces other than Alberta, British Columbia and Quebec that have passed substantially similar laws. Subject to some exceptions, organizations may only collect, use and disclose personal information once they have notified the subject individuals of the purpose of the data collection and received meaningful and informed consent from them. In addition, personal information can only be collected, used or disclosed for purposes that are reasonable and only to the extent necessary to fulfil those purposes.

Likewise, the *Privacy Act* can also come into play with the law of contests, prizes and games because most times you will be asked to provide personal information upon entering a contest or winning a prize. Under section 5, the Act states that the individual must be informed as to why the information is being collected. Under section 6, the information that is collected must only be used for its intended purpose; otherwise, the individual must consent to additional uses.

Provincial Legislation

In addition to federal criminal and competition legislation, the provinces prohibit unfair and deceptive trade practices which can include dishonest commercial contests, games and prize promotions. Almost all of these provincial statutes deem certain commercial tactics as illegal trade practices. These include taking advantage of consumers, using high pressure or undue influence, and resorting to ambiguous,

exaggerated or deceptive facts in promotion. All of these tactics can come in the form of contests and prize promotions.

It is also an unfair practice to knowingly deceive or mislead the consumer, represent sponsorships, affiliations, or benefits that are not true and that the product or service does not have. A company also cannot make false or misleading representations or misrepresent the quality or standard of any product or service.

This genre of provincial legislation across Canada is similar in content but goes by different names: the Alberta *Fair Trading Act*, the British Columbia *Business Practices and Consumer Protection Act*, the New Brunswick *Financial and Consumer Services Commission Act*, and the *Consumer Protection Acts* of Saskatchewan, Manitoba, Newfoundland and Labrador, Ontario, Quebec, Nova Scotia, Prince Edward Island, Yukon, Northwest Territories, and Nunavut as well as the Business Practices Acts of Manitoba and Prince Edward Island.

Conclusion: the Case of *Richard v. Time*

While it seems that Canada, through federal and provincial legislation, has in place many safeguards for the consumer when it comes to contests, games and prizes as business promotions, the real test of effectiveness will be found in the enforcement of the regulations and the remedies.

The most prominent recent demonstration of how this regulation works was the case of *Richard v. Time Inc.*, 2012 SCC 8 (CanLII) a case that went to the Supreme Court of Canada under the Quebec provincial consumer legislation.

Richard received a letter referred to as an "Official Sweepstakes Notice" in the mail from *Time* magazine. Several attention-grabbing, exclamatory sentences in bold uppercase letters suggested he had won a cash prize of U.S. $833,337, were combined with conditional clauses in very small print, some of which began with the words "If you have and return the Grand Prize winning entry in time." The back of the letter informed Richard he would qualify for a $100,000 bonus prize if he validated his entry within five days. The reply coupon offered Richard the opportunity to subscribe to *Time* magazine. Believing he would receive the promised amount, Richard immediately subscribed to *Time* magazine and returned the reply coupon. He received no money because he did not have the winning entry for the draw. The whole package, they explained, was only an invitation to participate in a sweepstakes.

The Supreme Court of Canada unanimously agreed that the test for false or misleading advertising is "general impression": the one a person has after an initial contact with the entire advertisement. The average consumer here would have been under the general impression that Richard held the winning entry and had only to return the reply coupon to initiate the claim process. The Court said it "was riddled with misleading representations" and had "fraudulent effect."

As for legal remedy, the Court compensated Richard for moral injuries in the amount of $1,000 and punitive damages of $15,000. For a more detailed examination of this case, please see "Turning a Loss into a Win" by Stephanie Laskoski.

This recent judicial decision reminds us that legislation is often mightier on paper than it is in action. The best law of consumer protection in commercial contest, game and prize promotions may often simply be to discard the promotion.

Is Good Luck Taxable?

Posted By: *Hugh Neilson*

Easy Money

There seem to be plenty of opportunities to win – big and small – in our lives, from lotteries to radio contests to a friendly wager with a friend. Whether it's $10 on who wins the golf game, or $10 million from the lottery, does the tax man share in our good fortune?

In Canada, the answer is generally "no" – receipts derived by luck are normally classified as non-taxable "windfalls". The *Income Tax Act* specifies that no capital gain or loss results from the chance to win a prize, and that the cost of such a prize is equal to its fair market value at the time of acquisition.

The Canada Revenue Agency (CRA) notes, in Interpretation Bulletin IT-213R (Prizes from lottery schemes, pool system betting and giveaway contest), that prizes are not taxable as capital gains or as ordinary income, unless they can be found to be income from employment, a business or property, or a prize for achievement in "a field of endeavour ordinarily carried on" by the recipient.

Eyes on the Prize

While the prize itself is tax-free, any income generated from the prize remains taxable. It's probably unsurprising that the income from investing prize money would be taxable. However, consider a "million dollar prize" which is not paid out in one lump sum, but over time. For example, the winner receives payments of $50,000 annually for 20 years. Assuming a rate of return of 2.5% (the Government of Canada 10 year bond rate), the right to receive $50,000 a year for 20 years is worth about $769,000, and that, not $1 million, is the prize won. The remaining $231,000 is interest earned on that initial investment, taxable as received over the 20-year period. The issuer of the annuity should issue T5 slips reflecting this interest income annually. This could come as a nasty shock if the winner was not expecting to pay tax on over $19,000 of interest which would be part of the first year payment (gradually declining in future years).

As the cost is equal to the value of the prize, sale of the prize shortly after winning is unlikely to result in a gain, so the proceeds should be received free of tax. If the value of the prize appreciates over time, then any gains would be subject to taxation in the ordinary course. This might be the case for the winner of a "dream home lottery" who sells the property ten years later. In that case, the owner may have resided in the property and possibly be able to realize any gains free of tax due to the Principal Residence Exemption (See "Your Principal Residence and Taxes", by the same author, LawNow Jul/Aug 2013). Many other prizes will not likely gain in value over time – the winner of a sports car, for example, faces little risk of a future sale for more than the car's value at the time they won it.

Taking Care of Business

Can winnings be received in the course of business? As with most tax matters, the answer can be uncertain, and is dependent on the facts. For example, a lottery ticket retailer might be awarded a prize for selling a winning ticket. This prize would be considered part of the consideration received for selling lottery tickets, and therefore included in the retailer's business income. It bears noting, however, that this interpretation reflects a change in CRA's interpretation, communicated within CRA in the summer of 2013. Prior to that, CRA's interpretation, published in March, 1981, was that a prize for being the seller of a winning ticket was based solely on chance, and therefore was not subject to taxation. This specific issue has never been addressed by the courts, so it is unclear whether CRA's current or prior interpretation is, in fact, correct.

Know When to Hold 'Em

There have been a variety of cases before the Tax Courts assessing whether gambling activities should be considered a business activity of a professional gambler, such that winning would be taxable, and losses deductible, as with any other business. The courts have looked to a variety of factors in making such determinations, including the degree of organization of the gambling activities, any special knowledge, skill or private information possessed by the gambler, the extent of gambling activities and the gambler's intention, whether personal enjoyment or entertainment, or playing for a profit.

A 1961 court decision (Harry Edgar Morden) contrasts the activity of a professional bookmaker with those of a typical gambler. The bookmaker calculates the odds over an extended period of time, sets payouts such that the aggregate odds are in his favour, and accepts wagers on any result, at the quoted odds, thus creating an organized business methodology. The individual gambler lacks such an organized, systemic approach, and any winnings are attributable to luck, as much or more than skill, and his activities are less the conduct of a commercial activity and more for personal entertainment.

A 1981 Tax Court decision (John Balanko), upheld by the Federal Court of Appeal in 1988, characterized the differentiating factor as one of risk, noting that risk-taking is necessary in any business venture, but that a characteristic of a business is the management or minimization of risk.

A 1997 case (Alvin J. Luprypa) addressed winnings from playing pool. The court concluded that the taxpayer carried on a business of playing pool for profit. He was a skilled player, practicing Monday to Friday afternoons, and playing at a bar, starting after 11 PM. He was calculating and disciplined, managing risks carefully. He drank alcohol only on the weekends, when he did not play pool, to gain an advantage over inebriated opponents. As he carried on a business, his earnings were taxable. However, the court also concluded that the taxpayer believed, reasonably, that his winnings were not taxable. Penalties imposed for failure to report income either knowingly or under circumstances amounting to gross negligence were therefore reversed.

A 2006 case (*Leblanc v. The Queen*, 2006 TCC 680 (CanLII)) addressed two brothers who, from 1996 to 1999, won over $5.5 million (net of losses) playing government-run sports lotteries. They resided near the Quebec and Ontario border so that they could play in both provinces, typically betting $200,000 to $300,000 weekly. They reviewed published odds for the games, eventually developing a computer program to calculate their betting approach. Due to Lottery Corporation limits, they purchased tickets from multiple retailers, negotiating discounts until the limits were reduced to a level that this was no longer possible. At one point they decided picking up the lottery tickets was too much work, so they hired three friends to pick the tickets up and increased their workforce when the limits were reduced. Eventually, they had fifteen "helpers".

CRA asserted that they wagered in an organized fashion, using a system which ensured that any winning wagers would generate substantial prizes. Their negotiation of discounts and hiring of fifteen helpers was advanced as support this was a business. Expert testimony indicated that the odds against winning these sports lotteries were "astronomical", and not remotely consistent with the payouts. These odds could not be beaten by skillful play – skill played no part in winning or losing. The court noted that the only evidence presented to show the brothers had a system was that they had won. All other evidence pointed to compulsive gamblers who got lucky, and not to an organized business. The winnings were not taxable.

Viva Las Vegas

Very little complicates a person's income tax situation quite as much as crossing a national border. While Canada does not tax gambling winnings, other countries have different tax laws. The most common foreign tax jurisdiction for Canadians is that of the United States, where gambling and lottery winnings are included in ordinary income, and subject to taxation.

For citizens of the United States residing in Canada, this means they will be taxable on such winnings, as the United States is one of only a handful of countries which base taxation on citizenship.

As well, Canadians winning prizes from sources in the United States are also subject to taxation. Typically, the payor is required to withhold and remit taxes directly to the Internal Revenue Service (IRS) when the prize is won by a non-resident of the United States, generally at a flat rate of 30%. Some forms of gambling winnings are exempt from withholdings, including blackjack, baccarat,

craps, roulette and big-6 wheel. The *Income Tax Treaty* between Canada and the United States permits taxable gambling winnings by Canadian residents to be reduced by gambling losses. However this would normally require the filing of a U.S. tax return, and provision of evidence of these losses.

With a Little Luck

Although the occasional court case has held someone to be a professional gambler, this is a rare exception to the general rule that gambling – win or lose – does not have income tax consequences in Canada.

Turning a Loss into a Win

Posted By: *Stephanie Jansen*

I remember the morning well: my mother had asked me to bring in the mail, and as I was sorting through it, a bright envelope with the sentence, "You Are A Grande Prize Winner" caught my attention. My heart leapt; my family just won an astronomical amount of money! When I showed the envelope to my mother, she shrugged, rolled her eyes, told me it was a scam, and explained to me how it worked. I recall being really shocked. How were companies allowed to do that to unsuspecting consumers? It simply wasn't right!

It turns out I am not alone in my feelings. A recent 2012 Supreme Court of Canada case dealt with exactly this issue (*Richard v. Time Inc.*, 2012 SCC 8 (CanLII)). Mr. Richards, a resident of Quebec, received an "Official Sweepstakes Notification" in his mailbox from a company called T and TCM. Written in English, the envelope suggested that Mr. Richards had won a cash prize of $833,337 U.S. dollars. In order to claim the prize, the mailing indicated that the Grand Prize entry had to be returned by a specific date, and if Mr. Richards returned the envelope within five days, he would also qualify for a bonus $100,000 U.S. dollar prize.

Along with the promises of money was some information: that the winning number had already been selected, and that the holder of that number would receive the Grand Prize by returning the reply coupon by the deadline. Additionally, if Mr. Richards did not return the reply coupon, the Grand Prize winner would be selected randomly among the eligible entries, and the odds of winning would be 1 in 120 million.

Mr. Richards immediately returned the reply coupon, believing he had won the $833,337 dollars. He also bought a subscription to *Time* magazine, which was recommended. Mr. Richards received his monthly magazines, but the cheque with his Grand Prize failed to arrive. After contacting T and TCM, Mr. Richards was informed that he had not won any money and worse; he had only been invited to enter a sweepstakes.

In response to receiving no cheque, Mr. Richards filed a motion with the Quebec Superior Court to declare him the winner of the cash prize and to order T and TCM to pay compensatory and punitive damages matching the promised amount. The Superior Court judgment granted Mr. Richard's action in part. The Court found that the letter breached Title II of the *Consumer Protection Act* of Quebec on prohibited business practice and that the authorized sanctions within the Act were applicable. Mr. Richards was awarded $1,000 for moral injuries and the quantum damages awarded were $100,000.

T and TCM appealed, and the Court concluded that the company did not violate the *Consumer Protection Act.* The Court of Appeal set aside the award of compensatory and punitive damages. The judgment highlighted that T and TCM did not breach the Act by failing to clearly specify Mr. Richards as the Grand Prize winner; that using a fictitious name as the contact person did not mislead customers about the merchant's identity; and that there were no false and misleading representations to a consumer with "an average level of intelligence, skepticism and curiosity."

The Supreme Court of Canada heard the case, and allowed the appeal in part. It determined that the approach used by the Court of Appeal to determine the general impression communicated by T and TCM's advertisement was inconsistent with the legal test established by the legislature. According to the *Consumer Protection Act,* particularly in the case of false or misleading advertising, the general impression occurs at contact with the material, and includes the whole document's words, and their meaning. The personal attributes of the person who received the advertisement are not considered. This general impression test must be applied from the perspective of an average customer, who is trusting and inexperienced, and includes viewing the advertisement with nothing more than ordinary care to what is written on the actual document.

Included in the general impression test are factors such as ensuring substantial importance is placed on the text, but also to the entire context of the advertisement itself, as well as how the text is actually displayed on the advertisement. The Supreme Court decided that the definition of "average consumer" as including average intelligence, skepticism and curiosity is inconsistent with how the definition ought to be interpreted in the *Consumer Protection Act*. Instead, in order to decide whether an advertisement is reliable, a two-step consideration should occur. The first step is to describe the general impression that the representation is likely to convey to a trusting consumer. Step two determines whether the general impression of the advertisement is true to reality. If the answer to step two is no, the merchant has engaged in a prohibitive practice. The Supreme Court found that T and TCM violated the *Consumer Protection Act* when it sent its advertisement to Mr. Richards. In failing to mention particular facts on the advertisement itself, T and TCM misled its consumers.

In order to claim damages under the *Consumer Protection Act,* a contract must have been formed between the merchant and the consumer. Here, in order for Mr. Richards to be compensated, a four-part test must be considered:

- he must show that the merchant failed to fulfill one of the obligations imposed by Title IIof the *Consumer Protection Act*;

- he must prove that he saw a representation that constituted a prohibitive practice;
- that the representation resulted in the formation, amendment, or performance of a consumer contract; and
- a sufficient nexus existed between the content of the representation and the goods or services covered by the contract.

If these four requirements are met, a contract is formed, and the consumer is permitted to demand a contractual remedy provided in the *Consumer Protection Act.*

The Supreme Court determined that because Mr. Richards subscribed to *Time* magazine, this constituted a contract between himself and T and TCM. Therefore, the company committed a civil fault that triggered their extra contractual liability, so the Superior Court ruling of $1,000 for moral injuries was warranted.

Additionally, the Supreme Court ruled that an award of punitive damages was justified, but should be varied. It concluded that the Superior Court ought to have considered the fact that T and TCM neglected to send the advertisement in both languages, which affected large numbers of French speaking consumers. In spite of Mr. Richard's complaints, T and TCM did not bother to take any kind of corrective action to make their advertising clearer or consistent with the *Consumer Protection Act.* Therefore, Mr. Richards was granted $15,000 in punitive damages, which was reduced from the initial amount of $100,000. The Supreme Court reasoned that this amount was sufficient to fulfill the preventative purpose of punitive damages. Mr. Richards was also entitled to costs in the Superior Court and the Court of Appeal and on a solicitor and client basis in the Supreme Court of Canada.

Viewpoint 39-1: Like hockey, Court's 'Mr. Big' decision clarifies the rule book and the 'code'

Posted By: *David Butt*

What are Canada's pre-eminent cultural symbols? Hockey is surely a top contender. The values of the rink are deeply embedded in our broader social values. Another contender is our criminal justice system, which strikes a quintessentially Canadian compromise between individual liberty, and collective responsibility. On Thursday, the Supreme Court of Canada demonstrated how similar they are.

The Court has ruled on a police trick known as the "Mr. Big" sting. An undercover officer pretending to be a rich gangster (Mr. Big) befriends the target of the police investigation and shows him a high-rolling good time. Mr. Big then tells the target that to join the criminal elite he must be a serious criminal himself. The target, eager to please, confesses to what police have suspected but not yet been able to prove. A deliberate, elaborate and expensive police ruse extracts a confession the target would never have offered had he known Mr. Big was a police officer.

Is this police trick permissible? The Supreme Court said, in most cases, no. And to understand why, we need to think hockey.

The culture of hockey is defined by not one, but two sets of rules: the official rule book, and the "code". The rule book and the code interact in subtle and fascinating ways. Tripping is prohibited by the rule book. So you should never trip another player, right? Wrong. Sometimes tripping is a "good penalty", for example if it prevents a sure goal. And while fighting is against the rules but sanctioned by the code, kicking during a fight is against the code because it is far too dangerous.

Together, the rule book and the code send a defining cultural message. A certain degree of rough-and-tumble is part of life, but only to a point: and that point is serious danger of injury.
Neither the hockey rule book nor the code are fixed. For example, the current debate about fighting in hockey, informed by research on head trauma, is prompting an evolution of both. Constant improvement of the game means regularly re-thinking what is acceptable under both the rule book and the code.

Our criminal justice system mirrors these hockey values. The "rule book" grants us many different rights and freedoms that the police must respect. But the "code" says the courts will overlook breaches of the

rules by the police when those breaches would not cause serious injury to the justice system. For example, evidence seized without a warrant violates the rules, but frequently that evidence is allowed in court anyway, if the breach of the rules is not terribly serious. In other words, a certain tolerance of rough-and-tumble is also part of the culture of law enforcement. And like hockey, neither the rule book nor code are fixed, as courts issue new rulings that develop both.

So, the Supreme Court has said Mr. Big schemes are generally undesirable. The Court's decision can be perfectly understood in hockey terms. The Court has not taken away the police tactic of deception altogether. The Court has not said police must behave like perfect angels, it has merely told police to tone down that deception in certain situations. Like kicking with skates, Mr. Big schemes are just too dangerous. They risk creating false confessions which can lead to innocent people being wrongly convicted. This is a cautious, thoughtful adjustment of the bounds of propriety, the "code" of acceptable law enforcement.

A rough and tumble hockey approach makes perfect sense in the context of law enforcement. Criminals need to be caught, and (spoiler alert) many of them are nasty people who don't play by the rules. So if the police are to do their job effectively, they must have their fair share of hard-hitting tactics to beat aggressive rivals, which includes some latitude to do unpleasant things on occasion. But on the other hand, if we condone dangerous police tactics that can cause serious wrongs like convicting the innocent, we bring the system into disrepute.

So the Canadian criminal justice system replicates the values of the rink. Both are extremely important to us, so in both we play hard, we play to win, and if some rules are occasionally overstepped, so be it. But beneath that hard-driving Canadian ethic is equally fundamental Canadian decency: do not under any circumstances breach the code.

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Prostitution Law in Canada: Will the Charter Dialogue Continue?

Posted By: *Linda McKay-Panos*

Constitutional law experts, such as Peter Hogg, speak about the relationship between the Supreme Court of Canada (SCC) and Parliament as a "dialogue". Parliament passes a law, which might later be challenged as being contrary to the *Canadian Charter of Rights and Freedoms ("Charter").* Often, after declaring the challenged law to be unconstitutional, the SCC will delay the effect of this declaration for several months to give Parliament the opportunity to address the constitutional deficiency, yet ensure there is not a gap in Canada's regulation of an important activity. This process is referred to by some constitutional scholars as the dialogue theory. This is the potential state of affairs for some of Canada's prostitution laws in the Criminal Code. On occasion, after Parliament re-drafts and passes an amended law, there is yet another challenge where the SCC is asked to determine the constitutionality of the amended law. Often, the SCC upholds the amended law as constitutional. However, sometimes the SCC will once again send Parliament back to the drawing board. This process is referred to by some constitutional scholars as the dialogue theory. This is the potential state of affairs for some of Canada's prostitution laws in the *Criminal Code*.

In December 2013, in *Canada (Attorney General) v. Bedford, 2013 SCC 72*, the Supreme Court of Canada held that the provisions of the *Criminal Code* that dealt with keeping a bawdy house (section 210), living off the avails of prostitution (section 212(1)(j)), and communicating in public with respect to a proposed act of prostitution (section 213(1(c)) were unconstitutional. According to the SCC, these provisions put the safety and lives of prostitutes at risk by preventing them from implementing safety measures such as hiring security guards or screening potential clients. The SCC concluded that these provisions offended the *Charter* section 7 right to life, liberty and security of the person, and were not in accordance with the principles of fundamental justice. The SCC's declaration of invalidity was suspended for one year.

Having decided to redraft these provisions, Parliament conducted online consultations. In addition, Parliament looked at models for dealing with prostitution from other countries (e.g., in Nordic countries, buying sex is illegal but selling it is not). Canada Justice introduced Bill C-36 the *Protection of Communities and Exploited Persons A*ct on June 4, 2014. Because purchasing sex will be a crime, there are concerns that sex workers will be forced to negotiate with prospective clients in hidden locations, which will expose them to safety concerns similar to those caused by the former provisions. The House

of Commons Justice Committee is examining the proposed new law in summer 2014. According to the Legislative Summary prepared by the Library of Parliament:

Bill C-36 amends the Criminal Code to, among other things,

- create an offence that prohibits purchasing sexual services or communicating in any place for that purpose;
- create an offence that prohibits receiving a material benefit that derived from the commission of an offence referred to in paragraph (a);
- create an offence that prohibits the advertisement of sexual services offered for sale and to authorize the courts to order the seizure of materials containing such advertisements and their removal from the Internet;
- modernize the offence that prohibits the procurement of persons for the purpose of prostitution;
- create an offence that prohibits communicating — for the purpose of selling sexual services — in a public place, or in any place open to public view, that is or is next to a place where persons under the age of 18 can reasonably be expected to be present;
- ensure consistency between prostitution offences and the existing human trafficking offences; and
- specify that, for the purposes of certain offences, a weapon includes anything used, designed to be used or intended for use in binding or tying up a person against their will.

The enactment also makes consequential amendments to other Acts.

The Government also promised $20 million to be aimed at getting prostitutes out of sex work (Blaze Carlson and Fine). "The government says the bill will protect and keep communities safe by allowing prostitutes to rent apartments, screen clients, hire a receptionist or security guard, and advertise their own services" (Confused about changing prostitution laws in Canada? Bill C-36 Primer).

Blaze Carlson and Fine report that Evangelical and pro-family groups support the Bill, but sex workers and their legal advocates "said the law would be vulnerable to a constitutional challenge on many fronts."

Because purchasing sex will be a crime, there are concerns that sex workers will be forced to negotiate with prospective clients in hidden locations, which will expose them to safety concerns similar to those caused by the former provisions. Further, it will be illegal to advertise sex services (of others) and one must decide whether the place one is selling sex is occupied by young persons. This will continue to raise safety issues about where one can legally sell sex. However, the new law's purposes have been written in such a way that judges evaluating their constitutionality would have to consider the values of promoting dignity and equality and protecting children and communities. Thus, the concern is whether

the new laws offend security of the person and freedom of expression or whether they will be upheld as constitutional (Blaze Carlson and Fines).

So, there are constitutional experts who believe that the new legislation will result in further *Charter* challenges (Blaze Carlson and Fines). Will the dialogue continue?

U.K. Case Potentially Positive Step in Recognizing Human Rights Work as Charitable

Posted By; *Peter Broder*

Human rights work has a checkered history in the world of charity law. One might have thought that this would be an area where the conception of charity in the popular imagination dovetailed with the public benefit that is the litmus test for qualifying in law as a charity. But that is not so. A recent case in the United Kingdom could, however, help change the legal landscape.

Things, seemingly, got off on the right foot way back in 1898 with an Ontario Appeal Court decision, *Lewis and Doerle*, which held that the upholding of human rights was a recognized charitable purpose. That case said that a trust to promote, aid, and protect U.S. citizens of African descent in the enjoyment of their civil rights qualified as charitable.

Since then, however, the courts have blown hot and cold on efforts to foster, entrench or ensure enjoyment of human rights. This brings us to perhaps the most vexing issue in assessing the charitable nature of human rights work. There are a number of cases where such work has been characterized as advancing a political purpose and/or, in Canada, breaching the ITA requirements limiting non-partisan political activities. They have grappled variously with the scope of such rights, the propriety of work to influence law or conduct in foreign jurisdictions, and human rights efforts potentially being intertwined with political purposes and/or political activities.

With respect to the scope of human rights, there has been consideration of defining such rights with reference to international law and conventions or treaty obligations as well as on the basis of either constitutional provisions or ordinary statutes. The experience is mixed. Some courts are willing to look outside their home jurisdiction for the sources of these rights, while others have taken a narrower view and put more stress on domestic law.

On the question of influencing law or conduct in overseas jurisdictions, the principle that there can be public benefit from charitable work done in countries other than that in which an organization is based – which applies to all types of charitable purposes, not just human rights work – has generally been accepted where charitable efforts are devoted to addressing rights issues. This is, of course, always subject to the proviso that if such work is focused on opposing, changing or retaining legislation or policy, or mobilizing public opinion to do so, it may be considered political rather than charitable.

This brings us to perhaps the most vexing issue in assessing the charitable nature of human rights work. There are a number of cases where such work has been characterized as advancing a political purpose and/or, in Canada, breaching the *ITA* requirements limiting non-partisan political activities.

One of the legacies of *Lewis and Doerle*, and a number of cases dealing with promoting enforcement of the law, is that once a legal matter becomes settled or a social norm, it may be charitable to plump for it. Over the years, numerous other cases have also declared the subjects of attention of various groups to be controversial social issues, and undertakings to address those matters political rather than charitable. Recently, however, in courts outside Canada there are signs that such analysis is losing favour. In contrast, characterizing something as a "controversial social issue" can lead to work around it being categorized as political, rather than charitable.

A famous example of this is a Federal Court of Appeal judge having stated in the 2002 case *Action by Christians for the Abolition of Torture (ACAT) v. Canada, 2002 FCA 499 (CanLII)* that "I am not persuaded that the abolition of torture is an issue that is entirely uncontroversial today" – basing the statement on the word torture potentially being used to cover such matters as the death penalty and excision. This reasoning led, at least in part, to the Court upholding the revocation of Action by Christians for the Abolition of Torture's charitable registration.

Over the years, numerous other cases have also declared the subjects of attention of various groups to be controversial social issues, and undertakings to address those matters political rather than charitable. Recently, however, in courts outside Canada there are signs that such analysis is losing favour. Notably, this August, in the case *Re Greenpeace of New Zealand Incorporated , [2014] NZSC 105*, the New Zealand Supreme Court held that topics addressed by an organization being controversial do not necessarily present a bar to charitable status.

More broadly, the 2014 United Kingdom case, *The Human Dignity Trust v The Charity Commission for England and Wales,[2014] UKFTT 2013_0013 (GRC)(6 June 2014)*, perhaps paves the way for a wholesale new approach.

The proceeding arose from the refusal by The Charity Commission for England and Wales to register a group mandated "to promote and protect human rights (as set out in *the Universal Declaration of Human Rights* and subsequent United Nations conventions and declarations) throughout the world…" and "to promote the sound administration of the law".

One aspect of the case that made it quite sensitive was the work the Human Dignity Trust was doing with respect to the criminalization of private, adult, consensual homosexual conduct in foreign states, which it addressed through support to mount legal challenges to such measures. Given this, shadowing the case was apprehension about potentially imposing contemporary Western values on countries with non-Western cultures.

Notwithstanding this, the Tribunal took a broad view of the meaning of human rights and accepted that it was an evolving term, whose meaning extended to rights set out in *The Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*.

It also endorsed the use of litigation as a means of protecting or asserting rights, and as a way of furthering the "sound administration of justice". Although promoting the sound administration of justice had been held charitable in *Incorporated Council of Law Reporting for England and Wales v AG [1972] Ch73*, its acceptance in the context of determining the charitable nature of a human rights organization appears new. A further basis of this holding was other case law saying that purposes pertaining to "enforcing the law generally" are charitable.

Concerns were raised about whether Human Dignity Trust's use of litigation was appropriate. Moreover, the use of litigation as a technique for promoting human rights had not previously been recognized as charitable. However, it was held that the organization's intention was only to litigate where there was a venue available to do so (on the evidence, in a large majority of the countries in question) and that use of litigation in the human rights context was analogous to the charitable nature of promoting prosecution of breaches of the law.

As to the issue of the purposes of Human Dignity Trust being potentially political, the Tribunal held that the litigation contemplated was fundamentally different from the engagement in legal proceedings that was ruled political in the 1982 U.K. case *McGovern v. AG*. The key difference was that Human Dignity Trust sought to determine the validity or constitutionality of legislation, whereas in *McGovern* the emphasis was on challenging laws.

On the question of the public benefit related to work in other jurisdictions, it was held that domestic public benefit was not required for an organization to be charitable, and even if it was, upholding human rights internationally was, on the evidence, beneficial to the public in the United Kingdom.

In short, this area of the law has seen some hopeful and helpful new developments. Perhaps developments Canadian courts can use as a template to get back to where we started from with *Lewis v Doerle.*

How is property divided at the end of a relationship?

Posted By: *Rochelle Johannson*

The property rights that you have at the end of a relationship depend on what kind of relationship you had in the first place. Are you married? Living together? If you are married, then the property rights that you have come from Alberta's *Matrimonial Property Act*. If you are living together but are not married, then there is no law that sets out how to divide the property.

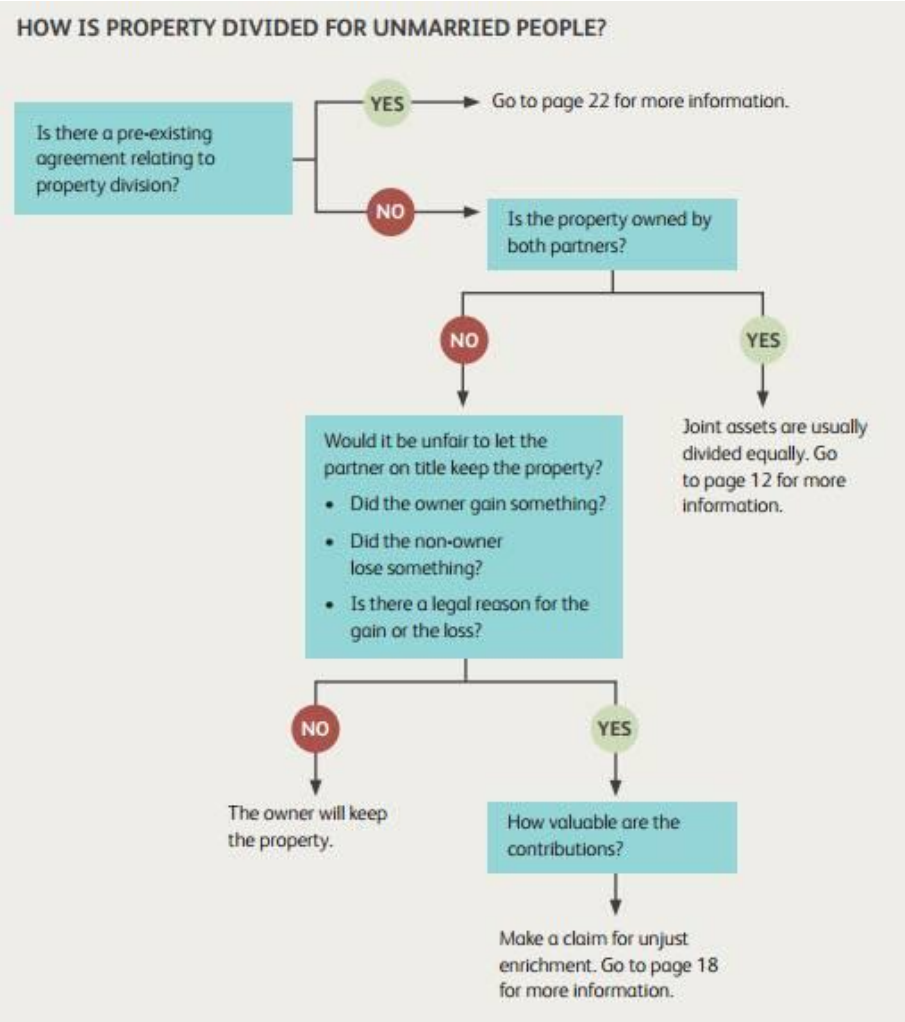
The *Matrimonial Property Act* divides property into three different categories: property that will be divided equally, property that will not be divided, and property that will be divided based on what is fair. All of the property from the relationship will fall into one of these three categories. This chart sets out some examples of the different kinds of property.

COMMON EXAMPLES OF MPA PROPERTY

How the property is usually shared	Examples
Property that is usually shared equally	· The matrimonial home · Vehicles · Pensions · Investments
Property that is usually shared, but not equally. The property is divided based on what is fair	· Increases in value of exempt property · Income received from exempt property · Property acquired after the separation · Gifts from one spouse to the other
Property that is exempt from sharing	· Inheritances · Property that one spouse owned before the marriage · Gifts from third parties · Any award or settlement of tort damages or proceeds from non-property insurance policies

For unmarried couples, property division is not as clear because there is no law that sets out how to divide the property. Property that you own with your partner is usually divided equally, while you get to keep the assets that are in your own name, and the other person gets to keep the assets that are in their name. If it would not be fair for you to keep all of the assets that are in your name, then your ex can make an application to divide the property based on a claim for unjust enrichment. For example, if you owned the house in your name, and your ex lived with you for ten years and helped you with major renovations, yard work, and other maintenance, then it might not be fair for you to be able to walk away with the entire value of the house when your ex contributed to the value of that asset.

Here is a chart that sets out the process of property division for unmarried people.



The charts in this article are from a new series of booklets, *Families and the Law,* which was developed by the Centre for Public Legal Education Alberta, in partnership with the Edmonton Community Legal Centre [5]. Each of the five booklets in the series addresses a different area of family law.

What, Why and Where: Untangling Jurisdiction in Family Law

Posted By: *John-Paul Boyd*

It can be a real challenge to figure out which court to go to when a family law problem needs to be resolved by a judge. You may need to go to a court where you live, or a court somewhere else. If you are going to a court where you live, you'll have to decide which of the three levels of court you should be going to.

The answer depends:

- partly on which legal issues you're dealing with,
- partly on where everyone lives and where everything is located, and
- partly on whether you are starting or replying to a claim,
- and all of these issues are about jurisdiction.

"Jurisdiction" means a lot of different things but basically refers to the court's ability to make orders resolving a particular legal dispute, and unfortunately, there are plenty of reasons why a court might or might not be able to deal with a legal problem.

First, I need to explain the **structure of our court system**.

There are two trial courts and one appeal court in each of Canada's provinces. A "trial court" is a court that makes orders about legal claims, after hearing the evidence of witnesses and the legal arguments of the parties to the dispute. The two trial courts are the provincial court and the superior trial court, and the superior court has different names depending on the province. …provincial courts are often extremely busy and usually have heavier caseloads than superior courts. (In British Columbia, the superior court is the Supreme Court; in Alberta and Manitoba, it's known as the Court of Queen's Bench; in Ontario, it's the Superior Court of Justice.) An "appeal court" is a court that deals with legal challenges about the outcome of a trial; these courts hear arguments but no evidence.

The provincial court is the lowest level of court and is established by the government of each province. Its jurisdiction is limited because it can only deal with the legal problems that are assigned to it by

legislation. However, provincial courts are often extremely busy and usually have heavier caseloads than superior courts.

The superior trial court is a higher level of court and is established by section 96 of the *Constitution Act, 1867*. The federal government is responsible for appointing superior court judges, and for paying their salaries. This court has "inherent jurisdiction," which means that it can deal with all legal problems and can make whatever orders are necessary and just, whether there's a specific law that says they can make those orders or not. In addition to dealing with trials, the superior trial court also hears appeals from the provincial court.

The court of appeal is the highest level of court in each province. It too is a superior court Above the courts of appeal is the Supreme Court of Canada, an appeal court shared by all of Canada. that is established by the Constitution, staffed by the federal government and has inherent jurisdiction. The court of appeal only hears appeals, usually just from the superior trial court.

Above the courts of appeal is the Supreme Court of Canada, an appeal court shared by all of Canada. The Supreme Court hears appeals and references from the federal government. (A "reference" is a legal question that the government needs answered; the last reference involved the terms on which Quebec can leave Canada.) Although the Supreme Court must hear appeals in certain kinds of criminal cases, other cases must get permission to go to that court; appeals in family law cases are rarely heard by the Supreme Court.

As if this wasn't complicated enough, there's also the federal court system, a system that works parallel to the provinces' superior courts and deals with legal problems like taxes, immigration claims and claims against the federal government. Trials are heard by the Federal Court, which can be appealed to the Federal Court of Appeal, which in turn can be appealed to the Supreme Court of Canada. The federal court can hear family law cases, but only when married spouses each start a claim under the *Divorce Act* on the same day.

Now I need to explain about the **laws the federal government can make and those that only the provincial governments can make**.

In addition to setting up the superior courts, the *Constitution Act, 1867* also divides the powers and responsibilities involved in running a country between the federal government and the provincial governments. Under section 91, the federal government is able to make laws about things like shipping, money, Canada's first nations and the postal service, as well as "marriage and divorce." Under section 92, the provinces can make laws about things like railways, taverns, hospitals and logging, as well as "property and civil rights" and "all matters of a merely local or private nature." As a result, both levels of government can make laws about family breakdown.

Since only the federal government can make laws about divorce, we have the federal *Divorce Act*. Alberta's *Family Law Act* and *Matrimonial Property Act* are a lot different than British Columbia's

Family Law Act or Saskatchewan's *Children's Law Act* and *Family Property Act*. This law sets out the rules for how married people get divorced, and, for married people, talks about the care of children after separation, child support and spousal support.

Since only the provincial governments can make laws about property and civil rights and "matters of a private nature," we have provincial laws that make rules about how property is divided, the care of children before and after separation, child support and spousal support, and sometimes about parental support and the rights of family members like grandparents. However, because each province can make rules about these subjects, the rules change from province to province, sometimes quite significantly. Alberta's *Family Law Act* and *Matrimonial Property Act* are a lot different than British Columbia's *Family Law Act* or Saskatchewan's *Children's Law Act* and *Family Property Act*.

Making things a bit more complicated, in most provinces only the superior courts have the jurisdiction to deal with family law claims under the *Divorce Act* and the unwritten rules of the common law. Although both courts can deal with claims under the provincial legislation, the provincial courts generally can't deal with claims about protecting or dividing property.

Finally, I need to explain about the **geographic limits of jurisdiction**.

As a general rule, the courts of one province won't deal with legal claims involving people or things located in another province or in another country. There are, as you'd probably expect, lots of exceptions to this rule.

Under the *Divorce Act*, you can start a claim for divorce in the province where you normally live or in the province where your spouse normally lives, as long as you or your spouse have lived in that province for at least one year. Most provincial laws don't have rules about jurisdiction like the Divorce Act. In general, the court will let you start a claim involving someone living outside your province as long as there is a connection between you, your relationship or the other party and your province. However, if there is a claim for custody of a child, the court can move the claim to the province where the child has the most ties.

Most provincial laws don't have rules about jurisdiction like the *Divorce Act*. In general, the court will let you start a claim involving someone living outside your province as long as there is a connection between you, your relationship or the other party and your province. In other words, the court of Alberta may not want to hear a claim involving a relationship you left in New Brunswick; the court in Alberta may say that it's better for the New Brunswick court to hear the claim. The rules about property claims are usually more specific: the court of one province can hear claims about movable property (bank accounts, cars, equipment and so on) located in another province, but usually won't hear claims about immovable property (real estate) located in another province.

Most superior trial courts have rules about when you can start a claim against someone who lives in another province or another country; most of the time you can just go ahead and start the claim, but

some courts may ask you to get permission before you serve the other person. The court will not hear your claim unless the other person has been served.

Provincial courts generally won't let you serve someone who lives outside the province. A few courts, like the Provincial Court of British Columbia, allow service outside the province, but on certain conditions.

Now that we've gone through all of this, let's go back to the question that started this article. ***Which court should you go to and why?***

This question is really only complicated for people who are starting a new claim. If you are replying to someone's claim, you have to go to the court in which the claim was started, although you can argue that the court shouldn't agree to hear the case, that it should "decline jurisdiction," later. If you've already been through a trial and are unhappy with the result, you need to go to the superior trial court, if your trial was heard by the provincial court, or to the court of appeal, if your trial was heard by the superior court.

- If you are the person starting a claim, here are some of the things you'll want to think about in deciding which court to go to.

- Provincial courts generally charge no or very low fees. Superior courts charge fees for things like starting a claim, making an application and hearing a trial to help reduce their operating costs.
- The rules and forms of the provincial courts are usually relatively short and usually written in relatively straightforward language. The rules and forms of the superior courts can be extremely complicated and difficult to understand; law schools have a course called Civil Procedure just to help students understand the rules of court!
- Provincial courts are designed for people who don't have lawyers; the judges and courts clerks expect people not to have a lawyer, try to keep things as simple as possible and will often overlook minor problems with the rules. Superior courts tend to be more rigid with their rules and have high expectations for people involved in a claim.
- Only superior courts can deal with claims under the *Divorce Act* or relating to property, and only superior courts have the inherent jurisdiction to make orders as necessary, whether there's a specific law that says they can make those orders or not.
- There are generally a lot more locations for the provincial court than there are for the superior courts, especially in rural and remote areas of the country.

Here's a summary chart that shows with sorts of issues the provincial courts can deal with and which only the superior courts can handle. If you don't need to go to the superior trial court, the provincial court may be your best bet, especially if you're not going to hire a lawyer.

	Provincial Court	Superior Trial Court
Divorce		Yes
Care of children	Yes	Yes
Child support	Yes	Yes
Spousal support	Yes	Yes
Division of property and debt		Yes
Personal protection orders	Yes	Yes
Property protection orders		Yes

[3]

One last thing needs to be said. You *can* start a claim in provincial court about some of your legal problems and start a claim in the superior trial court later to deal with the rest. This is fairly common – people often run to provincial court first because of convenience and cost and later find themselves having to start a separate claim to deal with issues about property and divorce – but should be avoided if possible. If you know that you have issues that only superior trial court can deal with, it's usually easiest to do everything all in that one place rather than having to worry about two separate court claims, two separate sets of court forms, two sets of court rules and obligations to provide information that probably overlap.

Regulation of Employment Agencies

Posted By: *Peter Bowal*

. . . the essential duty of the employment service shall be to ensure . . . the best possible organization of the employment market as an integral part of the national programme for the achievement and maintenance of full employment and the development and use of productive resources.

– International Labour Organization, *Employment Service Convention, 1948 (No. 88)*

Introduction

When public employment agencies were first proposed in 1650, the British Parliament rejected the idea. Attempts to later establish private employment agencies in the United States were likewise rebuffed. It was thought that a job and one's working life were too precious to allow meddling into them by commercial intermediaries. The International Labour Organization (ILO) was founded in 1919 as part of the *Treaty of Versailles* with the mission to We still have a federal government department which facilitates human resource development, training and employment, but most of today's employer and employee match-making is done at the private sector level. "Promote social justice and internationally recognized human and labour rights … to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues." Article 2 of the *Employment Service Convention*, which Canada signed in 1950, envisioned a "national system of employment offices" to co-ordinate bringing employers and employees together. We still have a federal government department which facilitates human resource development, training and employment, but most of today's employer and employee match-making is done at the private sector level. There is a wide variety of private for-profit employment agencies operating in Canada, many of which are industry- or profession-specific. The agencies work for many different employer clients who pay them a fee to accomplish a specific task: to provide a list of suitable and available candidates to fill a position. As a sign of the significance that public policy holds for job placement, job seekers who work with private employment agencies should know that those agencies are vigorously regulated by the provinces in which they operate. This article describes such regulation.

Provincial Regulation

The definition of "employment agency" and protections varies slightly in the legislation of different provinces. This chart (PDF) outlines the legislation defining "employment agency" across the English-speaking provinces in Canada Workers seeking employment cannot directly or indirectly be charged a fee from the employer or the employment agency for job matching services.. The Ontario statute

permits a job seeker to pay a fee. In Alberta, workers cannot be charged placement fees. Ontario, uniquely, has separate legislation for "temporary help agencies." Alberta employment agencies are licenced along the distinction of being a national or international employment agency. Other provinces do not recognize this distinction for licencing purposes.

Alberta Regulation of Employment Agencies

The Alberta model has an omnibus consumer protection statute supported by several dedicated regulations to deal specifically with employment agencies: the *Fair Trading Act*, the *Designation of Trades and Businesses Regulation* and the *Employment Agency Business Licensing Regulation* [8]. Combined, these three instruments establish numerous rules for employment agencies operating in Alberta, which include any business:

- trying to find people for work;
- trying to find work for people; or
- evaluating or testing an individual for skills or knowledge required for work.

Alberta employment agency business licences can be national or international. The reference point is where the prospective employees are sourced for work that takes place in Alberta. An agency can hold both licences, which are valid for two years. Job seekers and employers enter into agreements with the employment agency. An Alberta employment agency must ensure all agreements with employees and employers:

- are in writing;
- set out the services to be provided (and any restrictions);
- provide the agency's contact information; and
- indicate the schedule of fees that will *not* be charged to the worker.

That is to say, the job seeker will be informed through the attached schedule of prohibited fees that he or she will not have to pay fees for seeking employment, seeking information about potential employment opportunities or being evaluated for employer-demanded skills. Employment agencies are also not permitted to fill positions for companies where the current employees are on a legal strike. Workers can be charged fees for non-employment agency business services such as resume-writing or job-skills training services, although these fees must be reasonable and set out in a written agreement. All of these agreements must be signed and retained. Workers seeking employment cannot directly or indirectly be charged a fee from the employer or the employment agency for job matching services. The *Licensing Regulation* also prohibits employment agencies from engaging in unfair practices toward job seekers and employers. Unfair practices include:

- threatening or harassing consumers;
- exerting undue pressure;
- providing false, misleading or deceptive information about available positions or legal rights;

- collecting a fee, bond or deposit from the job seeker; and
- failing to enter into separate agreements regarding specific services.

Employment agencies are also not permitted to fill positions for companies where the current employees are on a legal strike.

Notes:
1. Tomás Martinez, The Human Market Place: An Examination of Private Employment Agencies (Transaction Inc. 1976) at page 13.

What is an offence under provincial renting laws?

Posted By: *Rochelle Johannson*

In many provinces, the law that applies to landlords and tenants states that if someone breaches specific sections under that law, then they have committed an offence. For example, in Nova Scotia, section 23 of the *Residential Tenancies Act* states the following:

Any person who violates or fails to comply with any order, direction or other requirement of the Director or the Small Claims Court or contravenes any provision of this Act, or any landlord who takes action against a tenant because of any resort by that tenant to any governmental authority in respect of the residential premises or because a tenant attempts to enforce or secure his rights under this Act or the Rent Review Act, is guilty of an offence punishable on summary conviction and is liable to a fine of not more than one thousand dollars.

How is an offence different than getting a court order? To get a court order, either the landlord or the tenant has to sue the other person. For example, let's say that the landlord kept the security deposit to cover damages to the property, but the inspection reports were not completed. This is an offence under Alberta's *Residential Tenancies Act* (section 46(6)). In order to get the amount back, the tenant must sue the landlord for return of the security deposit. If the tenant chose to make a complaint with Service Alberta, then there would be an investigation, and if there was an offence committed, then the landlord could be warned, fined, or made to appear in court. Service Alberta would not be going after the landlord to get the security deposit back for the tenant; they are only concerned with the offence.

A situation that is similar would be a car accident. Let's say that I don't stop at a stop sign and I hit a car who was going through the intersection. I damaged the other car, and the driver had a broken arm. The driver could sue me to pay to fix the car, and also for the financial damages that he suffered because he got hurt. So that is similar to when a tenant sues a landlord, because it is a person to person interaction. In addition, I didn't stop at a stop sign, and that is a crime, so the police would investigate to determine if a crime had actually been committed, and lay charges if it had. The police are not concerned with trying to get me to pay for the repairs to other car. The role of the police is the same as the role of Service Alberta in an RTA offence.

Sometimes making a complaint will help you get what you want without having to invest time and money in suing the other side. In the example above, where the landlord kept the security deposit, if

Service Alberta investigated and the landlord became aware that they were breaching the law, then the landlord might voluntarily return the security deposit to the tenant.

In Alberta, there is a tipsheet that lists the offences. It is free to make a complaint with Service Alberta and you can find out more about the process, along with the complaint form, on their website. If you are from another province, you can find the contact information for places that might be able to tell you more about offences on the chart below.

ALBERTA REAL ESTATE FOUNDATION

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Talking to the Police

Posted By: *Marilyn Doyle*

The police are key players in the criminal justice system. “To prevent crime and to make sure that there is order in the community, police officers are given special powers to search, arrest and detain any individual who is committing, has committed or who is believed to have committed a criminal offence. However, these powers are limited by certain basic rights guaranteed to all Canadians in the *Canadian Charter of Rights and Freedoms*.” (Criminal Law and Procedure, CLEA)

There are quite a range of plain language materials available to help citizens understand their rights and responsibilities in relating to the police. Since both the *Criminal Code* and the *Charter* are federal laws, this information applies across the country, although many publications also include lists of local resources.

Resources for Adults

A good general overview of this topic is covered by the Canadian Civil Liberties Association in their 12-page booklet “Know Your Rights: A Citizen’s Guide to Rights When Dealing With Police”. It covers the questions:

- What if I am stopped by the police?
- What if I am stopped by the police while driving?
- When can the police search me?
- What are my rights if I am arrested?
- What if the police come to my home?
- How do I make a complaint about the police?” (This section provides resources for every province as well as a national resource for the RCMP.)

From Community Legal Education Ontario comes a similar publication, “Police Powers: Stops and Searches”, which is also available in French, Spanish, Urdu, Arabic and American Sign Language (video). In “Arrest”, the Public Legal Education Association in Saskatchewan explains that whether or not the police can question you depends on the situation. The Public Legal Education and Information Service of New Brunswick describes their bilingual booklet “The Law, The Police and You: Your Rights When Questioned, Detained or Arrested / La loi, la police et vous: vos droits pendant un interrogatoire, une détention ou une arrestation” in this way:

The purpose of this booklet is to provide a general outline of your rights and responsibilities when you come into contact with the police in public. What should you do or say – and, not do or say – when you are questioned or detained by the police? What are your rights if the police arrest you?

Another exploration of questions related to talking to the police comes from the Legal Information Society of Nova Scotia. Their publication "You and the Police / Sur la police" also addresses questions about lie detectors, photographs and fingerprints, and the powers of private security guards.

The British Columbia Civil Liberties Association offers considerable detail on the topic in "The Arrest Handbook"(62 p.). It is important to remember that criminal law deals with young people between the ages of 12 and 18 somewhat differently from adults through the *Youth Criminal Justice Act*. Note that some of the legislation discussed is specific to B.C. It also broadens its discussion to include citizen or private security arrests, other agency search powers, civil disobedience and anti-terrorist legislation. This publication is also available in Arabic, Spanish, and Vietnamese.

Educaloi uses its short article "Rights during a detention or arrest / Droits d'une personne en cas d'arrestation ou de detention" to zero in on the nature of three specific rights: to know the reasons; to speak to a lawyer; and to remain silent.

An Alberta law firm, Pringle Chivers Sparks Tesky, takes a bit different approach in their information sheet "What You Need to Know if the Police Want to Speak With You" including looking at such issues as what you might want to know if you think the police are investigating you; whether there is such a thing as an "off the record" conversation with the police; and whether asking to speak with a lawyer might make you "look guilty".

People's Law School has a two page fact sheet "Talking to the Police" from which you can learn the basics about criminal law and the role of the police, reporting a crime and being a witness in court, being arrested, and going to court.

Community workers may find themselves struggling to support clients facing criminal charges. They could find help in a recorded webinar from Legal Aid Ontario. "Helping Clients Deal with Criminal Arrest" covers legal rights, the criminal charge cycle and bail process, and what services and supports are available to clients, especially with regard to helping vulnerable clients.

Resources for Youth

It is important to remember that criminal law deals with young people between the ages of 12 and 18 somewhat differently from adults through the *Youth Criminal Justice Act*. The B.C. branch of the Canadian Bar Association offers a short script, "Young People and Criminal Law", which discusses the rights of young people if stopped and questioned by the police, if arrested, or if charged with an offence. This is also available in Chinese (simplified; PDF), Punjabi (PDF) and Mandarin (audio/podcast).

Meanwhile, the Public Legal Education Association in Saskatchewan provides "Busted" with information about the *Youth Criminal Justice Act,* rights on arrest, being charged and detained or released.

Community Legal Education Ontario has created the Youth Criminal Law website specifically for young people accused of committing a crime. It includes a section on "Talking to the Police" and has a parallel site in French that can be accessed with the "Français button" in the top right of the page.

A community group from Toronto has reached out to youth with its video "Know Your Rights" which provides information about their rights when dealing with police, an understanding of powers of arrest, detention, and search, strategies to deal with situations relating to police contact, and an understanding of what recourse is available when someone experiences an abuse of police power.

Conclusion

We need the police to have the authority to address crime. We also need to have protections against indiscriminate use of that authority. Public legal education resources can help us understand the balance between the necessary powers of the police and the necessary rights of citizens.

Whatever Happened to … David Chen and Citizen Arrests

Posted By: *Peter Bowal*

Arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer.

– *R. v. Latimer, [1997] 1 SCR 217*

The police may arrest people they suspect of breaking the law as long as their suspicion is reasonable. What about our right to arrest others? Can we stop and hold people who we catch stealing from us or committing other offences? What is the line between defending oneself and one's property from the crimes of others on one hand, and committing the added crime of forcible confinement on the other hand?

The Asante-Mensah Case

In July 1991, Mensah was a "scooper," a taxi driver not licensed for pick-ups at Pearson Airport in Toronto. At the airport, an inspector stopped him, touched his shoulder, and informed him that he was under arrest for trespassing and that he would be detained until the police arrived. Mensah shoved the inspector away and bolted.

Mensah had already been cited on 22 separate occasions for trespassing at the airport. He continued to do so, despite having received notice under the provincial *Trespass to Property Act* denying him entry for any purpose onto airport property. The inspector had the status of a "citizen" – as he had not been granted police arrest powers – but he was also conducting arrests as allowed by the *Trespass to Property Act* (section 9). The issue was whether the inspector could use reasonable force to make or continue an arrest under that provincial trespass legislation. The Supreme Court of Canada answered in the affirmative and Mensah was found guilty of assault with intent to resist arrest. (*R. v. Asante-Mensah 2003, SCC 38 (CanLII)*)

The Chen Case

On May 23, 2009, David Chen and two of his employees were working at the "Lucky Moose Food Mart", a popular shop in Toronto's Chinatown district. Anthony Bennett, a known criminal, approached the shop. He helped himself to several plants and escaped on a bicycle.

Photo of David Chen by: Tony Bock/Toronto Star

About an hour later, Bennett returned to the same outdoor shop. This time, in the true meaning of shopkeeper, Chen and his employees chased him down (caught on video) and restrained him. They pinned him down, tied him and locked him in the store's truck.

Police arrived when Chen was trying to relocate his truck with Bennett inside. Suspicious, they arrested both Bennett and Chen.

Legal Proceedings

The Crown charged Chen with assault and forcible confinement. These criminal charges and Chen's trial generated considerable controversy across Canada. He was a hero to some, not a criminal. Would the legal system victimize him again? How can a citizen defend himself and his property? Surely Chen was not the criminal in this case?

Bennett pled guilty for shoplifting and agreed to testify against Chen. He was sentenced to 30 days imprisonment.

Chen spurned a plea deal and went to trial. The evidence of Chen and his two co-accused employees was somewhat contradictory. For example, Chen first said he called the police, but it was later revealed an employee had done that. Language may have also been a factor as the trial judge did not find all of Chen's evidence credible. However, in the end, the judge had a reasonable doubt and Chen was acquitted. (*R. v. Chen et al., 2010 ONCJ 641*)

Reform of the Law

Pursuing a thief to recover one's stolen property is not new. The common law has recognized the right to defend one's property since the 1600s. Citizens' arrests also have long been part of the common law.

Eventually, police forces were formed to better fight crime. As the Supreme Court of Canada said in Asante-Mensah: "the development of modern police forces brought a transfer of law enforcement activities from private citizens to peace officers. But it is the police officer's powers which are in a sense derivative from that of the citizen, not the other way around."

The *Chen* case caused many Canadians to think citizens' arrests needed to more clearly embrace the protection of one's own property. Pursuing a thief to recover one's stolen property is not new. The common law has recognized the right to defend one's property since the 1600s. As a result, each of the three major political parties presented private-member bills to reform the *Criminal Code.* Since the Conservative government had a majority, its reform was enacted. An amendment to the *Criminal Code* was passed in 2012 to clarify self-defence, defence of property and citizens' arrests.

1. Self Defence

The distinction between provoked and unprovoked self-defence was dropped, as well as the need for a pre-condition of deadly force. Under the new legislation, one can defend oneself if:

- one believes on reasonable grounds that force is being used, or threatened to be used, against them or another person;
- the actions are defensive, and designed for protection against the other person; and
- the defence is reasonable, determined by all attendant circumstances such as the nature of the threat, the person's role in the circumstances, the physical capacities of the parties and any previous interaction or communication prior to the incident.

2. Defence of Property

A citizen may lawfully take reasonable actions to defend his or her property only if there is a perceived threat of an unlawful entry or damage to the property. The owner of personal property may arrest a person without a warrant if they find them committing a criminal offence on or in relation to that property, and:

- they make the arrest at that time; or
- they make the arrest within a reasonable time after the offence is committed and they reasonably believe that it is not feasible in the circumstances for a police officer to make the arrest.

3. Citizens' Arrests

Although Chen's citizen arrest of Bennett was the incident that led to this prosecution and law reform on self-defence and defence of property, Parliament left the citizens' arrest law largely untouched.

Section 494 (1) of the *Criminal Code* section authorizes an ordinary citizen who reasonably believes that an individual is committing or has committed a criminal offence or believes him to be escaping from lawful authorities to arrest that person.

Originally, the law allowed citizens to arrest a criminal suspect if they were reasonably certain of their guilt. Citizens could only arrest a suspect while they find him or her committing the crime or immediately afterward.

The new law removed the "immediate response" requirement. A "reasonable time after the offence is committed "can pass before the citizen's arrest. Recall how Bennett returned to the shop an hour after he shoplifted and how Chen arrested him only at that time.

In all cases of citizens' arrests, the citizen must immediately deliver that person to a peace officer.

This *Criminal Code* authority serves as a defence to criminal charges and tort claims relating to citizens' arrests properly made.

Law in Other Countries

In Australia, the *Commonwealth Criminal Code Act 1995* authorizes self-defence under reasonable circumstances. One may only use the necessary force to prevent the suspect from leaving, must leave evidence undisturbed, must leave the investigative process to the police, and cannot use lethal force under any circumstances.

In the United Kingdom, the *Criminal Law Act 1967* stipulates that citizens' arrests must be reasonable. This generally falls between the public interest in a responsible contribution on the part of citizens preserving law and order and vigilantism and violence. British Law does not allow preventive self-defence. One may defend oneself only after being attacked and may not initiate the violence.

In the United States, the "stand your ground" law operates in Florida and other states.

Postscript: Chen's Celebrity Status

After his acquittal, Chen was in demand for interviews and photo-ops with eager politicians. In 2013, four years after his notorious shopkeeping arrest of Bennett, he received a Diamond Jubilee Medal.

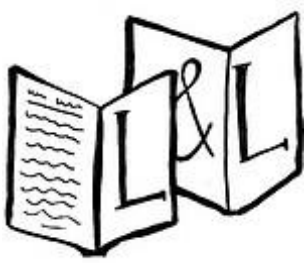
Chen learned the meaning of restraint. The very day he was awaiting the verdict on his charges, he was the victim of another burglary. This time he refused to act on reflex. He called the police and passively waited for them to arrive.

Conclusion

This article described two separate judicial proceedings relating to citizens' arrests. The *Chen* reforms turned out to be modest and would have made no difference in the *Mensah* case. Taken together, they are essential reading for business people and property owners, as well as ordinary citizens, in how to protect themselves from the crimes of others.

A Tale of Two Lawyers

Posted By: *Rob Normey*



I recently reread Charles Dickens' vivid evocation of Paris in the years when the French Revolution had descended into the bloodletting of the Terror, as well as London, which served as a home for French exiles who had fled the murderous impulse for revenge that had swept up the long- suffering and oppressed masses and the revolutionary vanguard that spoke for them. Dickens' novel **A Tale of Two Cities** has not overly impressed the critics over the years in the way that the early beginnings of life **Great Expectations** has, or the serious social and legal novels like **Little Dorrit** and **Bleak House** have. However, all lovers of this masterful Victorian novelist should not rest content with merely viewing one of the many film adaptations of the tale, but rather should open themselves up to the original in all its exuberant and dynamic glory. Dickens focussed on his story with a fairly tightly conceived cast of fascinating characters, plunging them eventually into the colorful world of the Old Bailey, London's central criminal court, and later, the fearsome Revolutionary Tribunal in Paris.

The novel relies heavily on the character device of the double – the dissolute, despairing lawyer Sydney Carton is found to bear a remarkable physical resemblance to Charles Darnay, the French nobleman who has fled the consuming flames of the Revolution to take up tutoring in French to support himself. Despite his loss of control over his ancestral home and the disruptions to his life, Darnay is depicted as a man of deep optimism and goodwill, ready to surmount his obstacles. Further, he is delighted by the lovely Lucie Manette who he meets and eventually woos. Carton, by contrast, is continually drinking himself into oblivion most evenings and has developed a pessimistic philosophy and a melancholic disposition.

While the plot develops a number of interesting comparisons between these two, the novel also contains another significant contrast. The novel relies heavily on the character device of the double – the dissolute, despairing lawyer Sydney Carton is found to bear a remarkable physical resemblance to Charles Darnay, the French nobleman who has fled the consuming flames of the Revolution to take up tutoring in French to support himself. Carton is portrayed as a key ally to a barrister he works with, and is called a "jackal" of the legal trade – that is, someone capable of digging through extensive records and materials and zeroing in on what will turn out to be key evidence or significant for use in cross-examination of a witness. The barrister is the supremely self- confident and energetic Stryver, who relies heavily on the work Carton does behind the scenes to make his mark in trials at the Old Bailey. Stryver is the type of lawyer who will do what it takes to rise in the ranks of criminal law and master the hurly-burly world of the Old Bailey, attracting a wide range of clients. Carton is something of an unsung

hero – he works through mounds of legal material through much of the night, gets Stryver much of what he needs, but it is only the latter that the crowds see performing on the public stage of the courtroom. When he appears in court seated next to Stryver, his wig askew and looking straight up at the ceiling rather than at the witness and judge, many would consider him a rather hopeless case.

I am rather taken by what Dickens has endeavoured to do with these two characters in **A Tale of Two Cities**. The novelist certainly intends for us to perceive this anti-hero as an enigma. There does not seem to be sufficient motive for Carton's despair and general air of futility. After Carton has encountered his double, Darnay in a tavern and made a disparaging remark, the mysterious lawyer refers to himself as a disappointed drudge and flings his glass against a wall. Then, after seeing Darnay, who looks so much like him but lives a life so much healthier and happier, he examines his reflection in a mirror and, tells himself what he has fallen away from and what he might have been.

Carton, who seems characteristically to be lounging in the shadows, is viewed by others as Stryver's silent partner in the courtroom, hands in pocket, seemingly unconcerned by what is unfolding. Alternatively, he is occasionally observed slinking home after an all-night orgy, unsteady on his feet, like a "dissipated cat." The chapter ends with a poetic meditation on Carton's state of dejection, as the sun comes up after another all-nighter of drink and painstaking research to assist his law partner:

> *…it [the sun] rose upon no sadder sight than the man of good abilities and good emotions, incapable of their directed exercise, incapable of his own help… sensible of the blight upon him, and resigning to let it eat him away.*

Although part of Carton's problem is that he lacks the ability to mobilize his talents in a productive way and further, that he is convinced that he cannot meet a woman like Lucy Manette with whom he could develop a lasting bond, the openness of the text leaves one to speculate on another cause. A look at histories of the period in which the novel is set – the 1780s and 90s – reveals a most rudimentary criminal trial process with a great deal of arbitrariness and potential for abuse. Might it be, I wonder, that a major reason for the sense that a "blight is upon him" is that he entered the legal profession with a bountiful idealism and this has gradually been ground down, recognizing that the English legal system and workings of the Old Bailey resulted in considerable injustice, and a failure to respect basic liberties? After all, in the trial we do witness, Darnay, charged with treason for supposedly passing on British military secrets to French officials, is given virtually no chance to prove his innocence. Two paid informers take the witness stand. Only a miracle at the trial's very conclusion provides cause for hope for a just result.

A look at histories of the period in which the novel is set – the 1780s and 90s – reveals a most rudimentary criminal trial process with a great deal of arbitrariness and potential for abuse. In Dr Johnson's London, Liza Picard tells us that "trial procedure would startle a modern lawyer." She recounts the various ways that corruption and unfairness were built in to the process – witnesses could be bought by either side and could be picked up outside the courts, ready to swear anything for the right fee. The rake Casanova, travelling through England, observed trials at the Old Bailey which shocked him,

particularly when he ventured down a street and saw the word EVIDENCE emblazoned on a window. Various features of court procedure from the Middle Ages had survived through much of the 18th century. Sentences for those convicted were generally savage and might bear little relationship to the seriousness of the charge.

When Stryver and other barristers failed in their bids to obtain acquittals, they might make an energetic plea for a pardon, failing which capital punishment was a distinct possibility for a whole range of offences. The condemned were then placed in a cell to await the trip to Tyburn, where a public execution would occur, with a rowdy crowd in attendance, filled with many pickpockets. An alternative was to sentence the guilty man or woman to transportation, involving a rough ocean crossing and an often grim beginning in one of the British colonies. Those who remained in one of the notorious prisons might easily succumb to disease from the pestilence that was ever-present.

Despite all these most unpleasant realities, Carton does persist to do his work in the shadows and will perform his remarkable act of renunciation in the concluding chapters of **A Tale of Two Cities**, transforming his entire life in the process. There is something dramatically satisfying with such an ending, and readers are left with a vivid impression of the full scope of the legal drudge's potential, a potential that was nearly ground into dust but makes a miraculous rebirth.