Jan/Feb 2015 Dangerous Work In the Public Interest Solitary Confinement

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Workplace Woes

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Issues Faced by Vulnerable Workers in Canada

Posted By: Linda McKay-Panos

The Law Commission of Ontario defines vulnerable workers as "those engaged in precarious work". "Precarious work" includes:

- those jobs where one has low wages and at least two of these other features;
- no pension;
- no union; and/or
- small firm size.

Precarious work includes temporary foreign labour, service industry jobs, food services and accommodation jobs, temporary agency work and self-employment (Law Commission of Ontario, *Quick Facts About Vulnerable Workers and Precarious Work*). It seems that part-time, casual and temporary work have become quite common in Canada. And, the LCCO notes that women, racialized persons, immigrants, Aboriginal persons, persons with disabilities, older adults and youth are disproportionately represented in the category of vulnerable workers. Other scholars add undocumented workers and refugees to the category of temporary foreign labour as precarious workers [1].

The Law Commission study identified the following problems. Precarious work can have significant negative physical and mental health outcomes for people. Recent immigrants are more likely to be engaged in physically demanding work. Health and safety risks also arise from lack of experience or training, lack of knowledge about health and safety rights, and fear of losing the job or being deported. Precarious work can cause stress because of job insecurity, the pressure of holding more than one job, the irregular or long hours, lack of legal protections and insecure visa status. Low income experienced by precarious workers can also have health consequences. In addition to susceptibility to illness and injury, precarious workers may not have access to safe transportation or to nutritious food. Lack of benefits

and low wages may preclude purchase of prescription drugs and other medicines. Pregnant women may not be covered by statutory emergency leave provisions and may not be able to get sufficient time off for medical care. Limited training or education opportunities of precarious workers also limits their ability to upgrade skills that are needed to obtain more stable and better paid work.

In Alberta, waged agricultural workers are often considered precarious workers. In addition to facing hazardous working conditions and below-average wages, they also are excluded from many of the statutes that would protect workers.

In 2008, the Alberta Federation of Labour estimated that there are approximately 12,000 waged agricultural workers in Alberta, with 2,600 working in a temporary or seasonal capacity. In December 2012, there were over 68,000 temporary foreign workers in Alberta. Premier Jim Prentice recently expressed concern that new rules to limit the number of temporary foreign workers would be seriously affecting rural Alberta, including agriculture. At the same time, Alberta Federation of Labour's Gil McGowan says that there is a shortage of workers because the temporary foreign workers are underpaid. This drives wages down, which in turn serves as a disincentive for Canadians to take the jobs. This then creates more demand for temporary foreign workers.

If one looks across Canada, precarious agricultural workers have less protection in Alberta than elsewhere in the country. Most of the basic statutes in Alberta that apply to workers, do not apply to waged agricultural workers. The exception is the Alberta Human Rights Act which applies to "persons" in Alberta. Yet, waged agricultural workers face many barriers, including not being aware of their rights under this legislation, or being fearful of exercising these rights, especially if they are temporary foreign workers.

Alberta's Employment Standards Code protects workers with respect to their hours of work, overtime and overtime pay, general holidays and holiday pay, vacations and vacation pay, restrictions on children under 18 working, and minimum wage. Provisions regarding termination notice and parental and maternity leave do apply to agricultural workers, which are listed as those employed on a farm or ranch whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, honey, livestock, game-production animals, poultry, bees or cultured fish. However, the other provisions of the Code do not apply to agricultural workers (section 2(4)).

The Alberta Labour Relations Code regulates unionization and collective bargaining for workers. However, similar to the Employment Standards Code, agricultural workers are not covered under these provisions.

The Alberta Occupational Health and Safety Act provides standards for the health and safety of workers. Farming and ranching operations are excluded from the definition of "occupation" and this means that agricultural workers are not protected by this legislation. David Swann (Liberal MLA) says that 18 to 20 farm workers are killed in workplace incidents every year and there have been 550

fatalities over the last ten years. It would appear that health and safety legislation would be very appropriate in this context.

Finally, Workers' Compensation coverage is not mandatory for farm workers, although their employers can purchase optional. If there is no workers' compensation coverage, agricultural workers are left to sue in court for their injuries or to purchase their own insurance, an option that they do not usually access [2].

Temporary foreign workers, refugee claimants and undocumented workers who perform agricultural work have additional barriers to accessing legal protections. As Sarah Marsden [1] points out:

- Temporary foreign agricultural workers are often unable to leave their place of residence as a condition of their work permit;
- They may also not be entitled to qualify for provincial social assistance or federal employment insurance;
- Refugee claimants make up a significant portion of the precarious migrant population and by their nature have extremely limited security of status;
- Undocumented migrants are estimated to be between 50,000 and 800,000 in Canada; and
- Their immigration status is also precarious, and they are vulnerable to marginalization and mistreatment.

All of these challenges may lead to the failure to partake of any legal protections that these precarious workers may have.

The *Canadian Charter of Rights and Freedoms* was used to challenge the lack of protections in legislation for agricultural workers in *Ontario (Attorney General) v Fraser*, 2011 SCC 20. Ontario had passed separate labour relations legislation (*Agricultural Employees Protection Act, 2002* (*AEPA*)), which excluded farm workers from the *Labour Relations Act*, but included a separate labour relations system for farm workers. The *AEPA* grants farmers the right to form and join and employees' associations, to participate in its activities, to assemble, to make representations to their employers through the association about their terms and conditions of employment, and to be protected against interference, coercion and discrimination in the exercise of their rights. Associations are given the opportunity to make representations regarding the terms and conditions of employment, and the employer must listen to them. A tribunal hears and decides disputes about the application of the *AEPA*.

After trying to use the new *AEPA*, Ontario farmers mounted a constitutional challenge, arguing that the *AEPA* infringed farm workers' rights under sections 2(d) (freedom of association) and 15 (equality) of the *Charter*. They argued that the *AEPA* failed to provide effective protection for the right to organize and bargain collectively and excluded farm workers from the protections accorded to workers in other sectors. The Supreme Court of Canada held that the procedures in the *AEPA* did not violate *Charter* section 15 or section 2(d). The SCC noted that the fact that there is a different legislative system for

agricultural workers in Ontario does not mean that farm workers in Ontario are not entitled to meaningful processes by which they can pursue workplace goals. In writing about the *Fraser* case, James Gross [3] stated that discussions surrounding the case "provide painful but necessary reminders that workers' rights, in regard to their realization and enforcement, have at best a fragile and perilous existence".

Thus, farm workers usually are only protected by the common law employment contracts they enter into with their employers, and these usually advantage the employers (Barnetson, at 53).

In its final report, the LCCO made 47 short, medium and long-term recommendations for reforms in Ontario in the areas of employment standards policy and legislative reform, which includes basic minimum employment rights for precarious workers. The recommendations included:

- forming an Innovative Solutions for Precarious Work Advisory Council to explore options for benefits for non-standard and other workers without coverage.
- increasing public awareness about rights and responsibilities of workers and employers:
- creating a complaints mechanism (e.g., anonymous complaints hotline).
- including workers and/or their representatives in health and safety discussions; and
- creating a provincial strategy involving multiple stakeholders to engage in comprehensive and coordinated initiatives.

Many of these recommendations would be applicable throughout Canada, where significant numbers of vulnerable workers, including agricultural workers, have very limited legal protections, yet face dangerous working conditions and lower wages.

Notes:

1. Sarah Marsden (2012) "The New Precariousness: Temporary Migrants and the Law in Canada [13]", *Canadian Journal of Law and Society 27(2)*

2. Bob Barnetson (2009) "The Regulatory Exclusion of Agricultural Workers in Alberta [14]", *Just Labour: A Canadian Journal of Work and Society 14*.

3. James A Gross (2013) "Book Review: *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*, by Fay Faraday, Judy Fudge and Eric Tucker (eds) [15]" Osgoode Hall Law Journal 51(1)

The Right to Refuse Dangerous Work

Posted By: *Peter Bowal*

There may, undoubtedly, be cases justifying a wilful disobedience of such an order; as where the servant apprehends danger to her life, or violence to her person, from the master; or where, from an infectious disorder raging in the house, she must go out for the preservation of her life. But the general rule is obedience, and wilful disobedience is a sufficient ground of dismissal.

– Turner v. Mason (1845) 14 M. & W. 112 at 118; 153 E.R. 411 (Ex.)

Introduction

Most jobs have some element of danger in them. At a minimal level, the danger associated with our employment does not go much beyond the regular hazards of being alive, such as getting to and from work every day, the stress of working with difficult people, or the infinitesimally small chance of having a meteor or airplane crash through our building. There is interest in the growing field of occupational disease, where certain occupations may be exposed to contaminants or conditions that cumulatively and slowly manifest themselves in the workers over time. Examples include firefighters inhaling toxins, professional drivers and diesel fumes, office workers and repetitive strains, and soldiers who later suffer post-traumatic stress syndrome. In this article we address acute, serious, imminent dangers encountered in performing one's job at work.

Employers have a legal obligation to protect their workers. As far back as 1845, the common law singled out danger as a proper excuse to refuse to follow the boss's orders. In the 170 years since, this common law has become codified into legislative rules and practices. The Canadian provincial and federal legislation is similar. We will describe the modern rules in this article with a reference to the Alberta legislation which does not apply to federal, interprovincial, domestic or agricultural workers.

Insubordination

Employers enjoy the prerogative to instruct their employees about what work their employees do and how they should do it. On the face of it, an employee who refuses to obey legal orders is insubordinate and subject to immediate termination for cause.

What constitutes legally unacceptable risk and danger in the workplace is usually a very contentious matter. It can be assumed that bosses are also generally concerned about safety. They certainly have the legal duty to create safe working conditions. Employers and bosses do not like to be second-guessed. If work can be vetoed by any worker on a mere unilateral assertion of a safety concern anytime without consequences, the employer's authority is undermined and workplaces may become unmanageable.

Accordingly, the circumstances under which the right to refuse dangerous work can be exercised are limited and procedures are prescribed in order to quickly assess imminent danger claims by workers. If a worker has refused to work and if that refusal was not on proper factual and legal grounds, that worker might be viewed as insubordinate and disciplined. It is important, therefore, for workers to know the law and standards in relation to refusals *before* they are presented with what they may perceive as an imminent danger at work.

Refusals for Imminent Danger at Work

In Alberta, workers' statutory rights to refuse to perform imminently dangerous work are governed by section 35 of the *Occupational Health and Safety Act, RSA 2000, c O-2*. Imminent danger is defined as a danger that is not normal for that occupation or one which someone working that job would not normally accept. Therefore, it is a relative determination according to the occupation or work being performed. Police and military personnel will be evaluated according to what are normal hazards and danger in that work. What would be out-of-the-ordinary, abnormal danger in your occupation or workplace?

Workers are actually under a duty not to perform any work – including not operating any tool or equipment – that they believe, on reasonable and probable grounds, carries an imminent danger to the health or safety of themselves or other workers present at the work site.

A worker who refuses to work or operate equipment for reason of imminent danger, must "as soon as practicable, notify the worker's employer at the work site of the worker's refusal and the reason for the worker's refusal."

The employer may require the refusing worker to remain at the work site and be temporarily re-assigned without loss of pay to other work assignments that he or she is reasonably capable of performing. The employer then must investigate and act to eliminate the imminent danger, and ensure that no other worker is assigned to use the tool or equipment or to perform the work which the prior worker reported as too dangerous.

The employer may re-deploy the worker if, after investigation, they determine there is no imminent danger or the imminent danger has been eliminated and they have prepared a written record of the worker's notification, the investigation and action taken, and given the refusing worker a copy of this record.

Appeal of Imminent Danger Investigation Findings

The worker may still be of the opinion that the imminent danger remains. In such a case, the worker may file a complaint with an Occupational Health and Safety (OHS) officer.The officer must also investigate and prepare an independent written record of the worker's complaint, the investigation, and the action prescribed to eliminate the imminent danger. The officer must give the worker and the employer a copy of the record.

If the worker or employer disagrees with the OHS officer's conclusions about the imminent danger, that person can appeal it to the OHS Council within 30 days of receiving the officer's record. A further appeal lies to the Court of Queen's Bench within 30 days from the decision of the Council. This process seems to be quick and responsive, but it could easily take a year to get to the final appeal. Real imminent dangers are, well, imminent and few employees can wait a year for final adjudication. That makes this legal process rather impractical. Few serious imminent workplace dangers are handled through this process.

Disciplinary Action Complaints (DACs)

Since workers and employers often disagree about workplace danger, the employer frequently views the refusing employee as insubordinate. Some form of discipline of that worker may follow. Discipline can take many forms, such as suspension, demotion, probation, assignment to less desired shifts, reprimands, loss of pay or benefits, transfer and even dismissal. If a worker is acting in compliance with the workplace health and safety legislation, such as good faith reporting of a safety concern at work, the employer must **not** take disciplinary action of any kind against that worker (section 36).

A worker who reasonably believes he or she has been disciplined for raising a safety concern or refusing to do unacceptably dangerous work may complain to the OHS department. An investigatory and appeal process similar to the imminent danger complaint above is invoked. These DACs currently comprise some 90% of the Alberta OHS Council's appeals. They usually involve mixed issues of performance management and safety and they can be difficult to sort out on the facts as to the real motivations and bases for the discipline. The Council may order reinstatement of the worker on the same terms and conditions under which the worker was formerly employed, cessation of disciplinary action, payment to the worker of lost wages and removal of any reprimand or other reference to the matter from the worker's employment records. Statistically, most DACs are dismissed because, on the facts of the cases, it is not clear that the worker's compliance with the legislation is what *caused* the discipline.

The Canada Labour Code

The *Canada Labour Code*(Part II) was recently amended in response to the large percentage of unjustified or frivolous DACs. The federal Finance Department had found that over 80% of work refusals were unrelated to danger. The definition of "danger" focuses on immediate and severe risks: "any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered." The Minister may batch similar complaints from the same employer and reject appeals considered to be "trivial, frivolous, vexatious or made in bad faith."

Conclusion

Whether it is hard hats that obscure vision, or harassing or violent co-workers, second-hand smoke, prison guards, dangerous machinery, psychiatric patients in hospitals, unarmed border guards, window washers, heavy lifters or roofers, the danger must be imminent and not a normal danger for the occupation. Employees retain the right to refuse work if they reasonably believe the work constitutes a danger to themselves or others. One cannot refuse dangerous work when the refusal itself puts the life, health, or safety of another person in direct danger.

Workplace safety begins with dialogue between employee and employer. The employer must conduct an investigation, and if the employee continues to refuse work, there is a multi-tiered appeal process.

Both employees and employers should be aware of the implications behind an employee's right to refuse dangerous work. Employees must carefully consider work refusals. Unjustified refusal could lead to job discipline. Employers have a legal obligation to maintain safety in the workplace. Safety is everyone's business.

Workplace Bullying: What Employers Need to Know

Posted By: *Jordan Rodney*

Bullying in the workplace is slightly different from bullying seen in the childhood sandbox. There is rarely physical violence or threats (although these are possible), and the tormentors may not always be the most obvious culprits. Instead, workplace bullying may not even be noticeable to an outsider unaware of the situation. Yet a cruel joke, a snide quip at the water cooler, or treating a co-worker in any discriminatory fashion can constitute workplace bullying, and it is never okay.

In recent years, the law has sat up and taken notice of the problem. Some provinces have already adopted specific workplace legislation, while others are looking to move forward. A recent workplace insurance appeal in Ontario highlights some of the changing attitudes in that province, but workplaces everywhere are realizing just how serious a problem workplace bullying can be, and what needs to be done to stop it in its tracks.

What The Law Says

Quebec set the trend in 2004 when the Province's *Act representing Labour Standards(ALS)* formally introduced prohibitions against 'psychological harassment' in the workplace. The ALS defines psychological harassment as "vexatious conduct that is manifested by repetitive behaviours, comments, acts, or gestures: that are hostile or unwanted; that adversely affect the employee's dignity or psychological integrity; [and] that make the workplace unhealthy." It emphasizes that all employees deserve a workplace free from harassment, and this caveat protects employees not covered under the entirety of the Act, such as in-home caregivers, working students, and some others.

Saskatchewan followed suit in 2007, expanding their *Occupational Health and Safety Act*(*OHS*) to include specific prohibitions on harassment based on prohibited grounds (grounds commonly enumerated in human rights legislation), and personal harassment – which includes bullying. The *OHS* defines this as "any inappropriate conduct, comment, display, action, or gesture by a person that: adversely affects a worker's psychological or physical well-being; and, the perpetrator knows or ought to reasonably know would cause the worker to be humiliated or intimidated." The legislation says examples of this harassing conduct include: jokes, malicious gossip, sabotage of another's work, and refusing to co-operate with others. All Saskatchewan employers are obligated to develop a written harassment policy, and ensure that employees are proactively protected from such instances. The policy guide goes into in-depth recommendations on designing harassment policies, and appropriate workplace training.

Other provinces have also made prohibitions against workplace bullying and harassment expressly clear. WorkSafeBC provides employers with template tool kits including a policy guide, sample training, tips on investigations, and posters available for display. The Alberta Learning Information Service also offers definitions of workplace bullying similar to those outlined in other provinces, along with suggestions on how to develop and implement workplace policies, and the legal implications workplace bullying can have if it reaches the level of human rights discrimination or workplace violence. Province by province, workplace laws are beginning to recognize that bullying extends beyond just a 'difficult boss' or 'critical management style,' and it is not okay.

In Ontario, recent case law highlights this changing approach.

A Case In Point

An April 2014 decision from the Workplace Safety and Insurance Appeals Tribunal (WSIAT) highlights the changing approach the law has taken to workplace bullying. In that case, a nurse with a three-decade career had spent the last 12 years being bullied by a doctor who undermined her work with frequent interruptions and public criticism. The nurse was forced to leave her position, and was subsequently treated for anxiety and depression.

Initially, the Workplace Safety and Insurance Board (WSIB) denied the nurse's claim. The *Workplace Safety and Insurance Act* in Ontario only covered mental health claims that were due to "an acute reaction to a sudden and unexpected traumatic event." The claimant filed a *Charter* challenge saying that, effectively, the legislation discriminated against her mental health claims as a result of workplace bullying, suggesting that her illness was not real. She succeeded in her appeal.

In its reasons, the WSIAT held that mental health claims should include those that develop over time, not just instances stemming from a specific sudden event. Ignoring these claims would be akin to denying claims for a work-related back injury that had developed over the long term, or exclusion of all lung cancer claims except for those related to asbestos exposure. Doing so would expressly deny insurance coverage to the bulk of workplace illnesses that develop over prolonged periods, and the

nurse's mental health claim is no different. The appeal decision effectively opens the door for broader insurance coverage of mental health claims in Ontario.

Taking A Closer Look

At the heart of protecting employees against harassment and discrimination is an employer's responsibility to prevent it in the first place. This can be accomplished through effective policies and thorough workplace investigations as required.

The first step to prevention is the implementation of thorough written policies that are clearly expressed to all members of a workplace. While some provinces have legislated the creation of harassment policies, all workplaces could benefit from policies clearly expressing what conduct is not permissible, and applicable penalties for any violations. These policies should be included in all employee manuals, and should also be readily available to all employees as a reference guide. Clear policies not only serve as a guideline for good conduct, but also offer clear standards for employers as to what conduct is prohibited, and what the appropriate punishments for violations should be.

The other half of the employer's responsibility is the importance of conducting thorough workplace investigations once the first signs of bullying or harassment arise. Investigations should be led by a trained professional, such as an employment lawyer or certified HR expert, who can properly assess the situation and issue the appropriate recommendations. Failure by employers or managers to take the problem seriously will only lead to increased challenges, as situations can quickly spiral out of control. An investigator's report will ensure employers are able to respond with full knowledge of the situation, and implement the appropriate measures.

Workplace bullying is a serious problem in Canadian workplaces. Yet as the law sits up and takes notice, and employers become more aware of the problem and how to deal with it, the message to perpetrators will become crystal clear – bullying is never okay, in any venue.

Being Fired: Employment and Identity

Posted By: *Matt Gordon*

Clearing Your Name: Some Basic Rules if You've Been Fired for Fraud

You've just been fired. It's probably affecting you financially and emotionally to a great degree. Worse yet, your (now former) employer is saying it is "for cause" or "just cause", possibly because of as serious an accusation as committing fraud or theft against the company. A just cause firing is not accompanied by notice or by a severance payment, with the implicit understanding that the employee's conduct has been sufficiently bad as to waive those rights.

The impact being fired has on someone is very well recognized in Canadian law. This can be seen in three Supreme Court of Canada cases. In *Reference Re Public Sector Employee Relations Act (Alta.),* [1987] 1 SCR 313, the Court said that "a person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." The Court applied this opinion to employee firings in *Machtinger v HOJ* Industries Ltd., [1992] 1 SCR 986, in which it said that "it has been pointed out that the law governing the termination of employment significantly affects the economic and psychological welfare of employees." The question that arises is what happens when an employer unjustly fires an employee without recognizing this impact on his or her life, and what a fired employee can ask for if he or she seeks to be compensated.

What can the legal system do about it? Can I get money? Can I get my old job back?

Courts can give certain remedies and not others. The general rule is that when people sue and win, they get put back in the position they were before they were wronged. However, certain conduct on the part of the employer can change that. In *Honda Canada Inc. v Keays*, 2008 SCC 39, an employee was fired for

refusing to meet with an employer-selected doctor after the employee provided doctor's notes which the employer did not accept as legitimate. He sued for wrongful dismissal, eventually receiving damages for mental distress. This was a sum set by the Court that exceeded the amount that would have put him in the situation he was in before. These damages are colloquially called "Honda Damages" after this case. They are different from aggravated or punitive damages, neither of which the Supreme Court of Canada felt Keays should receive, in that they do not require the employer to act in a particularly egregious manner. All that was required for Keays to receive mental distress damages was for his employer to reasonably foresee the mental distress that would ensue from his firing and to gain from it financially, both of which happened.

Keays's state of mind following his firing was a significant factor in the Supreme Court of Canada's reasoning. The trial judge's description of Keays's condition explains the original award of mental distress damages the Supreme Court left intact even when it overturned the other special damage awards: "The devastating impact of the termination on Mr. Keays was confirmed by his life partner, Mr. Crews, as well as his physician, Dr. Morris, who almost immediately diagnosed an adjustment disorder with depressive symptoms. He experienced a sense of loss for co-workers he would not be seeing again."(2005 CanLII 8730 (ON SC)) The mention of co-workers draws the employee's sense of self at work directly into the discussion. Although his employer demonstrated suspicion toward the extent of the employee's disability, Honda Canada was not found to have "set him up" through the request to see the employer-approved doctor, nor did it launch any concrete accusations. The bar the Court set for punitive damages was too high to be met here: "punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own." Respecting Keays's self-esteem was about compensating him, not about punishing his employer.

The awarding of damages for mental distress follows the reasoning of earlier cases like *Trask v. Terra Nova Motors Ltd., 1995 CanLII 9836 (NL CA)*. In that case, Trask was fired after seven years of employment for a single supposed theft incident that the employer was unable to prove. The employer then phoned its competitors to alert them of the supposed theft in the event Trask decided to seek employment with them. The damage to Trask's reputation cut to his core: "Carl Trask's father testified that, because of Carl's difficulty in finding employment, he is 'tied up in knots'. He spends all his time at home and rarely goes out, either at night or day. From a cheerful person he has turned into somebody who rarely laughs. Carl Trask testified that he finds it very stressful when he goes outside his home because people ask where he works. He suffered frustration and a loss of self esteem from his inability to find new permanent employment." This evidence was crucial to the Newfoundland Court of Appeal's upholding of a mental distress damage award assessed at trial.

It is important to note, though, that getting put back in the position you were in before or receiving other damages refers to money. Courts cannot reinstate people into their old jobs, nor can they temporarily reinstate fired employees while a lawsuit is ongoing. In *Sharma v London Life Insurance Co.*, 2005 CanLII 27324 (ON SC), two employees fired for a fraud accusation asked to have their old jobs back while their wrongful dismissal suit was ongoing, as well as to force their former employer to write letters to their old clients explaining that the Sharmas had not committed fraud. The court sympathized with

their situation but denied their application, saying that it did not have the power to make their former employer do either of those things.

An exception to this rule is that it is common in unionized workplaces for labour arbitrators to be able to reinstate fired employees. If you are in a unionized workplace and you are fired, make sure to read your collective bargaining agreement in order to see what your rights and obligations are. That document is often available in a small, “pocket” form.

The usual alternative to a trial is to settle the dispute out of court. The vast majority of cases settle, either during negotiations between the parties or with a third-party neutral mediator present. Unlike the rigid rules and often limited variety of solutions seen in court, settlement agreements can include apologies, reinstatement, or any number of other provisions the parties agree to include. Settlements generally do not include admissions of liability or guilt from either side. It should be highlighted that following this option only allows someone to receive what the other party is willing to give, and if the firing was particularly acrimonious, this may not be much.

Being fired can be among the worst experiences of a person’s life. Being fired while accused of fraud or theft can be damaging to someone’s reputation, career path, self-esteem and sense of self. Courts consider this reality when setting remedies and damages, which is important in wrongful dismissal lawsuits to employees and employers alike.

Independent Contractor or Employee

Posted By: *Caitlin Butler*

With business culture evolving, we see increasingly varied means to manage one of the most expensive and critical components of a business – human capital. Whether a business is motivated to reduce labour costs, streamline available skills, or minimize staff during slower periods, businesses are tending to engage independent contractors (ICs) as compared to employees. For the purposes of this article, unless otherwise stated, an IC is a self-employed individual, whether incorporated or not. Note that this discussion may not apply to contracts entered into in Quebec.

How do I know if I am an employee or IC?

At first blush, it may appear easy to determine whether individuals are employees or ICs. Have they signed an employment contract? Did they receive a T4 Statement of Remuneration Paid from the payer? Do they report 'employment income' or 'business income' on their tax returns?

However, simply examining these factors is not sufficient to determine the actual nature of the relationship. Interested parties, such as CRA and the courts may look beyond surface indicators to determine the legal nature of the relationship. They most commonly begin by examining the intention of the worker and the payer.

A common intention can be communicated in a number of ways – for example, in emails, an informal verbal arrangement, or a formal written agreement. In other words, a contract between the worker and payer may assist in providing support to CRA or a court of a certain intention. However, quite often these contracts may not be afforded much weight if the nature of the relationship is not consistent with the expressed intention.

That said, a contract can provide another very important role in documenting the terms of the relationship.
After considering the intention of the worker and payer, CRA and the courts normally consider the following five main factors:

1. Control

Control is the ability, authority or right to determine the manner in which a worker performs the work to be done. The degree of control a payer has over a worker may indicate whether the worker is an IC or employee (though the industry may also impact type and degree of control).

It is the right of a payer to exercise this control that should be considered, rather than whether or not they actually exercised it. More control is generally exercised over employees than ICs. Control is often the most critical element in these decisions.

Factors that may indicate an employment relationship include:

- the payer directs, schedules and controls the work;
- the payer determines the specific tasks the worker will perform;
- the payer has the final say on all decisions and actions;
- the payer trains the worker on how to do the work;
- the relationship is one of subordination;
- the worker requires permission of the payer to work for others.

2. Equipment and Tools

Consider who owns, rents or leases the tools to do the work. A worker who has made a significant investment in a tool is likely to retain significant rights over the tool, thereby diminishing a payer's control.

Tools can range from the equipment required for the work, to the workspace used to do the work and even intellectual tools such as training and experience.

Factors that may indicate an employment relationship include:

- the payer supplies most tools and is responsible for repairs, maintenance and insurance;
- the payer reimburses the worker for supplying their own tools.

3. Opportunity for Profit

Consider whether a worker can realize a profit or incur a loss. ICs have the ability to pursue and accept contracts, whereas employees are not normally in a position to realize a business profit or loss. Even if employees are paid based on commissions, or provided a production bonus, the increase in income is not usually considered profit.

Factors that may indicate an employment relationship include;

- the worker cannot accept or reject projects;
- the worker cannot schedule their own work;
- the worker is entitled to benefit plans normally only provided to employees;
- the worker cannot hire a substitute, or the payer pays for the substitute;
- the worker is assigned other tasks at no extra remuneration so the efficiency of completing their work does not enhance their income.

4. Financial Risk

Consider any ongoing costs the worker may bear. Employees do not usually bear financial risk, as costs they incur may be reimbursed, and they do not have fixed ongoing costs.

Factors that may indicate an employment relationship include:

- the worker is not usually responsible for operating costs;
- the worker is not financially liable if he does not fulfill obligations of the contract. For example, deficiencies in the work are not corrected at the worker's own cost or time;
- the payer determines and controls the method and amount of pay.

5. Integration

Consider integration of the worker's job in the payer's business. An employee is generally more integrated into a business, as compared to an IC, which is more ancillary to the business.

If the worker or payer is unsure of the relationship, either party can request a ruling from CRA to have the status determined.

Further discussion on these considerations can be found on the CRA website and in their Guide RC4110 – Employee or Self-employed. CRA also provides specific commentary on certain industries (eg. real estate and construction) that tend to trigger more questions.

The Impact of an IC being considered an Employee – What's the Downside?

The debate over whether an individual is an employee or IC may seem insignificant at first, however, for those affected, it can be crippling. Though the tax costs can be high, other non-tax considerations can also significantly impact a payer and worker.

Payers are not required to withhold certain source deductions such as the Canada Pension Plan (CPP) and Employment Insurance (EI) premiums for ICs. However, subject to a few certain exceptions, employers are required to withhold these amounts for employees. CRA will often assess the payer with CPP and EI premiums (for both employer and employee portions) when they consider an individual to be

an employee rather than an IC. This can be a costly bill. For example, a corporation engages 10 ICs for many years paying them $50,000 annually. If CRA assesses all ten workers as employees for the preceding three years (which is commonly the case), the bill for the CPP would exceed $130,000. CRA may also assess EI, and penalties and interest on the total balance due. Often, these disputes arise when an IC is terminated and applies, perhaps incorrectly, for EI.
The financial costs do not necessarily end with the tax bill, however. Individuals considered employees may be entitled to benefits and rights, such as overtime pay, vacation pay, and minimum wage, included in their province's respective Labour Standards or Employment Standards Codes.

Take, for example, the $180 million class-action lawsuit brought against the Canadian Hockey League (CHL) alleging that the junior hockey players are in fact employees and not ICs. The lawsuit claims that, as employees, the players are entitled to a minimum wage, as well as certain other benefits such as holiday, overtime and vacation pay,and is claiming punitive damages. Further, if the workers are found to be employees, the CHL may also be liable for additional amounts (if challenged by CRA), such as CPP and EI.

The Impact of an Employee being considered an IC – What's the Downside?

In some cases, an individual may apply to Service Canada for certain employment benefits, such as employment insurance (EI), maternity or paternity leave or disability benefits, only to be denied on the basis he or she is an IC. For example, individuals may believe they are entitled to maternity or paternity benefits and budget accordingly. When the baby arrives, and benefits are denied, the family may suffer significant financial costs and stress.

Also, should workers be considered ICs and not employees, they could face GST/HST issues due to failure to collect and remit this tax.

Incorporated Independent Contractors (ICs) – The Personal Service Business (PSB) Issue

One common way payers try to avoid being considered an employer is to require their workers to incorporate. The corporation then provides the worker's services. This may offer benefits to both parties: the payer is not subject to 'employment' benefit rules, and the worker may enjoy tax advantages unavailable to employees. However, if the relationship would be one of employment, absent the corporation, the arrangement may be considered a PSB, attracting significantly higher taxes.

Incorporated workers must be diligent to ensure that they are not engaged in an 'employment-like' relationship. Similar considerations as those mentioned above would determine whether a PSB exists. However, the courts may not consider the intention of the parties in analyzing such relationships.

Conclusion

As the above indicates, the classification as an employee or IC carries significant implications for both parties. Both should take proper care to ensure appropriate treatment.

Public Interest Standing and the Bedford Case

Posted By: *Juliana Ho*

According to law professor Jane Bailey, inaccessibility of justice is becoming an increasingly prevalent problem for middle-class Canadians. Exorbitant fees and lengthy timelines often act as barriers for many who may be interested in having their concerns formally heard and addressed through the legal system [1] [2]. Judicial capacity to grant public interest standing, she argues, is an effective way to bring a legal challenge forward when there are no other reasonable and effective alternatives, by allowing litigants the chance to challenge government actions that could have broad social effects. This article seeks to provide a very brief overview of public interest standing, before turning to look at how the line of *Bedford* cases contributes to the conversation.

Public Interest Standing

According to the 1975 Supreme Court of Canada decision in *Thorson v. Attorney General of Canada,* [1975] 1 SCR 138 the principle that legislation should always be open to constitutional review forms the basis of many public interest standing cases. Foreseeably, if an individual identifies a justiciable and substantive legal issue, it would be alarming should there be no way to make these concerns the subject of judicial review. While *Thorson* was foundational to spearheading the conversation on public interest standing, a clear test was not laid out until *Canadian Council of Churches v Canada (Minister of Employment and Immigration),* [1992] 1 SCR 236 which outlines the three considerations that must be met:

1. Is there a serious issue raised as to the invalidity of legislation in question?
2. Has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity?
3. Is there another reasonable and effective way to bring the issue before the court?

Around twenty years later in 2012, the court's method of considering public interest standing undertook a significant shift in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence,* 2012 SCC 45 *(*the *SWUAV* decision). Rather than considering the test as consisting of three distinct items on a "checklist," the court held that the three considerations must be assessed and "weighed cumulatively rather than individually" in a purposive and flexible way. The court focused on the third branch of the

test and noted that while this factor had often been considered a strict and rigid requirement, it would be more appropriate to broaden the factor in a way that considers instead, "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court." In other words, public interest standing would no longer be limited only to cases for which there is no other reasonable and effective way to bring the issue forward. Rather, assessing whether public interest standing would be granted would more broadly consider whether the proposed action is an "economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination … and whether permitting the proposed action to go forward will service the purpose of upholding the principle of legality." This change certainly renders the requirements much more flexible, which better reflects the need to hold laws open to judicial scrutiny. Allowing more achievable opportunities for the most marginalized members of society to participate in the legal conversation pertaining to issues of direct concern allows the court to take additional perspectives into account when adjudicating important social issues. Further, those that may otherwise be excluded from the legal system for lack of resources would be better able to advocate for the rights and protections provided by the *Charter*. [2] [2]

The *Bedford* Case

As Justice Himel wrote in 2010, there "has been a long-standing debate in this country and elsewhere about the subject of prostitution. The only consensus that exists is that there is no consensus on the issue." (*Bedford v Canada (Attorney General)*, 2010 ONSC 4264) While adult prostitution has never been a crime in Canada, the place of sex work within the Canadian legal system remains highly stigmatized and continues to generate debate that both supports and condemns the practice.

In 2010, three former and current sex trade workers – Terri Jean Bedford, Amy Lebovitch and Valerie Scott sought an order to declare three *Criminal Code* provisions that regulate prostitution – s. 210: keeping/occupying a bawdy house, s.212(1)(j): living off the avails of prostitution and s.213(1)(c): communicating for the purposes of prostitution – illegal. The court held that all three applicants were entitled to private interest standing because in being unable to "engage in their livelihood, either safely or at all, by the provisions," they "have a direct, personal interest in the outcome of this application that is different than the general members of the public." The Attorney General of Canada did not dispute Ms. Lebovitch's private interest, because she was working as a prostitute at the time of hearing. However, because Ms. Bedford and Ms. Scott were no longer employed as sex workers at the time, the Attorney General of Canada argued that they were not in a position to be awarded private standing.

Accordingly, one of the court's considerations was whether Ms. Bedford and Ms. Scott should be granted public interest standing instead. Justice Himel noted that while the applicants "raised a serious issue as to the constitutional validity of the impugned provisions and have a genuine interest in their validity," they failed to establish that there was "no other reasonable and effective way to bring the issues raised in this application to court" and as such, could not be successful in gaining public interest standing.

The Attorney General of Canada appealed Ms. Bedford and Ms. Scott's standing to bring the constitutional challenge; this was considered in brief by the Ontario Court of Appeal two years later, in 2012 (*Canada (Attorney General) v. Bedford*, 2012 ONCA 186). In its written judgment, the court reiterated that Ms. Lebovitch had private interest standing to challenge the three impugned provisions. The Court held that because this places "all the constitutional issues squarely before the application judge and now places them before this court," "Ms. Bedford's and Ms. Scott's standing is irrelevant" and as such, was not further discussed in that case, or in the Supreme Court's written judgment, released in 2013.

The refusal of higher courts to address matters of public interest standing in further considerations of *Bedford* is unfortunate, because the Ontario Superior Court's assessment was released two years prior to the *SWUAV* decision, which radically changed the third branch of the test. While it's true that Ms. Lebovitch's private interest in the matter renders further discussions of public interest standing irrelevant, it would undoubtedly have been fascinating to see such significant changes to the law within such a narrow frame. The importance of public interest standing as a method of allowing those without a personal claim to voice concerns about our laws is certainly vital to broader issues of accountability and as such, should not be overlooked.

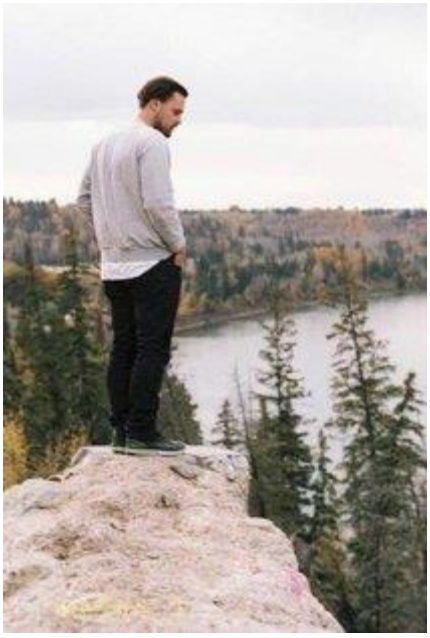
Notes:

1. Jane Bailey (2011) "Reopening Law's Gate: Public Interest Standing and Access to Justice [8]" UBC Law Review 44 (2)

2. Dana Philips (2013) Public Interest Standing, Access to Justice, and Democracy under the Charter: *Canada (AG) v Downtown Eastside Sex Workers United Against Violence* [9]", *Constitutional Forum 22(2)*

Can Administrative Agencies Grant Common Law Public Interest Standing?

Posted By: *Adam Driedzic*



Whether administrative agencies can grant public interest standing the way that courts do is an unsettled question. This question usually arises at environmental agencies whose enabling legislation provides standing based on affected personal interests. Multiple court cases have found that specific agencies have "no jurisdiction" to grant a discretionary form of standing, but these cases have not produced principles of broader applicability. Diving into this debate requires familiarity with the principles of public interest standing developed by the courts and covered in the article "Public Interest Standing and the *Bedford* Case" in this issue of Law Now.

The Environmental Front

Environmental agencies are ground zero for the question because their decisions impact public interests, but the legislation under which they operate often requires that persons be directly affected to receive standing. Environmental impacts are usually indirect, so often, no one is directly affected and issues go unheard. On public land where few citizens have property or economic interests, industrial developments can sometimes be approved with no hearing, even if they impact landscapes, drinking water, air quality, wildlife, recreational opportunities and countless other public values. Conversely, some hearings with open standing such as the Northern Gateway Pipeline hearings suggest that there can be too much public participation. The appeal of public interest standing is its ability to "strike a balance" between broad and narrow standing. Despite this appeal, the debate over public interest standing at agencies is not about what works but rather about maintaining the institutional roles of courts, legislatures and administrative agencies.

Standing in Court vs. Standing at Administrative Agencies

The question originates from the difference between courts and administrative agencies. Courts are independent institutions with constitutional status alongside the legislative and executive branches of governments. Their role is to decide legal questions through the adversarial model and to uphold the rule of law. Administrative agencies are extensions of the executive branch of government. Their decision-making mandates are delegated through ordinary legislation and vary immensely. This institutional difference raises two sub-questions. One is whether agencies have authority ("jurisdiction") to grant a discretionary form of standing where legislation provides for standing. The other is whether the principles of common law standing even apply, and if so, whether is available.

While courts have inherent jurisdiction to determine standing, administrative agencies must find their jurisdiction to determine standing under legislation. The most important indicator of jurisdiction is legislated provisions on standing, but the broader scheme of the legislation mandating the agency is also relevant.

Even if an agency has discretion to grant standing, it is not clear that common law public interest standing is available. The narrow range of "serious issues" for which it has been made available would preclude many agency matters like the hearing of substantive environmental concerns or requests for environmental protection action. Reasons **for** standing are more closely tied to agency mandates while those **against** standing are more readily applicable as they resemble general concerns with decision-making efficiency and certainty. In any event, where legislation provides a test for standing, the agencies and the courts that review agency decisions are apt to look narrowly at the standing test.

The Court Cases

There are very few court cases on the availability of public interest standing at environmental agencies. These cases do not form a cohesive body of law or offer principles of general applicability as each is focused on the legislation and agency in question. Nonetheless, these cases are all somewhat similar; they all:

- featured appeals tribunals with legislated tests requiring affected personal interests;
- found that public interest standing was not available; and
- reached this conclusion by distinguishing the jurisdiction of courts and agencies and by taking a narrow interpretive approach of legislation providing agency jurisdiction.

In two mid-1990s cases – *Friends of Athabasca Environmental Association v. Public Health and Advisory Appeals Board*, 1994 CanLII 8931 (AB QB) and *Canadian Union of Public Employees Local 30 v. WMI Waste Management Inc.,* 1996 ABCA 6 – the Alberta Court of Appeal upheld denials of public interest standing to challenge the approval of a waste management facility. It held that the "directly affected" test indicated the legislature's intention to require personal interests and made passing reference to the "floodgates" concern. These cases have never been revisited by the Alberta Court of Appeal and may be

unreliable authorities as they equated being directly affected with being differently affected from the community at large.

In the 2012 case of *Alberta Wilderness Association v. Alberta (Environmental Appeals Board)*, 2013 ABQB 44 the Alberta Court of Queen's Bench upheld a denial of public interest standing to challenge a water licensing decision. The court dismissed arguments for a more contextual analysis of agency jurisdiction and did not consider any case law on standing. The brevity of this decision is unfortunate as the facts provided an ideal test case for the questions of jurisdiction and the test for public interest standing. Concerning jurisdiction, the Alberta *Water Act* under which the original decision was made only provided appeal rights to directly affected persons, but the *Environmental Protection and Enhancement Act* under which the agency was created suggested broader discretion. Concerning the test for standing, the organizations sought to raise an issue with the legality of a decision which was an issue for which public interest standing is available and suitable for determination by the agency.

This scenario would force consideration of whether the "justiciable" issue requirement means that public interest standing is only for use in the courts, or whether the legality rationale should prevail and allow the issue to be heard. The agency had already found that the organizations held a genuine interest although they were not directly affected, and this would have been a reasonable means as there was no practical likelihood that directly affected persons would appeal. The perverse outcome of *Alberta Wilderness Association* is that the legality of a decision was shielded from scrutiny by the same agency whose role it is to scrutinize such decisions.

In the 2014 case of *Gagne v. Sharpe,* 2014 BCSC 2077 the British Columbia Supreme Court overturned a denial of standing by the British Columbia Environmental Appeals Board for reasons of unfairness, overly high standards of evidence and unnecessarily requiring that incorporated organizations show that their members had standing. In reaching this conclusion, it considered some of the judicial policy rationales articulated by the SCC in public interest standing cases including access to justice. However, the court provided *obiter dictum* (an after the decision opinion) that the agency lacked jurisdiction to grant common law public interest standing, even if the "genuine interest" factor would work to separate valid challengers from busybodies. This decision provides a stark contrast between the court's willingness to intervene in denials of standing under the agency regime and its unwillingness to recognize the availability of public interest standing.

Outstanding Uncertainties

The question of jurisdiction is hard to settle by litigation as the legislation mandating the specific agency always matters. None of the above cases necessarily reached the wrong conclusion but their reasoning is problematic. The courts' strict interpretation of the legislated tests is contrary to the consideration of context in interpreting the law used in most civil matters and avoids considering the principles of common law public interest standing. The outcome is in stark contrast to the courts' willingness to intervene in denials of standing under the legislated tests. The answer to the question of jurisdiction is also obscured by the fact that agencies inclined to trigger hearings could simply interpret the legislated

tests more broadly. These decisions would likely be upheld. Agency decisions to grant standing are almost never overturned.

A further uncertainty is created by the fact that agencies use public interest standing to screen parties once hearings are triggered. For example, in 2012 the environmental assessment review panel for the New Prosperity Mine used the SCC's public interest standing principles to screen parties where a hearing was certain to occur.

Finding that administrative agencies can grant common law public interest standing to trigger hearings or to add parties would expand the situations where it has been recognized as available to date. Cases so far do not prohibit this recognition, but the debate may become academic if repeat denials of standing deter public interest advocates from seeking standing.

Access to Justice in a post-SWUAV Courtroom

Posted By: *Sarah Burton*

In September 2012, the Supreme Court of Canada significantly changed the law on public interest standing. It did so under the banner of advancing access to justice. After being released, *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*, 2012 SCC 45 [*SWUAV*] received praise for making *Charter* litigation reachable to vulnerable groups who could not otherwise access the justice system. After providing a brief refresher on the *SWUAV* decision, this article examines whether the decision has lived up to its promise. Subsequent case law reveals that, while *SWUAV*'s full potential has yet to be realized, its early development is a reason for optimism among access to justice advocates.

The SWUAV Decision

SWUAV asked if a community group focused on protecting sex workers had standing to challenge the prostitution provisions in the *Criminal Code*. Justice Cromwell, speaking for the unanimous Supreme Court, agreed with the Court of Appeal that public interest standing should be granted. In doing so, however, he inserted a critical change into the last stage of the traditional three-part test. While the classic test asked if "there is **no other** reasonable and effective manner" to bring the case to court, *SWUAV* modified the question to ask if public interest standing "**is a** reasonable and effective manner" to bring the issue to court. In making this determination, a number of contextualized, non-determinative factors can be considered (*SWUAV* at para 51).

While this change may seem trivial, make no mistake — it is powerful. This seemingly innocuous modification removed the most significant hurdle faced by public interest litigants since the 1992 decision in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 [3] [*Canadian Council*]. Prior to *SWUAV,* the very idea that a potential — even hypothetical — private litigant existed could (and often did) defeat otherwise compelling public interest suits from

proceeding. The circumstances and restrictions faced by these hypothetical private litigants were not considered in any consistent manner.

The rationale for the Court's change of heart is equally compelling. Justice Cromwell, a known advocate on the topic, expressed public interest standing as an access to justice issue (*SWUAV* at para 51):

> *Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected.*

This statement acknowledges that disadvantaged and marginalized groups, no matter how directly their rights are affected, often cannot participate in the justice system without mechanisms like public interest standing. It thus removes the blanket justification that public interest standing should always take a backseat when private litigants exist.

Civil justice advocates have praised *SWUAV* for changing the conversation on public interest litigation. Instead of creating a gate to keep out "mere busybodies" (a concern accused of being overblown), the test for public interest standing is now a conversation about the most effective way to adjudicate issues engaging the public interest. For example, see Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the Charter: *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*", 2013 Constitutional Forum 22(2). Proceeding in this fashion is not only more efficient, it also eases the significant burden placed on Canada's most vulnerable and marginalized people to bring forward cases in their personal capacities.

In the two years since *SWUAV* was released, has it actually done anything that can be viewed as increasing access to justice? The following section considers the case law developed in the wake of *SWUAV.*

Post – SWUAV Case Law: Canadian Doctors for Refugee Care v Canada (Attorney General)

Any fear that *SWUAV* would create a flood of busybodies advancing improper suits has not materialized. At the time of writing this article, *SWUAV* had been judicially considered 45 times. Public interest standing was granted on 12 of occasions and rejected 19 times (the remaining 14 cases were decided on other grounds, or dealt with different issues).

Some of these 12 successful rulings provide stirring insight into how *SWUAV* can make the justice system accessible to Canada's marginalized populations. One particularly pertinent example is *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 [5] [*Canadian Doctors*]. This decision ultimately declared that government cuts to refugee claimant health benefits were unconstitutional. As a preliminary issue, the government argued that three public interest groups should not be granted standing, because refugee claimants could advance their claims individually (*Canadian Doctors* at para

329). Notably, the federal government succeeded on nearly identical argument in 1992's *Canadian Council* decision, which also dealt with court challenges by refugee claimants (*Canadian Council* at para 40).

In a clear departure from *Canadian Council*, the Court was not persuaded by the government's reasoning. Adopting *SWUAV*'s contextual and practical analysis, the judge focused on the realistic, lived experience of refugee claimants living in Canada with serious health concerns. Despite the fact that these refugee claimants had standing as of right, this population would be particularly reluctant to challenge the very government from whom they were seeking protection. In addition, these refugee claimants frequently lacked the financial resources or health stamina to launch constitutional litigation. Lastly, the Court remarked that it would be inefficient to require many individual claims where the constitutionality could be addressed in one coherent and comprehensive lawsuit (*Canadian Doctors* at paras 338 – 344).

While *Canadian Doctors* is perhaps the most demonstrative decision of *SWUAV*'s impact, it is not the only reason for optimism. In *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, the Supreme Court of Canada granted public interest standing to a group representing Métis rights, despite the fact that private interest litigants were involved in the suit as well. Drawing on *SWUAV*'s considerations, the Supreme Court held that the group's involvement was an effective and reasonable way to represent the collective interests at issue in the suit. A similar result was reached in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2012 BCCA 422, where the Court of Appeal held that the involvement of a genuinely interested public interest litigant would actually increase efficiency in the courtroom.

This brief sampling of post-*SWUAV* case law is not comprehensive, and it does not seek to present the court as the champion of access to justice. Indeed, courts have received ample criticism for not doing as much as they could. However, while no single program or initiative will solve the multi-faceted and complex barriers to our justice system, the expansion of public interest standing is one area where the Supreme Court has seemingly gotten it right. By creating inroads for marginalized groups to challenge initiatives of broad public interest, the Supreme Court has reduced the gap between the rights that people possess in theory and those they enjoy in reality.

Viewpoint 39-3: Canada's Asbestos Policy: Economics trump global health concerns

Posted By: *Suman Gupta*

Asbestos was once considered so safe it was used as an ingredient in toothpaste. Today asbestos is recognized as a potent carcinogen by health experts and scientists worldwide. Despite this, in Canada it seems economic concerns take precedence over health when it comes to the international trade of asbestos.

History of asbestos

The history of asbestos and its uses goes back to ancient times. The ancient Greeks and Romans are known to have woven asbestos into cloth for funeral dress and shrouds, wicks, and napkins that could be easily cleaned by simply throwing them on fire.

Asbestos refers to six naturally occurring fibrous minerals found all over the world. Asbestos fibres have several unique, desirable qualities—such as low conductivity and resistance to high temperature and chemical attack—making them ideal for use in hundreds of products and applications.

What is it used for?

From the 1930s to 1990 there was widespread use of asbestos in house-building materials in Canada. Today asbestos can be found in insulation board, shingles, ceiling and floor tiles, and certain types of cement.

When does it pose a health threat?

Asbestos is believed to pose little risk when encapsulated in housing materials that are in good condition, and is only considered a health hazard when its fibres are present in the air.

According to Health Canada, health risks caused by asbestos depend on the

- concentration of fibres in the air
- length of exposure time
- frequency of exposure

- size of fibres inhaled
- amount of time since first exposure

When inhaled in large quantities or over a long period of time, the fibres present in the air accumulate in the lungs, causing irritation and inflammation that can reduce lung function and cause serious forms of cancer.

Politics and bad science

Despite asbestos being strictly regulated in Canada under the *Hazardous Products Act* (1985), Canada is the fifth largest exporter of chrysotile asbestos. In June 2011 the government released a statement that "all scientific reviews clearly confirm that chrysotile [white asbestos] fibres can be used safely under controlled conditions."

This stance is at odds with many studies indicating that, although the nature of chrysotile fibres makes it less potent than other types of asbestos, chrysotile is still a powerful carcinogen known to cause cancers of the lung, mesothelium, and ovaries.

A potent carcinogen

In 2008 Health Canada created a panel of international experts to discuss the potency and carcinogenic effect of chrysotile asbestos relative to other forms of asbestos. The views expressed at the panel were divergent, but there was consensus that chrysotile asbestos is a potent carcinogen that causes lung cancer.

The results of the panel's report were delayed for more than a year, causing members of the panel to speculate about the Canadian government's misrepresentation of science to determine policy and economic agendas.

Lone exporter

Canada is the only G8 country still exporting asbestos. In 2011 Canada moved to block the listing of chrysotile asbestos as a hazardous product on the Rotterdam Convention, a United Nations treaty that encourages shared responsibility in the international movement of hazardous chemicals.

This is not the first time Canada has lobbied to keep chrysotile off the Rotterdam Convention: in 2006 the government rejected Health Canada's advice that chrysotile be added to the list.

The treaty was devised to protect health and the environment by creating a "right to know" process called Prior Informed Consent (PIC). Under PIC, countries exporting potentially hazardous materials are obligated to inform importers of any health or environmental risks of materials, allowing the importing countries to make informed decisions and exercise safe handling practices.

It is ironic that millions of dollars have been spent in Canada to remove asbestos from public buildings, including Parliament Hill and 24 Sussex Drive (the prime minister's residence), due to its carcinogenic nature and potential health risk. Yet we continue to export asbestos to India and South Asia, while 100,000 people worldwide die each year of asbestos-related diseases.

Asbestos and health

As mentioned previously, asbestos is only considered hazardous to health when fibres are inhaled, and one-time exposure to asbestos is unlikely to cause illness. There are several conditions that have been linked to asbestos, and most develop many years after long-term or high-level exposure. The time from asbestos exposure to onset of an illness is called the latency period.

Pleural plaques

The most common condition to result from exposure to asbestos is pleural plaques. Pleural plaques are non-malignant collagen fibre deposits that can become calcified. These can occur after low-level exposure to asbestos, and generally lack symptoms.

Even though pleural plaques are relatively benign, the presence of this condition indicates past exposure to asbestos has likely occurred. If you have been diagnosed with pleural plaques, have regular medical checkups to help monitor and mitigate onset of serious asbestos-related diseases such as asbestosis or mesothelioma.

Asbestosis

Caused by long-term exposure to high levels of asbestos, asbestosis has a latency period of 25 to 40 years. Inhaled asbestos fibres become trapped in lung tissue, and as the body attempts to dissolve the fibres, scarring and hardening of the lungs occur. This condition reduces lung function such as the ability to deliver oxygen and remove carbon dioxide from the blood.

Asbestosis also decreases total lung capacity (the maximum volume lungs can be expanded). Symptoms include shortness of breath, dry cough, chest pain, and difficulty undertaking physical activity. Although itself non-malignant, asbestosis increases the risk of developing cancers of the lung or mesothelioma.

Lung cancer

Having past work-related exposure to asbestos significantly increases the risk of developing lung cancer, and combining this past exposure with smoking is a deadly combination. Asbestos exposure alone increases lung cancer risk five-fold, and heavy smoking alone increases risk ten-fold. In combination, the risk jumps by 50 to 90 times.

Ovarian cancer

Recent studies have confirmed that asbestos exposure has been linked to development of cancer in the ovaries. The mechanism for how this occurs—or how asbestos fibres find their way into the ovaries—is still not understood.

Mesothelioma

This rare form of cancer occurs in the mesothelium, the protective lining of several organs and body cavities. Past exposure to asbestos is the main cause of mesothelioma.

There are three types of mesothelioma:

- pleural (attacking the lining of the lungs and chest)
- peritoneal (affecting the abdominal cavity)
- pericardial (affecting the membrane of the heart)

Pleural mesothelioma is the most common form and accounts for 66 percent of cases. Symptoms of pleural mesothelioma include persistent dry cough, bloody cough, painful breathing, and persistent pain in the chest and rib cage area. Symptoms for all forms of mesothelioma include fatigue, night sweats, fever, and unexplainable weight loss. The latency period is anywhere between 20 and 50 years.

If you know or suspect you've had long-term or high-level exposure to asbestos in your home or workplace, it is important to meet with your health care practitioner regularly to catch any developing conditions early on. If you smoke, it is important to quit right away.

Dangerous DIY home repairs

Another major source of asbestos exposure is building materials uncovered by home renovations. Most housing materials containing asbestos do not pose health risks, provided the materials are in good condition. If you discover asbestos-containing materials in your home, it is often best to leave them intact and undisturbed.

Airborne fibres

However, some materials disintegrate easily and can release asbestos fibres into the air; these materials are known as "friable." Friable materials include, but are not limited to, attic insulation, spray-on popcorn ceilings, sprayed fireproofing, and sprayed thermal insulation.

Bound fibres

Nonfriable materials, such as asbestos cement products and asbestos ceiling and vinyl floor tiles, contain asbestos fibres that are "bound." They are not released into the air except through damage caused by repair, maintenance, renovation, and demolition activities, such as sanding, drilling, and cutting.

Professional removal

If you know or suspect you have asbestos-containing materials in your home that are friable, in bad condition, or have been damaged, it is important to seek out professional help to remove or encapsulate the material right away.

By taking proper precautions you can reduce your risk of being exposed to asbestos. As for citizens of developing nations who are receiving Canada's dangerous asbestos exports, it is up to us to pressure our government to take a responsible stance.

Additional asbestos info

Are you thinking of renovating your home or want to learn more about how to avoid exposure to asbestos? Check out the following resources to help keep you and your family safe:

Health Canada –
hc-sc.gc.ca/hl-vs/iyh-vsv/prod/insulation-isolant-eng.php

http://healthycanadians.gc.ca/healthy-living-vie-saine/environment-environnement/outdoor-air-exterieur/asbestos-amiante-eng.php

United States Environmental Protection Agency – epa.gov/asbestos/pubs/ashome.html

The Mesothelioma Center – asbestos.com/abatement/

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The Right of First Nations Peoples to a Representative Jury

Posted By: *Linda McKay-Panos*

On November 21, 2014, in *R v Kokopenace,* the Supreme Court of Canada granted leave to appeal a case from the Ontario Court of Appeal (2013 ONCA 389). The case deals with what duty the Ontario government has to ensure that First People who live on reserve are included on jury rolls (list of potential jurors). A majority of the Ontario Court of Appeal (per Justice LaForme) quashed Kokopenace's manslaughter conviction, holding that his rights were violated when the Ontario government failed to ensure First Nations peoples were properly represented in jury trials.

Until 2000, Indian and Northern Affairs Canada (INAC) compiled lists of First Nations persons for jury rolls. These lists were used in the situation where band electoral lists were not available. In 2001, INAC stopped providing band lists because of privacy concerns. The key issue in the *Kokopenace* case was the Ontario government's efforts to address problems that had arisen since the INAC band lists were not available, as this had an impact on the right to a representative jury.

The Ontario courts relied on a report prepared by Justice F. Iacobucci, *First Nations Representation on Ontario Juries*(2013) for data on why Aboriginal on-reserve residents were reluctant to participate in the jury selection process. Reasons included:

- their views about conflict resolution;
- systemic discrimination experienced by First Nations people within the justice system;
- a lack of knowledge about the justice system and the jury system;
- the desire by First Nations leaders to assume greater control of justice matters in their communities; and
- concerns for the protection of privacy rights.

Additional concerns included some aspects of the content of the questionnaire itself (e.g. penalty for non-response) and the requirement to declare citizenship. The Iocabucci Report concluded that the *ad hoc* system for identifying jurors was ineffective, and thus, results in a jury roll that is unrepresentative of all First Nations peoples on reserve. While the report focused on the situation in Ontario, Justice Iocabucci noted that the problem with underrepresentation of First Nations peoples on juries exists in a number of Canadian provinces, as well as in New Zealand, Australia and the United States.

The major issues in *Kokopenace* were the scope of the right to representativeness on the jury roll under sections 11(d) (presumption of innocence), 11(f) (right to a jury trial in some circumstances) and/or 15 (equality under the law) of the *Canadian Charter of Rights and Freedoms,* and whether Ontario violated that right.

In the Supreme Court of Canada case of *R v Sherratt, [1991] 1 SCR 509*, Justice L'Heureux-Dubé held that the "representativeness right" is an essential component of the right to trial by jury:

> The perceived importance of the jury and the *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place.

In *Kokopenace*, the Ontario Court of Appeal relied on the idea that the representativeness right may also be supported by *Charter* section 11(d), in that it is an important means of ensuring impartiality (relying on *R. v. Church of Scientology of Toronto, 1997 CanLII 16226 (ON CA)*). Further, the Court noted that the representativeness right must inform the entire jury selection process. The process must begin with a properly representative jury roll, before the jury selected from it will have the required element of representativeness.

What is the appropriate content of the right of representativeness? Must the jury roll be representative of all groups that make up Canadian society? Justice Rosenberg of the Ontario Court of Appeal in *Church of Scientology*, above noted that:

> *The right to a representative jury roll is not absolute in the sense that the accused is entitled to a roll representative of all of the many groups that make up Canadian society. This level of representativeness would be impossible to obtain. …*
>
> *Further, the critical characteristic of impartiality in the petit jury is ensured, in part, by the fact that the roll and the panel are produced through a random selection process. To require the sheriff to assemble a fully representative roll or panel would run counter to the random selection process. The sheriff would need to add potential jurors to the roll or panel based upon perceived characteristics required for representativeness. The selection process would become much more intrusive since the sheriff in order to carry out the task of selecting a representative roll would require information from potential jurors as to their race, religion, country of origin and other characteristics considered essential to achieve representativeness. The point of this is not to demonstrate that a jury panel or roll cannot or should not be representative, but that the right to a representative panel or roll is an inherently qualified one. There cannot be an absolute right to a representative panel or roll.*

> *What is required is a process that provides a platform for the selection of a competent and impartial petit jury, ensures confidence in the jury's verdict, and contributes to the community's support for the criminal justice system.*

The Ontario Court of Appeal emphasized that the right to a representative jury roll is qualified. For example, "it does not require a jury roll in which each group is represented in numbers equivalent to its proportion of the population of the jury as a whole". This would be practically impossible and any attempt to achieve this type of representation would not work with random selection process that is used to choose people to receive jury service notices.

The Ontario Court of Appeal focused on the steps taken by the state to prepare a jury roll that provides a group of people, from which to select a competent and impartial jury. The test arrived at was:

In my view, to meet its representativeness obligation, the state must make reasonable efforts at each step of creating the jury roll. That includes the state's actions in compiling the lists, but also in sending the notices, facilitating their delivery and receipt and encouraging the responses to them. The objective of the state's actions must be to seek to provide the platform necessary to select an impartial petit jury and to maintain public confidence in the criminal justice system by providing groups that bring distinctive perspectives to the jury process with their fair opportunity to be included in the jury roll.

The Ontario Court of Appeal also held that the government's knowledge of decreasing questionnaire returns, and the efforts the government had made to address the issue, must be evaluated in the context of the state's special relationship with Aboriginal people (paras 121-22). The government must demonstrate that it made reasonable efforts with regard to the jury roll in this context. The Court of Appeal noted that (para 205):

To be *Charter*-compliant… the state must have made reasonable efforts, considering all the circumstances known to it, to fulfill its obligation such that Aboriginal on-reserve residents were given a fair opportunity to have their distinctive perspectives included in the jury roll.

In the *Kokopenace* case, the Ontario Court of Appeal held that the quality of the effort of the state was sorely lacking. For example, the state had relied on the "sole efforts of an individual in a local court office" (para 206). The majority of the Ontario Court of Appeal held that both sections 11(d) and (f) of the *Charter* were violated, so it did not have to deal with the *Charter* section 15 issue, but the Court went on to determine that section 15 was not violated. The remedies granted included granting Kokopenace a new trial.

As indicated, the Ontario government has appealed the ruling to the Supreme Court of Canada. There are a number of parties intervening in the appeal, including the Nishnawbe Aski Nation, the Native Women's Association of Canada, David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund, and the Canadian Association of Elizabeth Fry Societies. The issue of reasonable

representation of First Nations persons or juries is important across Canada and this case will be watched by many people.

Solitary Confinement is a National Disgrace

Posted By: *Charles Davison*

I have been privileged to visit Fort McPherson, in the Northwest Territories, a number of times since 2011. It is a pleasant little Gwich'in community located on the banks of the Peele River southwest of Inuvik, within sight of the Richardson Mountains to the west. It is one of the few remote northern communities connected to the rest of Canada by road: the Dempster Highway. The Dempster name conjures up what is probably the settlement's best known historical event, for it was from here that Cpl. Norman Dempster left in 1911 to find the R.C.M.P.'s "Lost Patrol" which had disappeared a year earlier. The recovered bodies of the four officers now rest in the little graveyard next to the Anglican Church.

Now, another citizen of Fort McPherson is in the news, albeit for very different, if also equally tragic, reasons. Thanks to Patrick White and the *Globe and Mail*, Canadians have been made aware of the sad story of Eddie Snowshoe, a young aboriginal man who ended up imprisoned in southern Canadian penitentiaries, and who ultimately hung himself in Edmonton Institution in 2010. Mr. White's expose, "Who Killed Eddie Snowshoe: the fatal sentence of solitary confinement [2]" (*Globe and Mail*, December 5, 2014), highlights various failings of our federal correctional system, including our continuing use of solitary confinement in our penitentiaries. This article should be mandatory reading for all Canadians, for it is in our name that our correctional system acts, and responds – or fails to respond – to the needs of our fellow citizens imprisoned within it.

Eddie Snowshoe is a male counterpart to Ashley Smith, the young woman who committed suicide in a Kitchener penitentiary in 2007, as correctional officers stood and watched. In Mr. Snowshoe's case, correctional staff did not stand and watch; indeed, when they discovered his body they did all they could to revive him, but it was by then too late. But his penitentiary history, and that of Ms. Smith, are remarkably similar: both spent inordinate periods in solitary confinement (a total of 2,000 days for Ms. Smith; in Mr. Snowshoe's case, 162 consecutive days ending when he killed himself. Both showed increasingly serious signs of mental illness and instability; and both had histories of self-harm and attempts at suicide while imprisoned.

Almost 20 years ago, calls began for a "cap" of 60 days in long-term segregation due to its mental health impacts. A year after the death of Ashley Smith, the Correctional Investigator (an ombudsman for inmate concerns and issues) issued a report identifying a number of the flaws and failings which led to

her death, and recommending changes to prevent such tragedies in the future. The Correctional Service did not respond; many of the lessons which should have been learned from the case of Ashley Smith were thus ignored or overlooked in the situation of Eddie Snowshoe.
Even now, four years after Mr. Snowshoe killed himself, it seems that our government sees no reason to change its policies or practices concerning solitary confinement of our citizens, including those with mental health problems, despite other western democracies moving away from this barbaric habit. Follow-up stories [3] in the *Globe and Mail* have detailed how Britain has long attempted to avoid putting inmates into solitary confinement for extended periods (if at all), and how some American states are moving to reduce their reliance upon this practice in light of the well-known significant and long-term mental health impacts upon prisoners held in such conditions. However, according to Mr. White the Correctional Service of Canada declined to comment or take part in his article or research, except for somewhat unresponsive and unhelpful confirmations that Canadian law permits the use of segregation.

At one time, Canadians could take some pride in their correctional system. There was always room for improvement, but in a number of ways we set an example for the world. Other countries, including the United States, sent representatives here to study our methods. As the name suggests, our system long focused upon the *correction* of criminal conduct, as opposed to emphasizing punishment and retribution. Persons such as Eddie Snowshoe – who, it cannot be denied, committed a serious and violent criminal offence – were sent into custody *as* punishment, and not *for* punishment. Once imprisoned, the goal of the system was to attempt to reform and rehabilitate – to "correct", in other words – so when the inevitable release date arrived, the individual would be better able to rejoin the rest of society.

But in 2014, under a government which clearly sees the lives and well-being of some as worth less than others, we continue to be headed in a different direction. People like Eddie Snowshoe are expendable, or at least not worth saving, because they have broken the law. Thus, Stephen Harper and his Conservatives continue to pass laws leading to more and more prisoners being crammed for longer and longer periods into aging institutions meant to house much lower numbers of people. Even if there was a political will and interest in responding to the special needs of the mentally challenged prisoner (whose numbers are also increasing), resources with which to do so continue to be restricted. Rather than dealing with such persons in humane and compassionate ways – ways which might actually address their underlying problems, including at least sometimes, the behaviours which led to their imprisonment in the first place – it is easier and more satisfying, as part of a "tough on crime" agenda to simply warehouse these troubles, including in segregation cells deep inside our penitentiaries and prisons.

A Federal Court judge once commented that "as long as they remain inside the walls, [prisoners] are, to our national disgrace, almost universally unseen and unthought of…". The cases of Smith, Snowshoe and all of the other 1800 inmates who are held in solitary confinement on any given day – and the even larger and growing numbers of prisoners who suffer mental health problems – demand our urgent and on-going attention. They are, after all, our fellow citizens. It has often been said that the measure of a society can be taken by how it treats its most lowly and marginalized members. We are clearly failing this group of fellow citizens, and that reflects badly upon us all.

Contrary to the guiding views and approach of our current government, meeting the needs of the incarcerated mentally ill is not to "reward" criminal behavior, nor does it amount to coddling the undeserving. Rather, effectively and humanely treating the unwell is the most likely way to prevent further reoffending when these citizens are ultimately released back into our communities across the country – *and* simply the right thing to do.

The views and opinions expressed in this article are entirely those of the author.

The Duty of Unions to Fairly Represent Their Members

Posted By: *Peter Bowal*

Introduction

About one-third of all Canadian workers, and most public sector employees, are members of unions, sometimes by choice and sometimes by legislation. Unions offer greater collective power than an individual generally can marshal for the negotiation and administration of collective agreements. Unionized employees surrender to the union the right to negotiate and contend on all work-related matters with the employer. Such a transfer of power from workers to unions reposes significant responsibility in the hands of the union. Therefore, it is essential that the union represent the best interests of its members. This legal obligation is referred to as the union's *duty of fair representation* of the members' interests.

Legislation on Duties of Unions

Provincial Labour Relations Acts or Codes and the Canada Labour Code (for federally-regulated employees) contain many rules for unions. For example, the Alberta Labour Relations Code prohibits unions from engaging in certain practices, such as using strong-arm tactics ("coercion, intimidation, threats, promises or undue influence of any kind") against employers, employers' organizations, other unions and employees (section 151).

The union's duty to fairly represent its members is also presented in the form of a prohibition in the legislation:

> 153(1) No trade union or person acting on behalf of a trade union shall deny an employee or former employee who is or was in the bargaining unit the right to be fairly represented by the trade union with respect to the employee's or former employee's rights under the collective agreement.

The *Canada Labour Code* is explicit in both the requirement of a union acting in a manner reflecting a duty of fair representation of any members, or any applicable employees, and in what constitutes fair representation. Section 37 prohibits unions from acting in an arbitrary or discriminatory manner or in bad faith when representing employees under the applicable collective agreement.

The Common Law Meaning of Fair Representation

Like the corresponding duty upon employers to bargain with unions in good faith, the concept of fair representation is difficult to define and very broad. The terms “arbitrary,” “discriminatory,” and “bad faith” are core elements that arbitrators and courts consider in evaluating the duty of fair representation.

We turn now to the two main judicial decisions, both involving federally-regulated workers from Quebec, on the topic of fair representation.

Canadian Merchant Service Guild v. Gagnon et al., [1984] 1 SCR 509

Guy Gagnon, a boat captain, asked his union to file grievances against his employer on the basis of his position transfer. The union proceeded with the grievances through several stages. However, on the basis of a third party recommendation, the union refused to take the grievance to arbitration. Soon after, Gagnon was dismissed. He sued both his employer and his union for damages resulting from his transfer. The issue was the extent to which a union must represent a union member.

The Supreme Court of Canada found in favour of the union and dismissed the claim for damages. It set down the following principles:

> 1. The exclusive power conferred on a union to act as a spokesman for employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit;
>
> 2. The right to take a grievance to arbitration is reserved to the union. The employee does not have an absolute right to arbitration and the union enjoys considerable discretion;
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other;
>
> 4. The union’s decision must not be arbitrary, capricious, discriminatory or wrongful; and
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

Of key importance is the principle that an employee does not have an absolute right to any advancement of its grievance and the union enjoys considerable discretion.

Noël v. Société d'énergie de la Baie James, [2001] 2 SCR 207

Christian Noël, a member of the United Steelworkers of America, was a flight dispatcher at a James Bay airport. After numerous disputes with his employer over several years of service he was dismissed. The union took his dismissal grievance to arbitration. The grievances were dismissed and Noël's termination was upheld. When Noël sought to apply for judicial review of the arbitration award, the union did not support him.

The Supreme Court revisited the extent to which the union is obligated to represent members. The Court said, in its duty of fair representation, the union *cannot* exhibit: bad faith, discrimination, arbitrary conduct or serious negligence. A union's bad faith is manifested in the union intending to cause harm, or participating in fraudulent or spiteful conduct. Discriminatory conduct places a member at a disadvantage for reasons unrelated to the concern at hand. Arbitrary conduct and serious negligence refer to procedural treatment of the member's complaint by the union, basically providing a form of quality assurance for the representation. Since the union pressed Noël's grievances through the arbitration process, the Court found it performed its duty based on these four factors.

The union's duty to represent an employee depends on the importance of the grievance. In the case of a dismissal, the union will have to do more than in a reprimand. However, in some cases the union may legally decide not even to proceed with an employee's grievance at all. Leeway is given to union discretion to protect union interests as a whole, the Court said, so the needs and rights of other employees, and the relationship with the employer are not compromised. Unions cannot be locked into contesting every grievance to the end at the demand of every employee.

Summary of the Duty of Fair Representation

Labour Relations Boards have further developed the duty of fair representation. They look for unions to treat all members of a bargaining unit fairly and with good faith. Unions must carefully examine and investigate the grievance, considering its significance and consequences for the union and the employee. It is arbitrary to give only superficial attention to the facts or matters in issue, or to decide without concern for the employee's interests.

Favouritism and prejudice should play no part in grievance handling. Unions should consider only relevant lawful matters when deciding whether or not to file or continue grievances. The union representation must be fair, genuine and not merely apparent. The union must act with integrity and competence and without serious negligence. The union must not be hostile towards the employee. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

Labour Relations Boards will uphold the union's decision if the union investigated the grievance and obtained full details of the case, put its mind to the merits of the claim and made a reasoned judgment about the disposition of the grievance.

Conclusion

Unions hold tremendous power over their members. Membership (or at least payment of dues) is usually mandatory if one wants the job, dues are deducted at source, union rules and discipline can be harsh, member participation in union decision-making is largely an illusion, and unionized employees have no legal right whatsoever to challenge anything their employer does to them without that challenge being accepted and prosecuted by the union. So what does the union owe its members?

The duty of fair representation of its members has been interpreted by the Canadian courts as some "thou shalt nots," but affirmative duties are minimal. There is little law on what the union must, or should, do. Most law is on what unions must *not* do. Unions must not act in bad faith, with discrimination, nor in an arbitrary or negligent manner. Union discretion will usually be upheld.

Law in the Public Interest

Posted By: *Marilyn Doyle*

In this issue of LawNow, the Special Report focuses on Public Interest Standing in courts and other tribunals. That got me thinking about public interest law in general. The Career Development Office of the University of Toronto says:

> *Public interest or social justice law has been described as legal work on behalf of individuals, groups, and causes that are underserved by the for-profit bar. Within the broad scope of its definition, public interest practice includes work done by legal clinics, boards, agencies, commissions, and all levels of government, as well as private practice firms and lawyers who define the majority of their clients as public-interest or social justice causes.*

Under this definition, law in the public interest can encompass numerous areas of the law: criminal law, civil rights, consumer law, family law, international law, environmental law, human rights and more. This article begins by presenting some examples of organizations dedicated to law practiced in the public interest followed by a few interesting projects in this domain.

First it is important to emphasize that this is by no means an exhaustive or even thorough examination of organizations involved in public interest law. It is merely an attempt to give a taste of the wide variety of work being done by lawyers, law students and other parties interested in how the law can support a better world.

In the area of criminal law, the **Association in Defence of the Wrongly Convicted (AIDWYC)** has a mandate to identify, advocate for, and exonerate individuals who have been convicted of a crime they did not commit and to prevent wrongful convictions through legal education and reform.

The **Canadian Civil Liberties Association** was constituted to promote respect for and observance of fundamental human rights and civil liberties, and to defend, extend, and foster recognition of these rights and liberties. Their program areas include education, fundamental freedoms, public safety, national security and equality.

There are two national organizations advocating for the interests of consumers in some overlapping areas. The **Public Interest Advocacy Centre (PIAC)** provides legal and research services on behalf of

consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services. It has done work related to online transactions, energy, financial services, telecom, and privacy. The **Canadian Internet Policy & Public Interest Clinic (CIPPIC)** is based at the University of Ottawa. CIPPIC's mandate is to advocate in the public interest on diverse issues arising at the intersection of law and technology. Its website outlines work done in copyright, privacy, telecom policy, electronic surveillance, open information, digital expression, cyber spam and security, identity theft, accessibility and consumer protection. The FAQs provided in each of these sections would be of particular interest to the general public.

Much legal work is done across the country to support women who are victims of violence so it may be unfair to highlight just one. However, those interested in this topic may be inspired by the work of the **Barbra Schlifer Commemorative Clinic** which offers legal representation, professional counselling and multilingual interpretation to women who have experienced violence in the Greater Toronto Area.

In the area of international law, there is the **Canadian Centre for International Justice (CCIJ)**. It works with survivors of genocide, torture and other atrocities to seek redress and bring perpetrators to justice. It also assists people with close relationships to victims who died as a result of human rights violations or who are unable to contact CCIJ on their own.

The health of our natural environment is certainly an area of public interest in which the law has a role to play. **Ecojustice** provides legal services free-of-charge to charities and citizens on the front lines of the environmental movement, helping ensure equitable access to environmental justice nationwide. Meanwhile, in Alberta, the **Environmental Law Centre** works to ensure that Alberta's laws, policies and legal processes sustain a healthy environment. It helps community groups understand and use legal tools to advance their concerns; works with policy-makers at all levels of government to create better processes for making environmental decisions; and provides free advice and education to people who have questions about a broad range of topics including pesticide use and conserving greenspace in cities, impacts of gravel pits, saving agricultural land or addressing the impacts of the oilsands.

In the area of human rights, one prominent organization is **Amnesty International Canada** whose mission is to conduct research and generate action to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated.

At the risk of having this article go on too long, I want to point out a small sample of projects which underline the diversity of work being done in public interest law.

That's Not Fair! is a series developed by the Canadian Civil Liberties Education Trust for kids, ages 7 to 11. The series includes animated videos, gamesand lessons to introduce children to critical thinking and the habits of democracy.

In B.C., the Atira Women's Resource Society produced "Your Rights on Reserve" – A Legal Tool-kit for Aboriginal Women in British Columbia (PDF). The tool-kit includes chapters on taxation, employment

issues on Reserve, social assistance / welfare, education, Indian Status, Band membership, Reserve land and housing issues, wills and estates issues, family law, relationship violence, Ministry of Children and Families Development and governance issues.

Across the country, the need for clear, thorough family law information for people who are representing themselves in court has been identified as an access to justice issue. Thanks to the work of a variety of organizations, three provinces now have dedicated family law websites: Family Law in British Columbia, Family Law NB, and Family Law Nova Scotia.

Also in the area of support for those representing themselves in court, Pro Bono Law Alberta, the Canadian Bar Association – Alberta Branch, and members of the judiciary from the Alberta Courts, worked together to produce **four educational videos** which provide unrepresented claimants with short, easy to understand instructions about basic courtroom procedures, processes, etiquette and other useful information.

Family Law Education for Women targeted a very specific demographic with Working with Your Lawyer: Advocacy Tips for Women with Disabilities and Deaf Women Dealing with Family Law Issues which is available in print or video (American Sign Language).

As you can see from these few examples, law in the public interest is alive and well in Canada.

Marc Ribeiro v. Dragons' Den

Posted By: *Peter Bowal*

Introduction

The modern phenomenon of reality television can be a tough business. What makes it interesting for viewers is what appears to be the spontaneous drama, the unpredictable turns and utterances and the raw, unscripted human confrontation. Television broadcasts the glorious performances of some and, equally, causes the embarrassments of others to be instantly publicized to the whole world. What serves up edge-of-the-seat interest, laughs and entertainment often come at the expense of someone in front of the cameras.

Recently we learned that Dr. Phil is being sued by the parents of a 15-year-old guest who appeared on his daytime talk show, accusing the show of "fraud, false imprisonment and breach of fiduciary duty." Another guest on the show criticized a mother for failing her daughter "by a country mile" and accusing the daughter of "total naiveté." This might seem mild for reality TV, even if the teen was later sent to a treatment centre where she suffered more abuse.

The pull for people to voluntarily appear on reality television shows is often the goal of free publicity, fame and fortune. Before they get in front of the cameras, the broadcasters have them sign sweeping consents and releases of liability to negate any chance of the networks being sued for hurt feelings and more. Individuals who have suffered embarrassment as a result of their experience on reality television have attempted to sue those television networks. This article describes a recent pitch on the CBC television show, *Dragons' Den* and the ensuing lawsuit, both of which did not go as planned.

Dragons' Den Appearance

In 2011 Marc Ribeiro appeared on an episode of *Dragons' Den*. Ribeiro, a lawyer, signed a Consent and Release as a condition to getting on the show. In it he agreed not to sue the CBC. It further gave the network the right to edit the footage in any way, even to portray his appearance as "disparaging, defamatory, embarrassing or of an otherwise unfavourable nature which may expose me to public ridicule, humiliation or condemnation." He also consented to CBC editing the segment at its "sole discretion."

Ribeiro sought financing for a family-friendly board game called "Pick 'N' Choose." In the broadcast, the investors were shown making lewd shapes out of play-dough and jokingly suggesting that it would only be worth investing in if it was turned into an "adult game."

Ribeiro was unhappy with the voiceover at the end of his segment on the show that said, "Dragons never pull punches when they spot a money-losing venture. Unfortunately, these next few ideas hit the mat immediately." Ribeiro thought this voiceover, along with the way the clip was edited, created the impression that his idea was a "complete flop," even though the panel of investors had expressed initial interest. Ribeiro claimed the aired segment was a "complete misrepresentation" of the original recording and that CBC had acted with "gross and reckless negligence, intentional misconduct, malice and bad faith." He sued CBC for breach of contract, defamation, breach of duty of care, and injurious falsehood.

Ribeiro acknowledged that no express terms of the Consent and Release were violated, but argued CBC breached an "implied duty of good faith" by editing the clip in that way, and that it would be unconscionable or contrary to public policy for the court to uphold the contract.

Legal Outcome

The CBC moved to toss out the lawsuit right away, without a trial. The first judge decided that CBC's Consent and Release form protected it from all of Ribeiro's claims. This 2013 case was: *MHR Board Game Design Inc. v. Canadian Broadcasting Corporation, 2013 ONSC 4457*.

On the unconscionability issue, the judge referenced the similar 2011 case of *Turmel v. CBC (Dragons' Den), 2011 ONCA 519*. John Turmel attempted to sue CBC for portraying him and his idea in a defamatory way. The court had decided that Turmel voluntarily agreed to present his idea on the show and signed a release form in which he consented to being depicted in a way potentially "defamatory." Accordingly, the Consent and Release form was not unconscionable.

In order for a transaction judge to be set aside on the grounds that it is unconscionable, two things need to be shown: (1) an inequality of bargaining power or the incapacity of one party to protect their interests; and (2) grossly unfair improvidence or a gain at another's expense. Neither of these was present in Ribeiro's case. Ribeiro is a lawyer and the judge used this against him in his own claim of bargaining power, capacity and improvidence.

The judge did not think that enforcement of the Consent and Release was contrary to public policy. A court would rarely disregard an exclusion clause. Likewise, the duty of good faith and the tort of bad faith breach of contract are generally applied when there is a fiduciary duty present or where there are clear economic implications in commercial cases.

Ribeiro alleged CBC acted "maliciously" and "recklessly" in its editing of the *Dragons' Den* segment. This, he claimed, hurt his reputation and was a gross misrepresentation of his actual

interaction with the investors. The judge ruled that, even assuming an implied duty of good faith operated here, there was no evidence to support these allegations. Although the investors on the show had fun at Ribeiro's expense, the judge did not consider it enough to override the signed Consent and Release.

The network does not have a fiduciary duty to entrepreneurs on the show to represent or carefully portray their interests when editing the footage. Much was made of the free publicity (positive or negative) entrepreneurs receive on *Dragons' Den*. They do not have input into the editing of their segment.

Appeals

Ribeiro's appeal to the Ontario Court of Appeal (2013 ONCA 728) was summarily dismissed because there were "no material facts in dispute." This Court agreed that all claims were barred by the Consent and Release, which was not unconscionable nor contrary to public policy to enforce. Even if an implied duty of good faith can be read into the contract, there were no material facts to support that such a duty was violated.

Last May, the Supreme Court of Canada refused to hear a further appeal (2014 CanLII 25874 (SCC)).

Conclusion

Ribeiro was not pleased by CBC's unflattering portrayal on *Dragons' Den,* but this is one of the risks of participating on a reality television show. The general principle that "if you sign it, you are bound by it" applied here, especially when the signing party was a lawyer.

Taking this case through three levels of court may not only have been time-consuming and expensive, but it ironically brought further attention to Ribeiro's embarrassment. His case serves as another example of how judges may be unsympathetic toward lawyers who use the courts to vindicate their own interests. Lawyers should not be penalized for their education when resorting to the legal system, but there may be a clear reality lesson in this case.

Voluntarily signed Consents and Releases where there is a free publicity "reality-value" to be enjoyed in return – especially when signed by lawyers – are likely to be enforced. Participants on reality television shows will be at the mercy of anonymous editors in how they or their ideas are depicted. The alternative is to give the reality show a pass and instead watch others take these risks.

Cold War Casualties in the True North Strong and Free

Posted By*Rob Normey*

I have just had the exhilarating experience of reading the new novel by Winnipeg's Margaret Sweatman, a political thriller set in the heart of the Cold War years. I was intrigued by the title **– Mr Jones** – as that was indeed the name we gave to the first book club I belonged to – the Mr. Jones Book Club, named after the much-misunderstood character (in my estimation) in the Bob Dylan song, "Ballad of a Thin Man." The quotation at the outset of the novel is taken from the song – "And you say / Oh my God, am I here all alone?" It is apt insofar as Sweatman does an expert job of conveying the rapidly ascending loneliness and paranoia of certain of her characters, who are caught in the inexorable trap of being the subjects of loyalty investigations over alleged Communist ties. I have to add as well that as my current book club is focussed on Canadian history, I consider this would make a great book club choice. It surely is the best I am aware of at depicting the critical period in Canadian history where, on the one hand, a growing human rights awareness was developing amongst thinkers, activists and some ordinary citizens, and on the other hand, simultaneously the growing tensions between the Soviet Union and the West led even peaceful, gentle Canada to develop fairly draconian national security measures. These measures interfered in a significant way with civil liberties, particularly freedom of speech and thought, along with freedom of assembly.

The time frame of **Mr. Jones** coincides with the beginning of the Cold War in 1946 with the defection of Igor Gouzenko. He was a Soviet cipher clerk and espionage agent from the Soviet Embassy in Ottawa, famously photographed in a hooded disguise. This remarkable and unusual character took with him papers establishing a spy ring which included one Member of Parliament, Fred Rose, Canada's one and only Communist MP, and various public servants. The novel continues through various murky episodes, chilling at times in their sense of menace, right up to the High Noon of the Cuban Missile Crisis of 1962. The focus throughout is on the three main characters who form one of several love triangles that ricochet off one another and set up fascinating explorations of loyalty, betrayal and inevitable guilt.

Emmett Jones is the first of the three. At the outset he is told by his superior at External Affairs that he is the subject of an extensive investigation by the Mounties, for his possible Communist affiliations past and present. Sweatman, in the opening chapter neatly announces a key theme: the surface appearance of a typical happy and prosperous family at ease during cocktail hour at a summer cottage, and the underlying tensions and psychic disturbances, as characters ponder the dangers associated with the fear

of being suspected to be a radical nonconformist. Jones has been a bomber pilot and has horrific memories of his role in the mass firebombing of German cities. He is described as having been easily captured by the first hopeful political community he encounters as a university student – the student communist movement in Toronto.

The second character in the triangle is John Norfield, a charismatic but enigmatic figure who is a major influence on Jones' political thinking. He is a dedicated Communist who turned to the movement with a religious zeal after his experiences as a POW in Hong Kong had shattered his faith in existing social and political structures. Norfield remains a man of mystery. We wonder at how he has exerted such a pull on his younger and less committed friend. Norfield was himself loved by a young and impressionable college student, Suzanne. She comes from a relatively wealthy Toronto family, well-bred and expected by her parents to marry the "right sort of man" – definitely not a secretive radical like John. Early in the novel we learn that her parents are sufficiently concerned about her growing attraction to the handsome older student that they hire a private detective to get the goods on him. This makes for an ironic commentary on the wider plot. Just as her high-toned and conventional-minded parents make rigid distinctions between "suitable" and "unsuitable" partners for their daughter, so too the Canadian state, or at least its security apparatus adopts a dogmatic approach to questions of eligibility for public service. Eventually, after John leaves the country without explanation, Suzanne comes to rely upon and then marry the less powerful but apparently more reliable Emmett Jones.

I found the ways in which each of these characters find particular meaning in either the Communist ideology or the philosophy of Karl Marx to be a vital part of understanding the shifting ties that bind them. Jones is particularly influenced by Marx's theory of alienation in capitalist society, no doubt finding it as a way to put into context the ghastly assignments he had received as an unwilling pawn in the Bomber Command unit in the war. For Suzanne, it is the strangeness and the simple ability of Marxist and Communist ideals to challenge the status quo that provokes in her a receptiveness that is decidedly non- intellectual.

As this is an intense thriller I will say little about the plot other than to highlight the fact that both Norfield and Jones become objects of ongoing interest to the secret agents who haunt the novel and are a constant weight on their subjects. The oppressive effect of being placed under surveillance is brilliantly conveyed.

The cottage at Blue Sea Lake takes on an especially important role as it becomes something of a refuge when the newspapers report on Jones' connections with the famous diplomat Herbert Norman and publish a photo of each of them side by side. This was at a time in the later 1950s when Norman was a well-known subject of scrutiny by the U.S. House of Un-American Activities Committee (HUAC). Norman is an actual historical figure who was one of the most prominent of the many individuals whose careers were ruined, based on vague and often unsubstantiated allegations or suspicions. Herbert Norman who was a brilliant Asian scholar, asked to play a vital role in the immediate postwar reconstruction efforts in Japan led by General McArthur. He went on to top posts as Ambassador, most prominently in Egypt, where his sensitive touch was a vital aspect of Canada's peacekeeping efforts that resulted in the Nobel

Prize being awarded to Lester Pearson. Norman had engaged in a youthful flirtation with Communism while a student at Oxford but had moved away from radical views and steadfastly denied any ongoing connection to Communist ideology or even the slightest support for the Soviet Union. After a thorough investigation he was cleared for his work at External Affairs by the Canadian government only to be hounded again and again by the jackals on the American committee. The relentless pressure by an agency of a foreign government that exerted such great influence on Canada was eventually too much for Norman, and he leapt to his death from the rooftop of a Cairo apartment in 1957.

The situation of Jones, who also secures postings in Japan and elsewhere, parallels that of Norman, a minor character in the novel, but a major presence looming over the various plot developments. There are also significant differences in some aspects of Jones' predicament but what is underscored for the reader is the manner in which civil liberties can so blithely be set aside once the clarion call of national security needs is made. The central values of our nation like fairness, due process and accountability are swept aside and anti-Communist crusaders are given a prominence that is unwarranted once their actions are scrutinized in the clear light of day.