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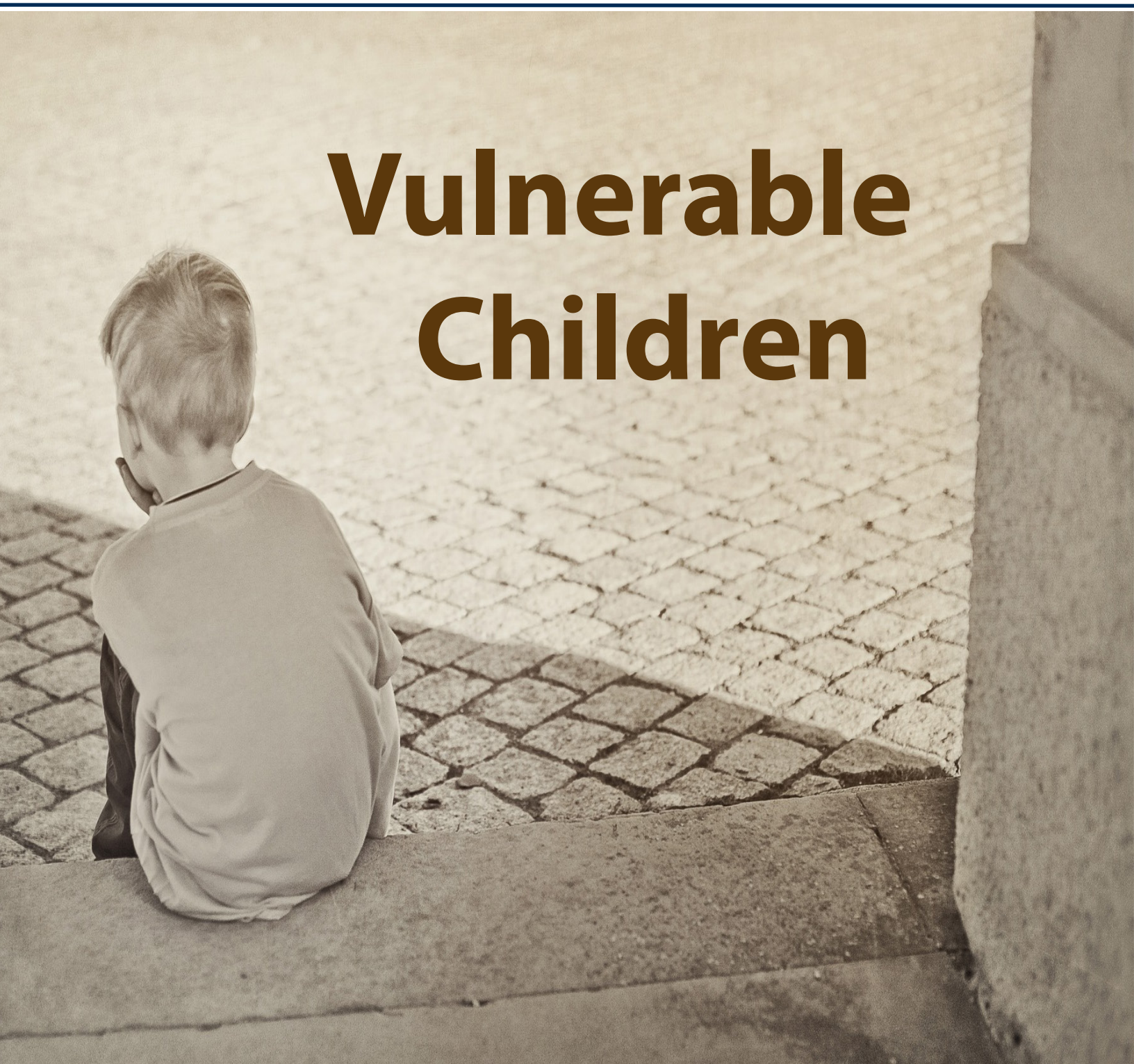

Vulnerable Children

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Age of Criminal Responsibility: An illusive dilemma

Posted By: *John Winterdyk*

If we, as adults, reflect back on our youth, there is probably not one of us who can say we didn't commit some type of infraction for which we could have been held accountable under the former welfare-oriented *Juvenile Delinquency Act* (*JDA*) – in effect from 1908 until 1984 – or the more legalistic approach of the *Young Offenders Act* (*YOA*) – in effect from 1984 to 2003. However, self-report studies introduced in the mid-1950s have repeatedly shown that most of us were never formally apprehended during those formative years of our life. This phenomena is the "dark figure" of (youth) crime and has both an indirect and direct bearing on the age young persons should be held criminally responsible (i.e., *mens rea*) for their alleged infraction(s) and perhaps equally important – how they should be dealt with.

In this article, I limit the discussion to the issue of age of criminal responsibility for several reasons. First, there are many well-established legal systems around the world and a plethora of research attempting to come to terms with and explain youthful offending from a range of different perspectives, e.g., social, psychological, cognitive, environmental. Yet, with all this, not only have we been unable to come up with a universal explanation for delinquency, we have also been unable to agree on a minimum age of criminal responsibility. Secondly, there has been much debate over the years about either changing the age of responsibility in Canada or, as under the *YOA* (carried over from the *JDA*), qualifying the age at which young offenders (as young as age 14) could be transferred to adult court if charged with a serious crime. The provision of transfer was later seen to be too harsh and even counterproductive to the well-being of young offenders and was repealed with the introduction of the *Youth Criminal Justice Act* (YCJA*)* 2003. However, we will see there has been a reinstatement of the provision with the passage of Bill C-10 (the Omnibus Crime Bill). And finally, given Canada's status as a signatory member of the United Nations *Convention on the Rights of the Child*(*CRC*)*,* the quintessential question should be: to

what extent does our current youth justice legislation comply with international guidelines and standards and how might our degree of compliance impact the debate on criminal responsibility?

Mental vs. Moral Capacity

> *I think that it should be 10 and up because kids get away with a lot.*
>
> – A comment from Oakwood just prior to the enactment of the *YCJA (The Great Youth Criminal Justice Act Debate).*

Considering the tragic 2013 killing of a six-year-old Saskatchewan boy (fortunately, a rare case) by a legally underage youth known to police. Under today's legislation, the offender could not be held criminally responsible even though known to police. Yet prior to 1983, when the lower age limit of criminal responsibility (based on common law) was seven instead of 12, the killer could have been held accountable. However, in a number of countries where there is no lower age limit of criminal responsibility, the accused youth could still be legally processed. Furthermore, even though the *YOA* set a maximum age of juvenile responsibility at 17 in 1984, Alberta's maximum age remained 16 for boys and 18 for girls until 1985. (Ironically, research has shown that girls mature at a younger age than boys!) Needless to say, one doesn't need to look too far afield to garner the history of controversy surrounding minimum and maximum ages of juvenile responsibility. Some additional context is in order.

On what basis was the minimum age raised in 1984? It was based on the fact that most children leave elementary school and are thought to have the mental capacity to understand right from wrong at around age 12. Yet, completing elementary school has no direct correlation to whether a young person meets the legal benchmark of what qualifies as *mens rea.* As noted American psychologist Lawrence Kohlberg (1927-1987) determined, mental capacity is NOT the same as moral capacity – the ability to appreciate the meaning of one's actions. According to Kohlberg's model of moral development, the general level of moral reasoning that meets the legal standard of *mens rea* does not occur until around stages four (Authority and social-order-maintaining orientation) and/or five (Social contract orientation). Various research studies show that few children reach stage three even in junior high school and typically stages three and four don't begin to express themselves until high school (average age of entry around 15!). As Kohlberg's generally accepted stages are known to have to be experienced in total and in order, these facts alone should raise serious questions among legal scholars and social scientists who study at-risk youth about how we determine a minimum age of responsibility. Failure to do so is an injustice to young persons.

A 'good' idea without any teeth

As early as the 1760s, the esteemed English lawyer Sir William Blackstone (1723-1780) argued there was a legal justification for differentiating criminal responsibility between "infants" (up to the age of seven) and "adults". He argued that infants were not capable of forming intent, although along with certain contemporaries, he acknowledged that youth between the ages of 7 to 14 fell into a no-man's-land. In North America it wasn't until the late 1800s, along with the insights of a Toronto newspaper reporter by

the name of J.J. Kelso (1864-1935) and several other pioneers of the "child saving movement", that the first juvenile court was established in Chicago. The court was grounded on the British doctrine of *parens patriae* (the State as parent). However, unlike in Canada, only 13 American states use a Common Law approach and have set lower age limits ranging from 6 to 12 years of age – with the median being 12. (By contrast the minimum age of responsibility in the UK is 10, France 13, and Brazil 18.) Also in contrast to Canada, in the United States, each state is responsible for setting its own age limits for criminal responsibility. This, obviously, raises further concerns about fair and equitable justice between jurisdictions.

Despite the 1948 *UN Universal Declaration of Human Rights*, and more specifically the 1990 *CRC* [1], the debate about minimum age of criminal responsibility has not been universally embraced. This may, in part, be due to the fact that the UN conventions do not specifically identify a minimum age. Section 10 of the *CRC* simply requires parties to establish a:

> "…minimum age below which children shall be presumed not to have the capacity to infringe the penal law" (Art 40(3)(a)."

Finally, another major UN convention, the UN *Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules, Article 4), reads:

> "In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity."

A pending ominous 'slippery slope'

In the UN's 10-year report commemorating Canada's ratification of the *CRC*, we received a failing grade. However, the report noted that until 2012 Canada had been complying with the *CRC* guidelines. Why the change? With the passing of Bill C-10 came new provisions for stiffer penalties for young offenders. With the new amendments to the *Youth Criminal Justice Act,* it became easier to try young offenders as adults – a direct contravention of the *CRC*. The UN report further pointed out there was no child rights assessment or mechanism to ensure the Bill's conformity with *CRC* provisions. Finally, the UN committee report also pointed out that ethnic minority and Aboriginal youth still continue to be over-represented in the youth criminal justice system.

Although the UN report does not offer any criticism about the minimum age of responsibility, the fact is that the new legislation potentially puts underage youth at risk of being directed to the youth/adult system under the umbrella of *parens patriae.*

Conclusion: Where to from here?

This article draws attention to several key issues that demonstrate the lack of a clear rationale or justification for setting a minimum age of criminal responsibility. This is due in part to the contradiction inherent in the criminal justice system (CJS). As I described in a previous article in *LawNow,* the CJS is a mix of classical criminological ideals (rule of law) vs. the back-end of the system (sentencing and corrections), that embraces a positivist criminological perspective. The matter is also compounded by the fact that despite various international conventions, every state retains considerable discretion in setting its own minimum age of criminal responsibility. While the intent of trying to protect young people from being held accountable when they may not be able to appreciate the implications (i.e., moral character) of their actions is laudable, the fact that the law has not/does not allow itself to be informed through social science evidence continues to raise serious doubts about the justification for what, if any, fixed age is justifiable. For example, as implied in this article, accountability does not always necessitate criminal responsibility. In the meantime, much could be learned by examining how other youth justice models and CJSs have approached the issue.

Notes:

1. The United States signed but did not ratify the Convention. However, the *CRC* is the most ratified of all the UN Human Rights conventions and it is a binding international treaty.

2. J. Winterdyk (Ed.). (2014). Juvenile justice: International perspectives, models, and trends. CRC Press: Boca Raton: FL.

International Charter on Prevention of FASD

Posted By: *Egon Jonsson*

The First International Conference on Prevention of FASD (Fetal Alcohol Spectrum Disorder) was held in Edmonton, Canada from September 23 to 25, 2013. The following *Charter* was endorsed and adopted by the delegates at the meeting, who included about 700 people from 35 countries around the world; senior government officials, scholars and policy makers, parents and families, and Indigenous Peoples. It is presented to all concerned in the international community, as a call for urgent actions to prevent FASD.

FASD

Fetal alcohol spectrum disorder is a serious health and social problem, as well as an educational and legal issue that affects individuals, families and societies worldwide. It is a condition caused by alcohol use during pregnancy. There is no known amount of alcohol that is safe for the growing fetus, which may develop extensive brain damage as well as physical abnormalities. While early intervention and supportive care can improve outcomes for those who live with this disability, FASD can have devastating implications for the individual, the family, and other care givers.

The cause and consequences of FASD have been known for forty years, yet it continues to afflict millions of people around the globe. It is estimated that at least one in every one hundred babies born will have to live with this permanent disability. In countries where drinking among women of childbearing age is more common, the prevalence of FASD may be significantly higher. It is a condition of overwhelming concern in some populations.

FASD is preventable. However, one major obstacle to effective prevention is lack of awareness of the existence of the disorder, and the risks associated with drinking alcohol during pregnancy. Opinion-based advice about how much of alcohol is needed to potentially harm the fetus, as well as conflicting

messages from different studies, cause confusion and contribute to the failure to see the risks for FASD. Currently nobody can tell if there is any amount of alcohol that is safe during pregnancy.

Findings from basic research have clearly documented that even low to moderate consumption of alcohol can cross the placenta and interfere with the normal development of the embryo and fetus. Heavy or frequent consumption of alcohol in pregnancy increases the risk of delivering a baby with FASD. It has been well established that people living with FASD frequently face additional challenges as a consequence of their disability, such as breakdown in family relations, disruption of schooling, unemployment, homelessness, alcohol and drug abuse, and coming into conflict with the law.

Adolescents and adults with FASD are at high risk to come in contact with the criminal justice system. Many may end up in jails, become repeat offenders, and are often victimized themselves. The legal implications of FASD are many and complicated. While early diagnosis, supportive living environments and tailored intervention can help reduce the risks of the secondary implications of the disorder, FASD is typically a life-long condition.

The financial burden of FASD on families, communities, and governments is substantial by any standard. Addressing the complex needs of individuals with FASD most often requires additional support in the health, social, educational and legal systems as well as of correctional services. The associated financial costs are unsustainable for many countries. However, the costs of inaction are even greater.

The cause of FASD is known and preventable.

Broad-based policy initiatives and actions at different levels of every society are urgently needed to encourage abstinence from alcohol during pregnancy.

Root causes of FASD

Maternal alcohol consumption during pregnancy is the direct cause of FASD. The underlying causes for drinking during pregnancy are numerous, including lack of information about the risks of drinking while pregnant the frequent perception that FASD is simply due to the individual woman's choices is a major barrier to effective prevention efforts in the field. Men also have a responsibility for FASD, drinking prior to pregnancy recognition, dependence on alcohol, untreated and unrecognized mental health problems, and social pressures to drink. The complex social and biological determinants of health also affect drinking and its consequences, including genetics, poverty, malnutrition, and lack of social support networks and personal autonomy. The risks for alcohol exposed pregnancies are also associated with adverse life events, gender-based violence, trauma, stress, and social isolation.

Whatever the influences are on women's drinking and the risks to the fetus; effective prevention strategies need to be identified and adapted to the social, economic, and cultural context of each community.

Who is responsible for FASD?

The frequent perception that FASD is simply due to the individual woman's choices is a major barrier to effective prevention efforts in the field. Men also have a responsibility for FASD.

Partners who show no or little support during pregnancy and who also may abuse alcohol, become violent, and demand that their pregnant partner drink with them, share responsibility for the outcome. Social norms that promote drinking among pregnant women are also responsible for increasing the risk of FASD. Healthcare and social services providers have a responsibility to inform about the risks of drinking during pregnancy, and to provide meaningful assistance and support to pregnant women to abstain from alcohol use, and also to secure adequate nutrition in their reproductive years. Failures in providing information and support make these providers responsible. Alcoholic beverage marketing that targets women of childbearing age, without cautioning about the use of their products during pregnancy, is also responsible. Society at large is responsible for failing to help pregnant women to cope with fear, anxiety, violence, malnutrition and poor health through means other than alcohol use. The risks associated with the underlying determinants of health are a societal challenge.

When a million babies are born every year with permanent brain injury from a known and preventable cause, the response ought to be immediate, determined, sustainable and effective.

This Charter calls on governments and all other stakeholders to engage in FASD prevention by:

Taking action to raise awareness about FASD and the risks of alcohol use during pregnancy.

Promote a consistent message about FASD prevention by the use of evidence

Public health information must be clear and consistent: abstaining from alcohol during pregnancy remains the safest path to preventing FASD. In many countries there is still a lack of access to evidence-based information about FASD and potential harms from alcohol use in pregnancy. Such information must be widely available, responsive to local contexts, and designed to facilitate access to supportive services for pregnant women.

Make FASD explicit in social and alcohol policies

Policies related to the social determinants of health should explicitly include the issue of FASD, its secondary implications for the individual, family and society, and how it can be prevented. Access to

reliable and affordable contraceptives is an important concern in this respect. FASD prevention should be given a more prominent role in the development of alcohol policies.

Sharing the responsibility

The responsibility for FASD prevention should not be borne by women alone. Prevention of FASD is a shared responsibility of all stakeholders. Actions should focus on information about risks of alcohol use during pregnancy and support to be able to abstain from alcohol consumption during this important period of life. This support includes the provision of timely, compassionate, and competent prenatal care, as well as access to birth control and services to deal with alcohol dependence during pregnancy.

Increasing and sharing knowledge

About awareness of FASD

Although FASD is well known among the public in some countries, it is generally very low in a global perspective. Assessing awareness at the population level is an important foundation for decision-making about targeted or general strategies and other approaches to FASD prevention.

About the frequency of FASD

In many countries around the world, the prevalence of FASD remains unknown. In other regions, this information is available only for some geographic areas and for specific populations. Coordinated research on the frequency of FASD within and between countries is needed to guide prevention efforts and set benchmarks for measuring the success of specific approaches.

About diagnosis and diagnostic capacity

It is a common misconception that FASD is the same as FAS (Fetal Alcohol Syndrome). FAS is only one of several disorders caused by alcohol use in pregnancy and it represents only a minority of the cases of FASD, which includes all conditions caused by alcohol use during pregnancy. FAS may be diagnosed at birth or in the first year of life as it often has visible signs of abnormalities. The remaining categories within the spectrum of FASD are usually not recognizable at birth and therefore cannot be diagnosed until the child reaches pre-school or school age, and demonstrates obvious signs of abnormal behavior and serious limitations in knowledge and understanding.

The skill to diagnose the full range of FASD is generally limited, and in most countries, non-existent. International collaboration in diagnosing FASD should therefore be encouraged as a major step in capacity building in diagnosing, and in linking this knowledge to primary prevention, as well as measures to reduce the secondary implications of FASD.

Supporting the research and evaluation needed

There is a wealth of research needed on FASD. For example, basic mechanisms at the genetic and epigenetic level, which either may facilitate or protect against the development of FASD are not fully

understood. Basic research may lead to the development of tools to identify risk groups more accurately, as well as to new opportunities for targeted prevention.

At the level of applied research and evaluation, very few controlled prevention trials have been undertaken that can produce reliable findings on how to reduce the frequency of FASD. Programs for prevention must include resources for evaluation of effectiveness.

Additional basic and applied research has the capacity to increase knowledge about prevalence and prevention strategies that are truly effective and cost-effective. This calls for international collaboration in research on FASD.

Using practical tools for capacity building in FASD prevention

There are a number of evidence-based practical measures available that can be introduced in many countries, regions or communities. For example:

1) Providing general information about FASD in appropriate school settings for both girls and boys, by making use of for example evidence based material on FASD.

2) Performing screening for problematic alcohol use among girls and women, which may signal alcohol use in later pregnancies. This can be introduced in primary care settings by the use of already available, validated and easy-to-use instruments. Evidence-based guidelines for providing treatment to pregnant women and mothers are available in the scientific literature and on many web sites.

3) Producing information on FASD, translated and adapted from existing sources, into country or region specific languages, cultures and systems. Such material should be made available widely and in the first place at schools, clinics and centers for maternal health and child health care. National and international funding agencies and organizations should support such activities, which could be organized in cross country collaborations.

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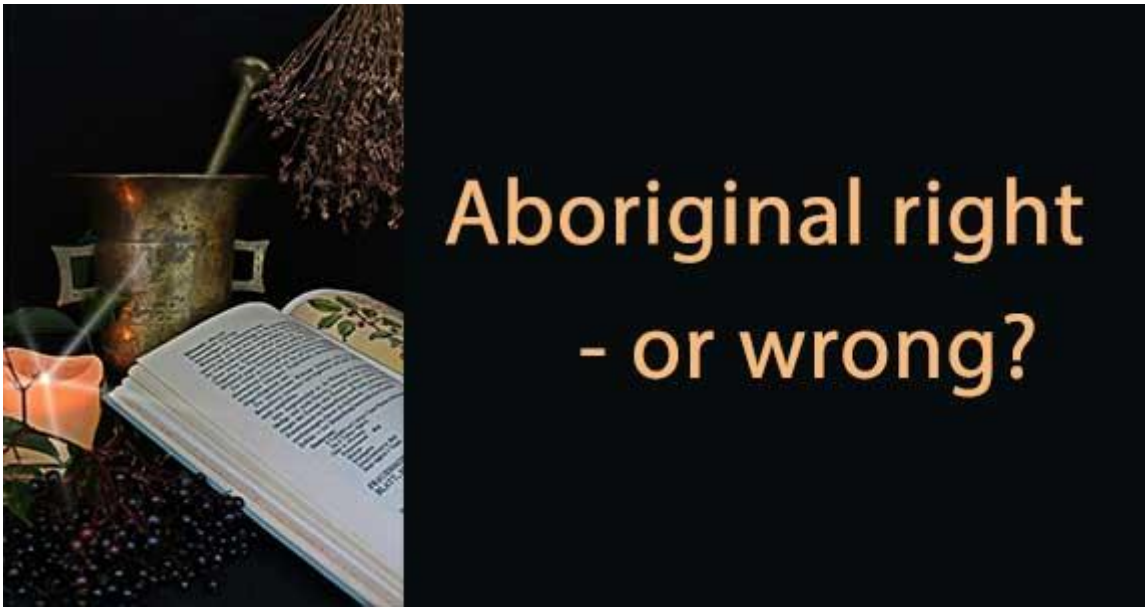
Aboriginal right – or wrong?

Posted By: *John Edmond*



Two eleven-year-old girls from neighbouring First Nations in southwestern Ontario were diagnosed last year with acute lymphoblastic leukemia, a cancer of the bone marrow. Both received chemotherapy, then stopped. One has died. Makayla Sault of the Missisaugas of the New Credit, after eleven weeks, told her parents that the treatments were "killing her," and discontinued the treatment last spring. She died in January, after following "alternative remedies," including an $18,000 treatment at the Hippocrates Health Institute in Florida.

The Institute is run by Brian Clement, a "nutrition counsellor" claiming a Ph.D. in philosophy from the University of Science Arts and Technology of Montserrat, where it has been refused medical accreditation. Licensed as a "massage establishment," treatments include cold laser therapy, Vitamin C injections and a strict raw food diet, not to mention Aqua Chi Ionic Footbath, BioEnergy Field Intervention and The Power of The Mind in Getting Well Program™, none of which seems particularly Aboriginal.

According to the First Nation, "Makayla was on her way to wellness, bravely fighting toward holistic well-being after the harsh side effects that 12 weeks of chemotherapy inflicted on her body. Chemotherapy did irreversible damage to her heart and major organs. This was the cause of the stroke." But a pediatric oncologist is quoted as saying no drug could have caused a stroke months after the fact: Her death "had absolutely nothing to do with the chemo [and] probably has everything to do with the leukemia coming back." He explained that cancer cells accumulating in untreated blood make it more viscous, causing clots and so a stroke.

The other young girl can be known only as J.J., by court order. From the Six Nations, she was the subject of a remarkable decision by the Ontario Court of Justice (the provincial court) that found her mother to

have a constitutionally-protected right to pursue traditional medicine. J.J. started chemotherapy in August, but her mother withdrew consent after 12 days, having spoken with Clement: "He had the tone of voice where he was so confident. By him saying, 'Oh yes no problem we can help her,' that's the day I stopped the chemo." The family found the money to attend the Institute in Florida.

The Ontario hospital applied to the Court a few weeks later for an order stating that J.J. was "a child in need of protection," and requiring her to be returned for treatment. Under the Ontario *Child and Family Services Act*, "A child is in need of protection where … the child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, the treatment." Dr. Breakey, Pediatric Hematologist/Oncologist at McMaster Children's Hospital in Hamilton, Ontario stated, "this leukemia has an approximately 90% cure rate with the recommended treatment. Without chemotherapy, we are not aware of any survivors of pediatric leukemia."

The Court found, "The family are committed traditional longhouse believers who integrate their culture into their day-to-day living." Nevertheless, by the time the proceeding had begun, mother and J.J. had left for Florida.

Was J.J. "in need of protection"? Judge Edward found J.J. "lacked capacity to [discontinue] chemotherapy." He also observed, "no one … is suggesting [the mother] is anyone but a caring loving parent." He then considered whether the mother's decision "to pursue traditional medicine is in fact an aboriginal right" constitutionally protected under s. 35 of the *Constitution Act, 1982,* as submitted by the Six Nations, a party to the proceeding by court order. (No more explanation is offered for this than "it was felt there was an obvious need for input from … the band." But only because the band was a party under compulsion did this case come to turn on Aboriginal rights.) He turned to *R. v. Van der Peet*, a 1996 decision of the Supreme Court of Canada and the leading case on Aboriginal rights. It was about selling fish; typically Aboriginal rights cases are about resource harvesting or disposition. The central principle laid down was, "to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."

From a review of the "Haudenosaunee Code of Behaviour for Traditional Medicine Healers" and other evidence, Judge Edward found that "traditional medicine continues to be practised on Six Nations as it was prior to European contact and, in this court's view, there is no question it forms an integral part of who the Six Nations are."

But what was the practice sought to be protected as an Aboriginal right? This question forms no part of the judicial analysis; it was sufficient that traditional medicine in general is constitutionally protected. The Judge describes the mother's decision as "steeped in a practice that has been rooted in their culture from its beginnings," but does not identify the practice. Yet, he acknowledged that J.J. and her mother had left "to purportedly attend an alternative cancer treatment facility in Florida." What of the Chief Justice's caution in *Van der Peet*: "Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the

right"? Had the Judge asked for what actual practice protection was sought, the answer would have to have been, "cold laser therapy in Florida." Without asking this question, he concludes, "I cannot find that J.J. is a child in need of protection when her substitute decision-maker has chosen to exercise her constitutionally protected right to pursue their [sic] traditional medicine over the applicant's stated course of treatment of chemotherapy." There is no suggestion in the decision that the mother is expected to return from Florida and commence some form of traditional treatment. Where one might expect some explanation of how the "in need of protection" definition fails to apply, the decision is silent.

Judge Edward relied heavily on the evidence of Dr. Karen Hill, a Six Nations medical doctor, practising on Six Nations in concert with a traditional medicine practitioner. The Haudenosaunee Code of Behaviour acknowledges that traditional medicine is not absolute: "As traditional healers, we commit ourselves to referring our clientele to other healers, doctors, or practitioners whenever we feel another form of care is required." Yet there is no record that Dr. Hill was asked whether, given the evidence of Dr. Breakey that chemotherapy had a 90% cure rate and survival was unlikely without it, this may be a case for "another form of care." Nor was she asked for her view of the $18,000 treatment in Florida in contrast to the Code's commitment "to using our medicines wisely and respectfully and prohibiting ourselves from selling our medicines or knowledge for commercial purposes or personal gain."

The Judge was quite selective in his reliance on authority. He repeats Professor Hogg's observation, in his classic text on constitutional law, that Aboriginal rights, being outside the *Charter*, are not subject to s. 1 "reasonable limits," but ignores what Professor Hogg goes on to say, that they are subject to "reasonable regulation." In fact, the *Sparrow* decision of 1990, the first Supreme Court of Canada Aboriginal rights decision, held that these rights may be infringed for valid objectives, including those that "prevent the exercise of … rights that would cause harm to the general populace or to aboriginal peoples themselves." Judge Edward treats the rights as absolute, preventing any consideration of whether an infringement might be justified.

The Judge also ignored critical qualifications by the Supreme Court in *Van der Peet*. Avoidance of harm in the exercise of rights was expanded on by Madam Justice McLachlin (not then Chief Justice), who wrote, "Any right, aboriginal or other, by its very nature carries with it the obligation to use it responsibly. It cannot be used, for example, in a way which harms people, aboriginal or non aboriginal. It is up to the Crown to establish a regulatory regime which respects these objectives," and, "Conservation, for example, is the condition upon which the right to use the resource is itself based; without conservation, there can be no right. The prevention of harm to others is equally compelling. No one can be permitted to exercise rights in a way that will harm others."

These cases were about fish. There can hardly be a more valid infringement of an Aboriginal right than conservation of a child, even if the right existed. No one has the "right" to deny the best available medical care to a child. Judge Edward's decision gives a bad name to Aboriginal rights. For some, it will just confirm prejudices.

For all her commitment to the longhouse traditions, J.J.'s mother was, in her actions, very much in that segment of society that distrusts science, the need for evidence, and authority generally. In another irony, this did not prevent her from turning to the hospital initially, for her child's diagnosis. We have yet to learn the final outcome of this sad story.

Transgender youth: Everyday items, everyday rights

Posted By: *Melissa Luhtanen J.D.*

The public bathroom can be a major source of anxiety for transgender youth. Using a public restroom may result in their status being discovered. If they identify as transgender and have not yet revealed their identity, they may feel like an imposter. Worse yet, trans teens may be subject to ridicule, abuse or assault, physical or sexual, in public lavatories. Issues concerning use of the restroom may be the first notice that a school receives that a child is transgender.

– Which Way to the Restroom? Respecting the rights of transgender youth in the school system

The task of protecting transgender youth in schools has begun. A topic that ten years ago was rarely discussed is now at the forefront of policy-making in many school boards across the country. The job of protecting transgender youth has not been easy and is still in the beginning stages, but it is a source of endless debate and discussion, which means it is on the radar of those who care for youth.

In schools, the discussion has centered around harassment, gendered washrooms and change rooms, segregated sports, dress codes, names and pronouns. Looking at this list, it is easy to see that much of it is a list of details; everyday items that make up a person's day: getting dressed, going to the bathroom, changing for gym, having your friends call you by name, and playing on a sports team. Part of the reason that transgender youth are fighting task by task is because a youth, for the most part, cannot have surgery to live in their identified gender. For a youth, this option is not possible and so they fight the battle of details. Their rights cannot stem from the fact that they have proof of surgery or proof of gender on an identification document. This is not to downplay the complexities of gaining rights for transgender adults, but instead to highlight the struggles for youth.

One of the legal debates has been: when does the law accept transgender persons as being the gender that they identify? Some laws and policies depend on the occurrence of gender reassignment surgery and say that a person must have had some surgery that reflects the identified-gender in order to obtain particular rights. More recently some rights have been permitted to transgender people who self-identify their gender. Policies protecting transgender youth cannot depend on the status of surgery, and so have often allowed for self-identification to obtain rights, such as participating on a particular gendered sports team.

Schools are faced with the issue of addressing how to accommodate a transgender youth who wants to use the bathroom or change room that matches their identified gender. Different school boards have used different standards.

The Edmonton Public School Board Policy on *Sexual Orientation and Gender Identity HFA.AR* asks school staff to be sensitive to the needs and privacy of transgender youth when determining restroom accessibility. It calls for "individual solutions" and mentions finding a solution that does not disrupt the school.

The Vancouver School Board Policy *Code ACB-R-1* assesses the accommodation of a transgender student using washrooms and change rooms "…with the goals of maximizing the student's social integration, ensuring the student's safety and comfort, minimizing stigmatization and providing equal opportunity to participate in physical education classes and sports." It says that transgender students shall be able to use the washroom and change room for their identified gender.

Nova Scotia's *Guidelines for Supporting Transgender and Gender-nonconforming Students* encourages schools to find a safe washroom facility that corresponds with a student's gender identity.

Toronto District School Board's *Guidelines for the Accommodation of Transgender and Gender Non-Conforming Students and Staff* goes a step further by clearly stating: "Requiring students to 'prove' their gender (by requiring a doctor's letter, identity documents, etc.) is not acceptable. A student's self-identification is the sole measure of the student's gender."

Some of these policies reference the transgender student's self-identification as the standard upon which to allow the student to use a washroom that corresponds with their gender. For instance, Toronto's policy is the most clear in using the student's self-identification as the sole gauge of gender. Other policies, such as Edmonton's, discusses the student's identity as transgender in the opening paragraph, but in the clause on restrooms looks more toward "individual solutions", respect and safety. This language of "individual solutions" is in line with human rights law on accommodating a student (or anyone for that matter). When looking for an accommodation, the school is legally bound to look for a solution on a case-by-case basis and to not rely on a one-size-fits-all rule.

School boards such as those in Edmonton, Vancouver and Nova Scotia, have included in their policies that schools must reduce or eliminate gender-segregated activities. Many policies specify that staff

should aim toward accommodating transgender youth according to their gender identity in these activities.

The school board policies in Vancouver, Edmonton, Toronto and Nova Scotia all stress safety and openness to the student participating in the gym class or sports team that corresponds to their gender identity. Each policy notes that excluding transgender youth from physical education is not an option. The debate on the issue of sports runs deeper than these policies are able to address in over-arching statements. In the adult world, the desire of a transgender person to play on a single-gender team that corresponds with their gender identity can create controversy. Some of this controversy has been abated. In 2004, the International Olympic Committee adopted a policy whereby transgender people may compete in the Olympic Games if they: have had gender reassignment surgery, are legally recognized and have had two years of hormone therapy. Many sports oriented organizations have followed suit.

The Transgender Law & Policy Institute, an American based organization, published *Guidelines for Creating Policies for Transgender Children in Recreational Sports* in September 2009. These Guidelines state that the debates that may cause problems in the adult sporting world are focused on the competitive advantage that male hormones may provide in sports. However, "[i]n preadolescent children… hormonal levels do not differ significantly between the sexes. Therefore, no hormonally-based advantage or disadvantage between girls and boys exist."

Not every school board in every province and territory has a policy on transgender youth. Some places are creating policies around sports. Some school boards have yet to create a general policy for transgender youth. Every school board would be bound by human rights laws, within their area, that protect students based on gender identity, gender or sex. And therefore, even school boards without a policy will still have human rights obligations toward transgender students. What many of those rights are has yet to be heard by tribunals and courts. Therefore, students may find it difficult to decipher what rights they are entitled to without a policy, and to obtain those rights in a timely manner.

The policies that I reviewed acknowledged that each situation must be addressed on a case-by-case basis. This is the very nature of accommodation – looking at each case individually and finding solutions that would reasonably accommodate a transgender youth. Legal cases providing direction on these issues are few and far between and there are no cases addressing bathrooms or change rooms that have made it to a higher court (for instance, *Ferris v Office and Technical Employees Union, Local 15* [1999] BCHRTD No 55is a tribunal decision regarding the use of the woman's bathroom by a transgender woman in her workplace). Any case law that does address transgender complainants usually involves adults. Therefore, schools are left to interpret the law as it relates to human rights and apply it to the situation of gender identity.

Mitigating Children's Involvement in Maritime Piracy

Posted By: *Carl Conradi*

Observations by the Roméo Dallaire Child Soldiers Initiative

Introduction

Recently, the Canadian Forces Maritime Warfare Centre (CFMWC) had the honour of hosting the prestigious Multilateral XII Wargame, an annual event that convenes representatives from eight of the western hemisphere's most potent navies. In the past, game scenarios have sought to replicate the catastrophic conditions that have accompanied real-world political or environmental events, such as the 2010 earthquake in Haiti. However, among this year's various problematics and injections, participants will be asked to simulate and discuss the burgeoning involvement of children in maritime piracy.
Until quite recently, the phenomenon of child maritime piracy elicited scant attention. Precious few academic articles have been written on the subject – excepting three pieces by Danielle Fritz, Mark Drumbl, and the Roméo Dallaire Child Soldiers Initiative– and little has been done to create practical counter-piracy doctrine that affords consideration to threats posed by children. Yet according to the Seychellois Department of Legal Affairs, some ten to 20 percent of all pirates captured within the Indian Ocean have been below the age of 18. These youths present naval security actors with unique tactical and operational challenges that merit a distinct tactical and operational response.

Since 2012, the Dalhousie University-based Dallaire Initiative has been partnering with the Dalhousie Marine Piracy Project (DMPP) to explore the security implications of children's involvement in maritime piracy; and while it is not yet capable of offering doctrinal recommendations, the Dallaire Initiative has managed to identify a number of key issues that demand further consideration by affected navies.

Children as a Security Concern

The Dallaire Initiative hypothesises that child pirates share a great deal in common with child soldiers, insofar as they are recruited to serve specific tactical and operational functions – functions that adults are ill-disposed to serve themselves. Indeed, children are prized by unscrupulous commanders (and presumably, by piratical gangs) for being agile, submissive, trustworthy, daring and largely impervious to legal prosecution.

Moreover, as Dr. Shelly Whitman noted:

> *…the socio-economic factors (e.g. poverty, armed violence, lack of educational or employment opportunities, orphanhood, displacement and exposure to disease) that make children vulnerable for use by armed groups exists in each of the major areas where piracy is currently reported. In addition, in many of the regions where piracy exists, children are being used by terrorist groups, criminal gangs and within state and non-state armed groups (e.g. in Somalia, Nigeria and Haiti). Therefore, the use of children and youth by pirate groups could be viewed as a natural extension of these armed groups.*

When they are deployed against a professional armed force, children also present adult security actors with a serious ethical dilemma – one that may result in fatal hesitation and/or subsequent post-traumatic stress. For instance, if a security actor were reluctant to return fire against a child – and said reluctance resulted in the death of a colleague – he or she might be blamed for the casualty. On the other hand, if he or she *were* to return fire – thereby eliminating a child pirate or child soldier – they may return to base, only to be stigmatized as a child killer.

For these various reasons, if Western armies and navies are not afforded adequate doctrinal guidance and clear preparatory training on the subject of child soldiers and/or child criminals, they may well become increasingly loathe to participate in operations that involve children, thereby effectively ceding the strategic advantage to persons who use boys and girls for criminal or political purposes. Obviously, this would be unacceptable.

Challenges Inherent to Engaging Children at Sea

Throughout 2013, the Dallaire Initiative began the exercise of crafting child pirate-specific rules of engagement (ROE) for naval security sector actors. This work was accomplished with significant subject matter input from the CFMWC and was based upon the suite of ROE options put forth in the seminal *Sanremo Handbook on Rules of Engagement.* At this time, the Dallaire Initiative also became a supporting entity of the maritime private security industry's 100 Series Rules on the Use of Force (RUF), a "…model set and example of best practice RUF [that] complement current industry RUF guidance… as well as [that support] the requirements of ISO PAS 28007 as a Publicly Available Specification and international standard."

This period of consultation and design culminated in a security sector roundtable, held at CFB Halifax (Stadacona) from 21-23 October 2013. The event drew together some 20 naval personnel, private security contractors, civilian merchants, international lawyers and child protection experts, who were collectively tasked with assessing the Dallaire Initiative's proposed ROE via a series of scenario exercises.

Ultimately, the roundtable precipitated a radical shift in the Dallaire Initiative's understanding of naval interactions with children at sea. In particular, as participants worked through the Dallaire Initiative's ROE, it became clear that it is both impractical and unadvisable to distinguish between adult pirates and child pirates in the heat of armed combat. While land-based forces have the ability to assess threat according to the actions of individuals, sea-based forces are necessarily obliged to assess threat according to the behaviour of entire skiffs. Whether children are present on any given skiff is nearly impossible to ascertain in advance – and in the absence of such critical intelligence, security sector actors cannot be expected to employ a competing set of child-specific ROE.

Furthermore, it was determined that although UNCLOS and a supporting collection of UN Security Council resolutions stipulate a clear legal responsibility to effect the immediate arrest of any pirate encountered at sea, state navies frequently (and according to some, necessarily) shunt this responsibility when pursuing an ambiguous or conflicting operational mandate. For instance, roundtable participants expressed contrasting views as to whether apprehension and detention of alleged child pirates should be considered an integral component of counter-piracy operations. Some believe that once a skiff has been neutralized, the counter-piracy mission has been accomplished, whether apprehension has taken place or not.

This lack of operational clarity – coupled with the fact that most warships are not built to effect the separation and accommodation of large numbers of adult and child pirates – has meant that many navies, including Canada's, pursue an unofficial policy of "catching and releasing" suspected juveniles. Yet this is *precisely* the kind of strategy that the Dallaire Initiative is striving to abolish; for if adult pirate commanders were to realize that navies routinely release children who are accused of piracy, they will opt to use children more often. In this way, "catch and release" provides a direct incentive for children's recruitment into piratical gangs.

Evidence of Child Maritime Piracy in the Indian Ocean

Near the end of the roundtable event, participants concluded that it would be more prudent for the Dallaire Initiative to shift its focus from the propagation of child-specific ROE to the creation of after-action standard operating procedure (SOP), particularly for the ethical apprehension, detention, interview and transfer of children at sea. Indeed, it was universally affirmed that no such SOP currently exist, neither within the Canadian navy nor any international naval coalitions.

In pursuit of this new objective, the Dallaire Initiative decided that it first had to develop a better understanding of the status quo – that is to say, what navies are *currently* doing when faced with the challenge of apprehending child pirates. This preliminary research prompted the Dallaire Initiative's

attendance at the November 2013 Counter-Piracy Week in Djibouti, as well as a four-week field mission to Kenya and the Seychelles, from February through March 2014. Both "recce" missions yielded a significant amount of pertinent information.

Perhaps most importantly, these two research forays allowed the Dallaire Initiative to conclusively establish children's participation in maritime piracy as an *incontrovertible fact*. Indeed, as was mentioned previously, it was at this time that the Dallaire Initiative learned that some ten to 20 percent of all pirates captured in the Indian Ocean are below the age of 18.

As recounted by the Seychellois Department of Legal Affairs, the average size of a Somali pirate action group (PAG) is nine persons, though they may be comprised of as few as four persons and as many as 15. Typically, one crew member aged 32+ will serve as captain, while members of the boarding party are usually between the ages of 18 and 30. However, in almost all cases, one youth below the age of 18 will be employed to serve in a support capacity (e.g. as a cook or a cleaner). On occasion – as in the notorious hijackings of the SV *Quest*, the FV *Vega 5*, the MV *Semlow* and the MV *Maersk Alabama* – this juvenile auxiliary will be made to participate in boarding party activities. Said organizational structure was further corroborated by a group of some 20 Somali pirates who are currently incarcerated at the Seychelles' Montagne Posée prison.

According to the UN Office on Drugs and Crime (UNODC) in Nairobi, these youths are incorporated into piratical operations precisely because they are "nimble" and "expendable". Moreover, according to the Mombasa-based Seafarers' Assistance Programme, adult pirates may choose to employ children because they are morally "pure", thereby ensuring that their prayers for calm seas and successful operations pass directly to Allah.
Worryingly, the Dallaire Initiative found anecdotal evidence to suggest that juvenile pirates may also be thrown overboard after a successful take, so that their share of the spoils may be redistributed amongst their adult associates.

The Importance of SOP Specific to Child Pirates

While no one East African organization interviewed by the Dallaire Initiative was able to officially confirm that navies in the region are *deliberately* pursuing a strategy of catching and releasing juvenile pirates, many intimated that they'd heard stories to this effect. In the absence of clear doctrinal prescriptions and/or sufficient space to detain large numbers (and different demographics) of pirates, this is not entirely incomprehensible. However, as was mentioned previously, such a strategy may have the unintended consequence of *incentivising* children's participation in maritime piracy.

If one were to therefore grant that navies have a strategic interest in apprehending and detaining pirates – irrespective of their age – one must then consider *how* such a detention would unfold. First: where juveniles are concerned, navies would face the complicated task of physically separating child pirates from their adult associates. This protocol – which has already been established as an international child protection norm on land – is necessary because of the dire physical and psychological

risks that adult detainees may pose to children. Indeed, even when a person is only *suspected* of being a child, they should be treated as such and separated.

Of course, such partition is fraught with challenges. For example, in early 2014, when the Seychelles Police attempted to separate a 14-year-old Somali child pirate from his adult associates, the boy tried to commit suicide twice. According to the Seychelles Police, the boy was terrified that his associates would think that he'd "snitched".

Moreover, when children are being detained by guards who do not share their language, religion or culture (as is the case amongst Somali children detained in the Seychelles), said differences may aggravate their sense of isolation. This is why the Seychelles Prison Service has opted to incarcerate Somali children alongside Somali adults (a practice that it replicates amongst indigenous Seychellois juvenile offenders).

Nevertheless, even within these seemingly compelling circumstances, child pirates should be separated from adults. While the impetus to mitigate a child's sense of isolation or suicidal thoughts is entirely commendable, the solution lies in robust monitoring and the skilled provision of child-specific services – *not* in keeping children and adults together.

Second: once a suspected child pirate has been separated from their adult associates, navies must undertake an individual age assessment, so as to confirm *as accurately as possible* that said juvenile is indeed below the age of 18. Navies already play a tremendously important role in this respect. In the Seychelles, when an alleged pirate is being prosecuted, the age provided by the resident physician aboard the apprehending warship will determine whether he is tried as a minor or as an adult.
At present, the only age assessment technique employed by Western navies (and by most East African prison services) is medical examination. However, whilst affording some veneer of precision, medical examinations – including, for example, dental and bone scans – are often highly inaccurate. This is especially true in cases involving persons who are malnourished or diseased and whose bodies are therefore suffering from accelerated ageing. Such is often the case amongst apprehended Somali pirates, many of whom may appear to be older than they actually are.

In light of the above, UNICEF has actually recommended that medical examination be the *last of several* techniques employed during an age assessment. The assessor is first and foremost encouraged to conduct a psychosocial interview with the suspected child. By asking questions that probe memories and associated inconsistencies, skilled child protection officers are able to estimate a person's age within a narrow window of months or years. Medical examinations should then be used only to *corroborate* what has been discovered during the interview.

Conclusion

The Dallaire Initiative has made great strides in its work on child maritime piracy, having both proven its existence as a widespread phenomenon (particularly in the Indian Ocean, though possibly in the Gulf of

Guinea, the Straits of Malacca and other areas where youth and criminality have frequently intersected) and identified a number of related problems that demand further consideration by concerned navies. Its preliminary recommendations on the subject of child maritime piracy are as follows:

1. In recognizing that children afford piratical gangs certain idiosyncratic tactical and operational advantages, naval doctrine must outline a child-specific tactical and operational response. It appears that the United Kingdom's Royal Navy has already made some headway in this respect, having drafted specific guidance for engaging (though not necessarily detaining) children at sea. If a country's navy does not currently offer such clear doctrinal instruction, the Royal Navy may serve as one possible model.

2. More specifically, navies must include apprehension and detention as integral, non-optional components of counter-piracy operations – *especially* when intelligence indicates that children may be present. In the absence of such clarity, some may believe that once a purported pirate skiff has been neutralized, the counter-piracy mission has been accomplished. This would effectively mean that possible juvenile crew are being surrendered to criminal elements – a move prohibited by international children's rights law.

3. Warships deployed to participate in counter-piracy operations should be equipped with multiple detention facilities, so as to allow for the possible separation of child and adult detainees. During the Dallaire Initiative's visit to Kenya and the Seychelles, it became clear that certain navies – such as the French – have already begun to do so (see the *Siroco*, the *Floréal* and the *Nivôse*). If a given navy were not in possession of such a warship, alternative procedures should be devised to preserve the spirit of what separation is intended to accomplish.

4. When a suspected child pirate is being subjected to age assessment aboard a naval warship, the first technique used should be the psychosocial interview. Recognizing that most warships do not already have a designated child protection officer who is experienced in such exercises, navies should collaborate with international child protection organizations to have a particular "point person" trained in general child protection. This person should also receive some context-specific training in the operating region's culture and history.

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Notes:

1. Danielle Fritz, (2012) "Child Pirates from Somalia: A Call for the International Community to Support the Further Development of Juvenile Justice Systems in Puntland and Somaliland," *Case Western Reserve Journal of International Law*, Vol. 44.

2. Mark Drumbl, (2013) "Child Pirates: Rehabilitation, Reintegration and Accountability," *Washington & Lee Legal Studies Paper* No. 2013-16.

3. Dr. Shelly Whitman, (2012) "Children and Youth in Marine Piracy: Causes, Consequences and the Way Forward"

4. Interview with Mr. Charles Brown (Senior State Counsel, Republic of Seychelles), March 2014.

One Edmonton Youth in Conflict with the Law: A Case Study

Posted By: *Stephanie Jansen*

We have all been there at one point in time: young, insecure, and impressionable. You would do anything to fit in: wear the right clothes; listen to the proper music; dislike the right people and share the same opinions as all the cool kids. But what if the cool kids were the RCMP acting as undercover agents to obtain a confession from a teenager suspected of killing two people?

This is precisely what happened in the spring of 2012 during a "Mr. Big" operation where undercover officers coerced a murder confession from a youth under the guise of recruiting him for organized crime activities. Barry Boenke and Susan Trudel were found bludgeoned and shot on their property in Strathcona County in 2009. Two youths were arrested after they were discovered driving the stolen truck belonging to Mr. Boenke. The charges were stayed in 2011 after a judge excluded an illegally obtained confession from one of the young men.

Despite this exclusion, the RCMP carried on with its attempts to lure the teen into their imaginary gang. The strategy included supplying the underage foster child with beer, concert and hockey tickets, a PlayStation and a trip to the mountains.

Through the interception of letters, and the monitoring of the teen's phone calls, the RCMP spent over 200,000 dollars on the undercover operation. Eventually, they received what they set out to accomplish: the teen confessed to killing Boenke and Trudel. Regardless of the fact that the confession contained many factual errors and outright absurdities, the RCMP arrested the teen for the two murders.

There are some obvious issues with this approach, the most blatant being that the conduct by the RCMP could be interpreted as abusive. The teen was a foster child with a poverty stricken upbringing, and a history of sexual abuse. Some might argue that it was no wonder the boy was so keen to have his "new friends" accept him into their gang. A lifetime of neglect and exclusion had resulted in a very attention-deprived young man, willing to sacrifice practically anything to be recognized.

These circumstances have raised some moral and ethical questions around whether these types of operations ought to be used when the target suspect is a youth. The teen's defence lawyer argued that the case was an example of police entrapment. This was argued after the teen was found guilty of counseling to commit murder in March 2013. But by May of the same year, Justice Brian Burrows threw out the confessions the RCMP gathered in their undercover operation.

Ultimately, Justice Burrows determined that the RCMP violated the teen's *Charter* rights against self-incrimination. (R v. NRR, 2013 ABQB 288 (CanLII)) Worse, the judge also found that the teen's confession contained exaggerated, inaccurate descriptions of what happened and was not the least bit credible. The judge acquitted the teen, without even hearing from the defence, because there was no evidence linking the teen to the murders.

Incredibly, the RCMP did not investigate anyone else and has declared that it will not pursue other suspects in the future. This, in spite of evidence presented at trial that investigators found a bloody handprint and three sets of boot prints belonging to three unidentified people. The teen's fingerprints and DNA were not found at the murder scene.

The idea that someone underage could be coerced into a false confession is troubling, to say the least. Justice Burrows wrote: "permitting the use of the statements made to Mr. Big would give rise to the real and serious possibility of abusive conduct by the state." He also wrote that the state had a duty to protect the teen. "As his guardian, the state had a duty to protect which was incompatible with its desire as the enforcer of criminal law to deceive him." It was deceit, plain and simple.

The focus of these types of operations must be on ensuring that statements from susceptible people are reliable. In this case, the RCMP appeared to care more about a conviction than warranting accurate information. The RCMP should have been aware from the beginning that their main suspect was unreliable from the very fact that the teen's stories changed each time they were told, and had been proven inaccurate by forensic evidence.

Worst of all for the teen, as the "Mr. Big" operation was unfolding, he was being sexually exploited by someone who had worked at a detention center where the teen was held, and she is now facing criminal charges.

While the excluded confession and acquittal have devastated the families of Boenke and Trudel, the decision of the Court was the correct one. The need to hold someone responsible for these murders

cannot overshadow the importance of compiling evidence properly, and not compromising the *Charter rights* of anyone in the process, particularly our most vulnerable.

Ultimately, the teen was found guilty of possession of Boenke's stolen truck and break and enter. He was sentenced to twelve months probation.

Wedding Law: By the Authority Vested in Me . . .

Posted By: *Peter Bowal*

Add getting married to the list of activities in modern Canadian society which today is easy, chock full of options and as quick as you want it. This article is a brief summary of wedding law in Canada.

Federal Marriage Legislation

While our *Constitution Act, 1867*, section 91(26) confers exclusive jurisdiction on "marriage and divorce" upon the federal government, the federal regulatory role over marriage is a modest one.

The *Civil Marriage Act, SC 2005, c 33* was enacted in 2005 to authorize same-sex marriage. Section 2 reads: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." Accordingly, gender is not specified in Canadian marriage legislation. Religious officiants are free to refuse to perform marriages that are not in accordance with their religious beliefs (section 3). Presumably, civil marriage commissioners with similar religious convictions are not entitled to the same scope of freedom of conscience, although section 3.1 adds that "no person shall be deprived of any benefit . . . of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights*."

Section 2(2) of the *Marriage (Prohibited Degrees) Act, SC 1990, c 46* bars someone from marrying "another person if they are related lineally, or as brother or sister or half-brother or half-sister, including by adoption." Lineal relationship is not defined, but would include close, direct relatives by blood or adoption such as grandparent-grandchild, parent-child, and siblings. Such prohibited marriages are void [section 3(2)].

The federal *Criminal Code RSC 1985, c C-46* establishes certain "offences against conjugal rights" in sections 290 to 293, namely bigamy, "procuring feigned marriage" and polygamy. Unlawful solemnization of marriage, whether it be an unauthorized officiant or someone who "procures a person to solemnize a marriage knowing he is not lawfully authorized to solemnize the marriage" [section 294(b)] is a crime punishable by imprisonment for up to two years.

Recognition of Foreign Marriages

What about eloping overseas, quickie Las Vegas marriages, beach resort weddings in the Caribbean, or immigrating to Canada as a married person? Generally, a foreign marriage will be legally recognized in Canada if it is legal under the laws of the location where it occurred and if it complies with Canada's federal laws on marriage, which prohibit marriage between close relatives and being married to only one person at a time.

Provincial and Territorial Marriage Legislation

In the exercise of their constitutional authority over "the solemnization of marriage in the province" [*Constitution Act, 1867*, section 92(12)], all provinces and territories have *Marriage Acts* which have much in common (see Appendix). This legislation sets out who can solemnize marriages, namely religious representatives or marriage commissioners, and provides a process for registering them. Religious clergy must be ordained or appointed according to the rites of the religion. There are over 8000 clergy registered to perform marriages in Alberta. Marriage commissioners are discussed below.

Legal formalities for weddings are minimal. There must be at least two adult witnesses present at the wedding, which must be performed in a language that all understand, or is otherwise interpreted. The wedding must happen within 90 days of the marriage license being issued, and even on the same day that the license is issued.

Sixteen is the minimum age to marry, and parents or guardians must give written consent for children under 18 years to marry unless the female is pregnant or a mother. If either of the marrying parties has been divorced, proof of that divorce must be provided.

There is significant opportunity to create one's own wedding ceremony. It can be held anywhere in the province or territory. Civil ceremonies especially are limited only by one's imagination. They are held in homes, resorts, hotels, restaurants, boats, at one's workplace or sports events, underwater, in airplanes or skydiving, parks, vehicles, hospitals, amusement rides, and even jails. The mountains are a popular venue. Per capita, there are 15 times more marriage commissioners in Canmore than in Medicine Hat. Weddings can be long or short, big or small, formal or informal, and traditional or original.

Certain words of marriage, however, are prescribed. For example, in Ontario the parties must say to each other: "I call upon these persons here present to witness that I, (name), do take you, (name), to be my lawful wedded (wife/husband/spouse)." This is followed by exchanging "I do solemnly declare that I do not know of any lawful impediment why I, (name), may not be joined in matrimony to (name)." The officiant ultimately proclaims "I, (name), by virtue of the powers vested in me by the *Marriage Act*, do hereby pronounce you (party 1) and (party 2) to be married."

Provincial Differences

Alberta singles out the Bahai faith for special regulation as does Newfoundland and Labrador, which also has special provision for the Labrador Inuit. Saskatchewan has special mention for the marriage of Doukhobors. In Ontario, Aboriginals residing on a reserve are exempt from paying marriage license fees.

Quebec's marriage laws are in the *Civil Code of Quebec* and include Civil Unions. The Quebec flag must be displayed in the room in which courthouse ceremonies take place. Even the attire of the clerk or deputy clerk performing the ceremony is regulated. The text will be read in either French or English, as preferred by the parties. If they want another language, they must provide an interpreter at their own expense. The form of ceremony is detailed and outlined in the rules.

Marriage Law in Alberta

Marriage Licenses

The marrying parties must present proof of identification, proof of age, parents' birthplace and names, including the mother's maiden name and, if applicable, final divorce papers. This information is online under the Vital Statistics department of the Service Alberta ministry. The marriage license is for record keeping only. One does not have to qualify beyond demographics or pass a test of skill to get this license. The marriage license is surrendered to the officiant at the wedding and is not returned to the couple.

Issuers of marriage licences are private parties appointed by the province for up to 5 years, much in the same way as Marriage Commissioners as described below.

Civil Ceremonies

Civil weddings are a popular option because they can be fast, convenient, informal and secular. Don't be surprised if, while on a walk or in a hotel, you are asked to be a witness to someone's wedding. Civil weddings are just as legal as religious ceremonies. The legislation permits civil weddings to be followed by religious ceremonies, if the parties desire.

For civil weddings, a private, registered Marriage Commissioner must be contracted to officiate at the ceremony. That individual may also assist with the wedding plans and documentation. Commissioners generally charge $300 to $500. A full listing of these Commissioners is available online at the Service Alberta website, from all registry agents and even in map form at the Government of Alberta website. They cannot themselves perform religious elements (such as readings and prayers) in the ceremonies but any participant in the ceremony can do that.

Becoming a Marriage Commissioner

Alberta appoints both permanent (actually only for up to five years) and temporary Marriage Commissioners to perform civil (non-religious) marriages in their communities. *Permanent* Marriage Commissioners must be 18 years old, fluent in written and spoken English, resident in Alberta where they perform marriages, and possessed of a driver's licence and own vehicle. The position profile calls for customer service experience, good presentation and public speaking skills and access to the

Internet. There is a roster of several hundred permanent Marriage Commissioners. Most communities are covered and there are no current openings. When an opening appears, a four- page application form, cover letter, resume and two letters of reference must be submitted by the closing date. Candidates are interviewed.

Temporary Marriage Commissioners are appointed for one day (24 hours) up to three times each calendar year. These temporary appointments are curiously restricted to current or former: judges, members of a provincial legislature, members of the House of Commons or Senate, and permanent Marriage Commissioners from other Canadian jurisdictions. Any former permanent Alberta Marriage Commissioner in good standing may also be appointed a temporary Marriage Commissioner. In special cases where it is clearly verified that no current permanent Marriage Commissioner is available, a temporary Marriage Commissioner who does not fall into one of the above categories can be appointed. One occasionally hears how a parent obtains the temporary authorization on the basis that a child's wedding will be in a very remote wilderness location which is not serviced by other appointees.

Other than this official category status, temporary Marriage Commissioners have the same qualifications, except that they can come from anywhere in Canada to perform marriages for one day in Alberta.

Certificate of Marriage

Couples receive an unofficial Marriage Statement certificate after the ceremony. The marriage should be registered by the officiant at Alberta Vital Statistics Registry, from which the newlyweds can then apply to obtain an official Certificate of Marriage.

Conclusion

Marriage remains an important social institution, but it has undergone a major revolution in the last generation. People who marry do so at an older age. A growing number of single parents raise children. Common law relationships enjoy many of the same legal protections as officiated, witnessed and registered marriages. Same sex marriages are legal and commonplace. The overall marriage rate has declined to where fewer than two-thirds of Canadian families are headed by married couples. There are now more single-person households than couples with children.

It is not surprising, therefore, that wedding and marriage law has adapted to reflect those numerous choices and freedoms. Those who choose to marry no longer have to be 'solemn', nor exchange elaborate promises to 'honour and obey' each other in a church before a community of witnesses. If they choose marriage, they have a range of thoroughly modern options available to them in Canada to get the job done.

Appendix: Provincial Marriage Legislation

British Colombia: *Marriage Act, RSBC 1996, c 282*
Alberta: *Marriage Act, RSA 2000, c M-5*

Saskatchewan: *Marriage Act, 1995, SS 1995, c M-4.1*
Manitoba: *Marriage Act, CCSM c M50*
Ontario: *Marriage Act, RSO 1990, c M.3*
Newfoundland and Labrador: *Marriage Act, SNL 2009, c M-1.02*
Prince Edward Island: *Marriage Act, RSPEI 1988, c M-3*
Yukon: *Marriage Act, RSY 2002, c 146*
Northwest Territories: *Marriage Act, RSNWT 1988, c M-4*
Nunavut: *Marriage Act, RSNWT (Nu) 1988, c M-4*
New Brunswick: *Marriage Act, RSNB 2011, c 188*
Nova Scotia: *Solemnization of Marriage Act, RSNS 1989, c 436*
Quebec: *Rules respecting the solemnization of civil marriages and civil unions, CQLR c CCQ, r 3*

The Engagement Ring: Whose Property is it?

Posted By: *Juliana Ho*

As William Shakespeare once wrote “The course of true love never did run smooth.” What happens when relationships turn sour and questions arise about property that a couple may have acquired together prior to marriage or given as gifts to one another? If diamonds are forever, does the bride-to-be get to keep the engagement ring when the wedding is called off?

On January 6, 2015, *The Toronto Star featured a story* about a now-separated twenty-something couple in Ottawa, who brought a bitter property dispute to the Ontario Superior Court. In this case, the groom’s family gave the bride half ownership of a home worth $1 million as a wedding gift, which they then sought to reclaim when the marriage disintegrated a year and a half later, suggesting that the gift was conditional upon the parties staying married and continuing to “reside in the property as a matrimonial home.” The bride, in turn, argued that her share was an absolute gift that was not conditional upon any need to remain in the marriage in order to keep ownership.

Based on the facts of the case, the court held that the following components of a valid gift as set out in *McNamee v. McNamee, 2011 ONCA 533 (CanLII)* were met:

1. An intention to make a gift on the part of the donor, without consideration or expectation or remuneration;
2. An acceptance of the gift by the donee; and
3. A sufficient act of deliver or transfer of the property to complete the transaction

According to Justice Smith, the only “expectation” involved here was that the couple would marry, not that they would remain married indefinitely. Because there was no documentary evidence that supported the family’s claim that the bride had agreed to conditions that would strip her of her share of the property should the marriage end, the court dismissed the claim that the bride be required to reimburse the groom’s family for her share of the home.

While the circumstances of this case may seem quite specific and unique, variations of similar questions about ownership and conditional gifts are much more widely applicable than what appears on the surface. For example, if one party provides their partner with an engagement ring with the intention of getting married, which party gets to claim ownership of the ring should the couple never make it to the altar?

A short survey of different sources seems to indicate that opinions vary widely across Canadian jurisdictions. According to Toronto-based civil litigation attorney Anna Wong ("With this ring, I… take thee to court"), some courts have held the engagement ring to be a conditional gift, the eventual ownership of which is dependent upon which party ended the engagement. As this view considers the engagement ring to be a symbol of the binding agreement to marry, whoever ends the engagement forfeits their right to claim ownership of the ring. For example, in *Okhai v. Sharify, 2004 CanLII 33356 (ON SC),* the plaintiff sought the return of an engagement ring, claiming that the defendant Sharify conspired to relieve him of his assets through marriage. Sharify countered by suggesting that she was physically or mentally abused by the plaintiff, which caused her to terminate the engagement. In his written judgment, Justice Loukidelis followed the previously mentioned rule on engagement rings, holding that because it is clear that "the engagement was terminated by the defendant [Sharify], … the ring should therefore be returned to the plaintiff." However, because the claims of conspiracy and abuse were ultimately dismissed by the court for lack of evidence, it is not possible to anticipate whether these assertions, if proven, would have changed the court's ruling. While this case raises questions as to whether it may be more appropriate to also consider the reasons behind why the engagement was terminated in the first place, interpreting engagement rings as a conditional gift in this way would certainly simplify the process, as it eliminates, in large part, the need to explore additional details about the couple's relationship that move beyond who terminated the engagement.

Alternatively, an engagement ring can be considered an unconditional gift, which does not bind the party who receives the ring into returning it to the donee should the marriage not take place. In such cases, the ring becomes the property of the receiver upon delivery and cannot be recovered by the original owner despite who ends the engagement for whatever reason.

Lastly, according to Anna Wong, the offer and acceptance of an engagement ring has been taken by some courts to symbolize "a mutual promise to marry," that calls for the parties to be restored to their pre-contract positions should the marriage not go forward. For example, in *Sperling v Grouwstra* (*K.E.S. v. C.G., 2004 BCSC 330*), both parties "blames the other for the failure to set a date, as each blames the other for ending the relationship, and each asserts a claim to the ring." Despite the absence of persuasive evidence as to who ended the relationship, the court held that the ring should be returned to Sperling, as he was the original purchaser. In following this logic, returning the ring to Sperling was considered the most appropriate way in which to restore the parties to the financial positions they were in prior to the engagement.

As Ontario-based lawyer Jason Murphy points out, these questions of ownership have recently gained higher stakes, as "modern engagements often entail more financial commitments than just jewelry."

Therefore, as Wong suggests, there is a pressing need to “inject some consistency and clarity into the law,” to allow couples to better understand where they stand and to better equip individuals to make decisions best fitted to their circumstances.

Married vs. Common Law – What's the Difference Anyway?

Posted By: *Brad Taylor*

 [1]

Introduction

Most individuals who have recently wed realize this will change their income tax status, but common law couples often fail to realize they may also be considered married by the Tax Man. Many are surprised to learn that a different set of rules applies the next time they file their income tax returns. This article provides a basic overview of how married and common law are defined for purposes of the *Income Tax Act* of Canada ("*ITA*") and some tax advantages and disadvantages associated with married/common law status.

Definitions

Married

The *ITA* does not specifically define married, so the ordinary definition – two people legally united in marriage – applies.

Common Law

The *ITA* defines a common law partner as a person (opposite or same sex) with whom the taxpayer lives in a conjugal relationship, and at least one of the following applies:

- the parties have cohabitated with one another throughout the previous 12 months, or
- the person is the parent of the taxpayer's child.

In determining whether two individuals are living in a conjugal relationship, the courts evaluate seven main factors:

- shelter
- sexual and personal behaviour
- services
- social
- societal
- support (economic)
- children

These factors were cited in the case of *Hendricken v. The Queen*, 2008 TCC 48 Paragraph 12 of this case expands on each of these factors.

For couples without children, this means they become common-law partners one year after they move in together. Under these definitions, it is possible for a legally married person to also have a common law spouse (or multiple spouses).

Each province legislates "common law status" for family law purposes, typically not matching the income tax definition. For the remainder of this article, "married" is used to refer to both legally married and common law couples, unless otherwise noted. Ultimately, the *Income Tax Act* affords married and common law couples the same advantages and disadvantages.

Tax Advantages Enjoyed by Married Couples

Spousal Tax Credit

If one spouse had net income less than their basic personal amount in the taxation year ($11,327 in 2015 indexed for inflation), the excess may be transferred to their spouse. Where one spouse had no income in 2015, the other would claim a married credit based on $11,327, for a federal tax savings of $1,699. Provincial credits are available as well, in varying amounts.

Transfer/Optimization of Personal Tax Credits

Married couples can optimize the use of their personal tax credits by transferring or combining credits on their tax returns. Some credits that may be transferred include: the age credit; pension income credit; disability tax credit; and tuition credits.

Medical expense credits can be optimized by combining the couple's eligible expenses and claiming them on one return. Medical expenses are reduced based on net income, so combining a couple's expenses normally results in a greater tax benefit.

The Canada Revenue Agency also allows charitable donations made by either spouse to be claimed on one spouse's return to take advantage of a higher credit on donations exceeding $200.

Spousal RRSP Contributions

One spouse may make contributions to the other's RRSP. The contributor will receive a deduction as if they had contributed to their own plan. Generally, the higher income spouse will contribute to the lower income spouse's RRSP, on the assumption that the lower income spouse will continue to have lower income upon the couple's retirement. Taxes in retirement will be minimized by equalizing the spouses' respective incomes.

Pension Income Splitting

Married couples can split up to 50% of their eligible pension income on their income tax returns. When each partner is in a different tax bracket, this reduces the couple's taxes by allowing the higher-taxed spouse to shift some income to the lower-taxed spouse. This can also reduce exposure to Old Age Security repayment for higher income individuals.

Transferring Assets Without Triggering Gains

Capital property such as the matrimonial house, family cottage, or non-registered investments may be transferred between the married couple on a tax deferred basis. The *ITA* allows one spouse to transfer capital property to the other spouse at their cost amount, realizing no gains. Careful planning is necessary to ensure the attribution rules (discussed below) are addressed. An election could be made to transfer at fair market value if they wish to realize any gains.

Spousal rollover provisions apply automatically on the death of a spouse. In addition, if the surviving spouse is the beneficiary of the deceased's RRSP/RRIF, this can also transfer on a tax deferred basis to the surviving spouse's RRSP/RRIF.

Canada Pension Plan Benefits

Spouses qualify for CPP survivor benefits, and may also qualify for survivor benefits from other pension plans. Application for such benefits often results in a review of past income tax filings to determine whether married/common law status was reported historically.

Tax Disadvantages of Being Married

Attribution Rules

Married couples generally cannot transfer investment income by transferring investment assets. Income and capital gains (or losses) on assets transferred attribute back to the spouse who transferred the asset. For example, if Betty transfers her TELUS shares to her spouse, Barney, any dividends he receives are properly taxable to Betty, as are any capital gains (or losses) on the sale of the shares. Further any investments Barney acquires with the proceeds on a sale of the TELUS shares are also subject to this attribution. The attribution rules are complex, and asset transfers can, with careful planning, be structured to allow the income and capital gains to properly be taxed to the recipient of the assets.

Potential Loss of Benefits

Eligibility for certain benefits such as the Guaranteed Income Supplement, Canada Child Tax Benefit or the GST Credit are determined based on family net income for a married couple. If either spouse qualified for these benefits before they were married, they may be reduced or lost based on their family net income.

Loss of Principal Residence Exemption

The capital gain on the sale of a principal residence is tax exempt if the property is designated. If one spouse owned a home and the other owned a cottage, the capital gain on the sale of both properties could be exempt if they were not married. Once the couple is married, they will only be able to designate one home as their principal residence, and any capital gain on the sale of the other property is taxable. Some of the gain may still be exempt if they owned the property before they became married. See "Your Principal Residence and Taxes" in the July 1, 2013 issue of LawNow.

Loss of Eligible Dependent Credit

Single individuals may claim an eligible dependent credit for a minor child in their care. This credit is equivalent to the married credit, but is not available to a person who is married throughout the year.

Child Care Expenses

Where a married couple incurs tax-deductible child care expenses, the deduction must normally be claimed by the lower income spouse.

Relationship Breakdown

When the relationship doesn't work out, it is important to note that the *ITA* also has specific rules on when an individual is considered to be single.

For individuals exiting a common law relationship, they will not be considered single for income tax purposes until the relationship has ceased for a period of at least 90 consecutive days due to a breakdown in the relationship. For example, if the couple was to separate on December 31, and stay separated until at least March 31 (90 days), they ceased being common law on December 31. However, if they reconciled in March, they would not cease being common law at all.

For married couples, the 90 day rule is also applicable. However, subsequent to 90 days, married individuals will be considered separated for income tax purposes. The single marital status will not be applied until such time as the divorce (cessation of a legal marriage) is finalized.

While many of the tax rules related to separation and divorce apply equally to common law and married couples, there are some complex cases, particularly where the couple owns an interest in a private corporation, where the tax treatment depends on the marriage continuing. The date of divorce is under the couple's control. As noted above, the date a common law relationship ends is not. These provisions can be extremely complex and mandate specialized advice being obtained.

Conclusion

In conclusion, there are many issues that couples, both young and old need to be aware of when entering into or exiting out of a marriage or common law relationship. Often, the tax implications are overlooked in addressing other issues like pre-nuptial agreements, future asset division, and revision of Wills. Being mindful of these issues can help maximize the benefits for the couple and avoid some potentially negative tax consequences that could arise due to poor planning. Professional advice should always be sought to ensure that the proper precautions and planning aspects of a change in marital status are taken into consideration.

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Viewpoint 39-4: Ten Years – A Look Back At Bullying

Posted By: *Rob Frenette, O.N.B.* [1]

What were you doing in 2005? I can easily recall what I was trying to accomplish. I was a grade 9 student at Bathurst High School at the time, trying to get the courage to do something that no one ever thought I would do – come forward as a sixteen-year-old teenager who endured years of bullying. Come forward to try to accomplish one task, prevent bullying by the year 2008; the year I graduated from High School. The year that, at the time, I was hoping would be enough to prevent one more kid from being silenced about the pain, the thoughts, the abuse they were enduring. The same thoughts, abuse, and the pain I was enduring.

I was kicked, burnt, spit on, called names because of the way I walked – a name that that unfortunately I will remember for the rest of my life.

Prior to going public, I wrote an anonymous letter to the editor of my local newspaper The Northern Light. That letter turned into a column written by the editor of the paper at the time. His column was entitled "Even in so-called enlightened times, bullying is still a problem". That headline spoke volumes to me, and it still does today, but for a different reason.

I can clearly remember the nightmares, the night sweats, the headaches, not being able to do my homework because I had to pay more attention to: was I going to get thrown down the stairs? Tripped? Shoved? Kicked? How could I concentrate on learning while trying to prevent another sleepless night? I remember two students who I went to school with, two girls who were sisters who publicly never got identified, and how they burned the back of my neck on the way to school, and how unfortunately, no punishment could be handed out because a) no one would say a word on what they witnessed in fear that they would be the next target and b) the location the bullying happened – on a school bus. The bus driver didn't see the incident happen and the bus did not have a camera.

In ten years, bullying has changed dramatically. The forms of bullying have changed, the way bullying is reported has changed, the way schools handle bullying has changed too and most importantly youth hopefully know they now have a voice, and can speak out and get bullying support when they need it most. Over a ten-year span, I've been able to help grow a national anti-bullying charity, share my story

about how a student with cerebral palsy was bullied, and most importantly, I can now help other youth and their families get the support they need.

Policies have come and gone over the years, some have helped prevent another child enduring what I did while others are newer and provide something that was not there when I was in school – more support for teachers, more information on the new forms of bullying.

I've been recognized for my tireless work, ranging from my first award being the Chaleur Youth Outstanding Awards, a part of an award ceremony that the Bathurst Youth Centre offers, to Community Leader Awards, to most recently the Order of New Brunswick in 2011 at the age of 21. The youngest New Brunswicker to receive this honor since its creation.

Over the next years, I hope to see more programs, support networks, laws, and policies to help handle this problem. To the educators who did all they could with the resources they had at the time, thank you. To the media, especially The Northern Light and MAX 104.9 FM (formally CKBC), thank you for helping tell my story. To the national media, thank you for helping get my message out, coast to coast to coast.

To any child or teen who is afraid of coming forward to tell someone, I have a very important message to you, your parents and family: tell someone. Tell a teacher, a guidance counsellor, a school official. Tell someone. You do not need to live in silence. Any child or teenager or their family can reach out to BullyingCanada 24/7 for support, information and resources by telephone at: 877-352-4497, or by email: support@bullyingcanada.ca

Role of the Organization of American States in Canadian Human Rights

Posted By: *Linda McKay-Panos*

Recently, the Inter-American Commission on Human Rights of the Organization of American States (OAS) said that there should be an inquiry in Canada into the country's missing and murdered indigenous women and girls. The seven-member panel concluded that the disappearances and murders are part of a larger pattern of discrimination. The report said: "addressing violence against women is not sufficient unless the underlying factors of discrimination that originate and exacerbate the violence are also addressed."

While many Canadians are familiar with the United Nations, others may not have heard about regional human rights bodies that Canada is involved with, such as the Organization of American States (OAS) and the Inter-American Human Rights System.

The Organization of American States *Charter* was signed in 1948, and entered into force in 1951. The *Charter* has been amended on a few occasions. According to OAS *Charter* Article 1, the OAS was created to achieve among its member states "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and defend their sovereignty, their territorial integrity, and their independence." The OAS consists of all 35 independent states of the Americas (including Canada) and is the main political, juridical, and social governmental forum in this hemisphere. The OAS has also granted permanent observer status to 69 other states and the European Union. The OAS has four pillars: democracy, human rights, security, and development.

The *American Declaration of the Rights and Duties of Man* was adopted in 1948 ("*Declaration*"). In 1969, the *American Convention on Human Rights* ("*Convention"*) was adopted. The preamble states that the purpose of the *Convention* is "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." The Inter-American Commission on Human Rights ("IACHR") and the Inter-American Court of Human Rights (both organs of the OAS) are responsible for overseeing compliance with the *Convention*.

In addition to an individual or group petition complaint process, the IACHR also monitors the general human rights situations in member-states and publishes country-specific human rights reports where it determines these are necessary. The reports also contain recommendations to countries that are

intended to improve their human rights situation. The *Report on Murdered and Missing Indigenous Women in British Columbia, Canada* is one such report ("Report").

The Report was prepared after a working visit to Canada in August 2013 to collect information from individuals, government, and civil society sources, among others. The Report notes that although indigenous people represent a small percentage of Canada's total population, the number of missing and murdered indigenous women is particularly concerning, especially in British Columbia (concentrated near Prince George and in the Downtown East Side of Vancouver). The Executive Summary states:

- The disappearances and murders are part of a broader pattern of violence and discrimination against indigenous women across Canada.
- Submissions indicate that police have failed to adequately prevent and protect indigenous women from killings and disappearances, and have failed to properly and promptly investigate these cases.
- Canadians largely agree that the root causes of the high levels of violence are related to the history of discrimination from colonization and the unjust laws and policies such as the *Indian Act* and forced enrolment in residential schools that continue to affect indigenous peoples in Canada.
- The historical discrimination has resulted in indigenous women and girls being one of the most disadvantaged groups in Canada.
- Poverty, inadequate housing, and economic and social relegation contribute to the increased vulnerability to violence.
- IACHR strongly indicates, however, that addressing violence against indigenous women is not enough unless the racial and gender discrimination that cause and exacerbate the violence are also addressed comprehensively.
- While there have been efforts to address the situation of missing and murdered indigenous women in British Columbia, there needs to be a coordinated and consultative response to address the discrimination and violence against indigenous women and girls in order to create successful response mechanisms for responses to the problem.

The Report concludes with a series of recommendations for Canada. These recommendations will be discussed in the next issue of LawNow.

Unilateral Relocations – Don't Do It!

Posted By: *Sarah Dargatz*

[1]

When a family is in conflict, it can be tempting for one parent to want to get away. This can be especially true in cases where a parent is struggling financially after a separation or, in cases of domestic violence, when leaving is part of a safety plan. However, a unilateral relocation with a child can have detrimental consequences in the long run.

As has been reviewed in past Law Now columns, most parents are joint guardians of their child with the other parent. This means that, *unless a court has said otherwise*, parents are required to make major decisions regarding their child together. One parent is not free to relocate a child without the permission of the other parent or the court, e*ven if they feel they have excellent reasons, including financial or safety reasons, to move.*

I have come across many parents who have been in desperate financial circumstances in their home town and have left to where they have an available bed to sleep on or a job that pays. Others have fled to escape violence and seek support from family. These parents have taken their children with them without first seeking the agreement of the other parent, or in defiance of the other parents' opposition. However, parents that relocate with children without the clear consent of the other parent, or without the court's permission, are frequently ordered to return with the child pending a final determination of the matter. This is ordered notwithstanding the financial and emotional cost of returning.

Usually, a parent who has been left behind objects to the move, as it limits their time with the child. And usually that parent will:

1) deny that a relocation was necessary (especially in cases of family violence as most people will not admit committing it) and/or;
2) will argue that even if the other parent relocates, the child should be left with them.

Until a court can hear *all the evidence from both parents*, it will not be able to make a decision about whether or not the relocation is in the child's best interest. Unfortunately, the courts do not move very fast and it can take months, in some cases years, for a family to get to an appropriate forum, such as Special Chambers, or a trial where a court can make this kind of decision. Permission to move may

ultimately be granted, and it often is. However, the court must have the opportunity to make that decision. Permission to move in the interim, before a final decision can be made, is rare and only granted in exceptional circumstances.

Mr. Justice Smith of the Saskatchwan Court of Queen's Bench stated it this way in *Ofukany v. Ofukany*, 2009 SKQB 234:

> *Allowing one parent to relocate with the children completely changes the familial landscape of the access parent. In my view, given the profound change such a move creates, the issues relating to that proposed relocation can rarely be satisfactorily weighed by affidavit evidence. Only at trial can the issues and considerations be fully developed and considered.*

Even if a parent does relocate unilaterally, but then complies with a court order and returns pending trial, the court often uses the premature move to deny the parent ultimate permission to relocate with the child. It has been suggested that the very fact that a parent relocated unilaterally should be *prima facie* evidence that that parent is not acting in the child's best interests. The move, in other words, backfires and is held against the parent.

In summary, a unilateral relocation by one parent with a child often ends up being more costly and sometimes dangerous (because the parent must return) and, when a final decision is eventually made, the relocation may be a factor held against that parent.

If a parent feels they truly have no other choice but to relocate, notwithstanding the court's discouragement, many troubles can be avoided by providing the other parent with an address at which they can be reached in the event a court order is granted. This address does not have to be the parent's actual address but an address at which they will be notified if anything arrives; such as with a friend, support agency, or family member. And, if the court in the home province grants an order, the parent should respond to it promptly, as the province to which they have moved will have few choices but to enforce it.

The best approach to relocation is for a parent to plan well in advance and seek the other parent's, or the court's, permission. In financial emergencies, parents should access all possible community resources and seek out support orders. In safety emergencies, parents should seek community and police assistance and protection orders.

Mandatory Retirement: Not so Fast!

Posted By: *Peter Bowal*

"In cases where concern for the employee's capacity is largely economic . . . it may be difficult, if not impossible, to demonstrate that mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed . . ."

– *Ontario Human Rights Commission v. Etobicoke,* [1982] 1 SCR 202

Introduction

Generally, gone are the days when workers are forced to retire on their 65th birthdays. If Canadian courts and human rights tribunals have not roundly declared that this constitutes illegal discrimination on the basis of age, most employers have simply rescinded their mandatory retirement policies for good business reasons. They do not want to retire skilled and experienced workers, who can be hard to find or train. They know older workers are competent and loyal.

Accordingly, mandatory retirement has moved from the norm to an exception in Canada. It is either prohibited entirely or permitted only if it is based on a *bona fide* occupational requirement (BFOR), or if accommodating an older worker is an undue hardship on the employer.

In this article, we explore when an employer *can* dismiss an employee, essentially on the basis of age.

Bona Fide Occupational Requirement

An exception to age discrimination is a situation where employers impose mandatory retirement under a "*bona fide*" retirement or pension plan. Where there is evidence that age is a relevant criterion in the performance of an employee's necessary duties, an otherwise age-based discriminatory rule may be excused under human rights equality legislation as a BFOR.

The test for a BFOR in the context of age discrimination was established in 1982 by the Supreme Court of Canada in *Ontario v. Etobicoke*. In that case, the complainant was a firefighter who was required to retire at age 60. The Court set out a two-part test to determine whether a mandatory retirement scheme is justifiable:

> (1) Subjective component: the employer must establish that mandatory retirement was imposed honestly, in good faith, and in the belief that the limitation is in the interests of the adequate

> performance of the work, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the [Human Rights] Code.
> (2) Objective component: the employer must establish that the retirement plan is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

A mandatory retirement program based primarily on saving money (for example, related to productivity), will be much harder to justify than one based on public safety where evidence shows a palpable risk of harm from failure of older employees to adequately perform.

Ontario has enacted legislation mandating emergency firefighters to retire at age 60 unless a higher age is negotiated in a collective agreement. This legislation precludes individual firefighters from challenging mandatory retirement on the ground that age is not a BFOR.

In late 2011, the federal Parliament amended the *Canadian Human Rights Act*. Mandatory retirement policies are no longer allowed in federally-regulated workplaces. However, there will be some cases where mandatory retirement based on age (or, put another way, "a younger person's performance level") will be determined to be a *bona fide* occupational requirement. The BFOR defence exists in most human rights legislation across Canada and the Supreme Court of Canada has developed legal factors to apply it.

Undue Hardship

Employers must accommodate older employees up to the point of suffering undue hardship. The hardship factors for employers include: costs, safety, employee morale, interference with other employees' rights, and disruption of collective agreements.

Air Canada's mandatory retirement policy for pilots was litigated for years in *Kelly and Vilven v. Air Canada*. The case was heard three times by the Canadian Human Rights Tribunal and ruled on several times by the Federal Court. Airline pilots were automatically retired when they turned 60, in accordance with provisions of the collective agreement between their union and Air Canada. The airline argued that the standard in the industry was to retire pilots over 60 because they were ineligible for certain roles in the plane and this seriously hampered scheduling.

The Tribunal ultimately ruled in favour of Air Canada. The mandatory retirement of pilots at age 60 balanced corporate and employee interests. To abolish mandatory retirement of pilots would impose an undue hardship on Air Canada through increased operational costs, inefficiencies and challenges in scheduling pilots, as well as negative consequences for both the pilots' pension plan and the collective bargaining agreement.

Conclusion

Age is never a factor at work until it is specifically a factor for a certain individual performing a certain job. Although general mandatory retirement policies *prima facie* violate human rights legislation, the BFOR defence can still apply to permit age discrimination in employment as well as documented cases of undue hardship to accommodate a single older worker or a class of them. The municipal firefighter and airline pilot cases described here showcase two examples of this. Although these cases show how mandatory retirement can be used, it is still rather rare that an employer may legally retire an employee at a certain age.

Interestingly, these age-related rules equally apply where minimum ages for employment can be justified.

The Best Interests of the Aboriginal Child

Posted By: *Troy Hunter*

In the British Columbia *Family Law Act*, *(FLA*) Part 4, Division 7 – Extra-provincial Matters Respecting Parenting Arrangements, there is legislation designed to ensure the best interests of the child are met. The Court is guided by best interests on numerous factors including:

- the child's health and emotional well-being;
- the views of the child if appropriate; the nature and strength of relationships between the child and significant persons;
- the child's history concerning their care;
- their need for stability taking into consideration their age and stage of development;
- the ability of a guardian or the person seeking guardianship or parental responsibilities to exercise such responsibilities, considering access, parenting time, and contact with the child;
- family violence;
- the safety or well-being of the child;
- appropriateness of arrangements;
- cooperation on issues; and
- other court proceedings.

In addition to best interests, there are guiding principles that must also be adhered to including:

- protection of the child from abuse, neglect, harm or threats of harm;
- family as the preferred environment and responsibility for protection resting primarily with the parents;
- any available support services;
- the ability of a family in providing a safe and nurturing environment;
- the child's views;
- kinship ties and preserving as much as possible a child's attachment to extended family;
- the preservation of the cultural identity of Aboriginal children; and
- decisions being made and implemented in a timely manner.

In preserving cultural identity of Aboriginal children, this speaks to specifics such as where the aboriginal child has his or her aboriginal roots. The legislation defines an Aboriginal child as a child that is

registered under the *Indian Act*, has a biological parent that is registered under the *Indian Act*, or who is a Nisga'a child, or a treaty first nation child, or one that self identifies to be Aboriginal and has Aboriginal ancestry. The definition is broad enough to encompass all children of Aboriginal ancestry including Metis, and there are no fractions or blood quantum restrictions.

An interesting case was before the B.C. Court of Appeal back in the late 1990s where a similar issue was raised under Article 13 of the *Convention on the Civil Aspects of International Child Abduction* [3] (the "*Hague Convention*"). In *Hoskins v Boyd* [1997] B.C.J. No. 958 [4], it was argued that, "the child will suffer grave risk of psychological harm if removed from his mother, who lives in an aboriginal community …, and placed with the father … in a non-aboriginal community in Oregon until final resolution of custody … The grave risk now said to be facing the child is the psychological harm likely to be caused by his dislocation from the aboriginal culture in which he and his mother have again lived since they returned from Oregon".

The BCCA stated: … "the risk of harm alleged must go beyond the normal disruption expected on the removal of a small child. The situation must be intolerable… This is a severe test which the mother could not satisfy in the light of the fact that she took the child herself from the Aboriginal community in which the child was born to live in the father's non-Aboriginal culture. In addition, Austin is a very young child and his enculturation in the Aboriginal community has developed only over the last 7-8 months."

While psychologists, Elders, etc. supplied affidavit evidence speaking to the child's best interests from an Aboriginal perspective, that evidence was not fully considered because the child was of mixed ancestry and that the *Convention* only covers the interests of children generally and not specific to individual circumstances, noting that "the courts of the requested state shall not decide on the merits of custody until they have determined that a child is not to be sent back under the *Convention*". The risk of physical or psychological harm or otherwise that would place the child in an intolerable situation was decided upon without full consideration of the impacts to the individual child, specifically as to their s.35 Aboriginal rights as well as what the psychological harm would be for an Aboriginal child to be raised in a non-Aboriginal community or the converse, in an Aboriginal community. The BCCA decided to act under the general rule of the *Convention* that, "there must be prompt removal if there has been a wrongful taking and retention of a child contrary to the *Convention*".

These arguments of psychological harm or otherwise were punted to the Oregon court where they could have been raised on the merits of "best interests of the child". The BCCA decided that there was no need for prompt judicial intervention under the *Convention* even though, it correctly pointed out that, "The longer the child remains in one culture the more difficult it becomes to shift to another". The BCCA also stated, "Nothing in these reasons should be taken as a commentary on the custody questions facing the Oregon court. There is a world of difference between the best interests of the child and whether an intolerable situation would result from removal".

Getting back to the *Family Law Act* of B.C. with regard to best interests of the child and extra provincial matters regarding Aboriginal children, *Hoskins v. Boyd* is useful in that it states: "The longer the child

remains in one culture the more difficult it becomes to shift to another". It is this feature that must be considered in the test for best interests of the child. Undoubtedly, s.35 of the *Constitution Act* must also guide the courts in coming to any decision concerning the best interests of Aboriginal children because of their constitutionally protected Aboriginal rights which include cultural, social, political, and economic rights (socio-economic human rights).

Time for oversight of social investments?

Posted By: *Peter Broder*

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We are, as I write this, on the cusp of RRSP season, and as usual at this time of year, many people are turning their minds to plans for their future financial security. Early January, however, brought for some investors unfortunate news of the troubled state of the $95 million Church Extension Fund (CEF) run by the Lutheran Church in B.C. and Alberta. Similar funds are run by other branches of the Lutheran Church in Canada and the United States. The funds are a vehicle available for individuals, congregations, organizations and businesses to invest in religious and social projects that advance the church's ministry.

The immediate problem the Alberta and B.C. CEF faces is an anticipated shortage of liquid assets to meet redemptions in the next few months, but the long term viability of the fund has also been called into question. The fragile state of the fund seems to stem from some questionable investment decisions.

The CEF concept is perhaps one of the first instances of what we now call social investment. It was initially developed in the early part of the 20th century so Lutheran congregations could fund facilities for a new parish in a neighbouring community. Whether from this or other modest origins, interest in investing for purposes other than (or in addition to) monetary return has grown exponentially in recent years and now extends well beyond faith-based organizations. That said, what the Alberta and B.C. CEF is currently experiencing may hold some wider lessons for social investment.

As is commonly the case in the world of Canadian charity law and regulation, in this area you can't go very far without stubbing your toe on jurisdiction.

In revisions to its *Community Economic Development Guidance* in 2012, the Canada Revenue Agency Charities Directorate provided registered charities with greater scope to use their assets for investments or loans to further social ends. That was a welcome development given widespread desire to consider non-monetary factors in how monies not directly used in charitable work were invested or otherwise allocated by registered charities. But this increased flexibility was subject to the *caveat* that any activity in this regard had to comply with applicable provincial regulation.

Property and civil rights matters, under the Canadian *Constitution*, generally are within the jurisdiction of the provinces. Determining what constitutes appropriate investment of charitable assets is a

provincial issue. But, other than in Ontario, provinces do not take an active interest in investment decisions of charities. In Ontario there is legislation establishing the Office of the Ontario Public Guardian and Trustee and giving it authority to investigate and go to court for a variety of remedies where there may be misuse of charitable property.

Elsewhere, it is generally left to the courts alone to deal with claims made by interested parties seeking remedies for misuse of charitable assets through poor investment. Where this happens, charity stakeholders may be able to bring an action against the organization's board or trustees to hold them accountable for breach of fiduciary duty.

At common law and, in many jurisdictions, under statute, trustees have an obligation to invest charitable assets prudently. It is not yet settled law whether this duty extends to the directors of corporations that hold charitable assets. The legal question is: are they trustees?

In practice, even in Ontario, poor organizational decisions on the use of assets are dealt with – if at all – only after the fact.

Moreover, provincial securities legislation intended to protect individual investors often features an exemption for charities and/or non-profit organizations from issuing a prospectus and the other requirements that would otherwise apply to promoting investment opportunities. Discussion is currently underway in some jurisdictions about possible new exemptions with respect to crowdfunding initiatives, which may be put on by voluntary sector groups.

Although this approach has the obvious merit of relieving charities and non-profit organizations from complying with red tape – a burden lifted – doing so deprives investors of the protections (protections particularly important for unsophisticated investors) provided by these requirements. Unfortunately, the appeal of being able to invest in projects that are socially beneficial, as well as earning a monetary return, may make these individuals even more vulnerable to problematic investment decisions than they might otherwise be.

In the face of cyclical and frequently project-based, as opposed to core, government funding, together with the often unpredictable philanthropic funding, self-financing mechanisms have huge appeal. There are also sound public policy reason for encouraging innovative practices and new approaches to addressing social issues.

But with incidents like Alberta and B.C. CEF, there is also a compelling rationale for a robust regulatory regime that will ensure full transparency for individuals choosing this type of investment vehicle and adequate measures to safeguard assets being put to a social end. Whether that should be a return to command and control style government regulation, developing metrics around performance and disclosure or other measures appropriate for this type of initiative remains a matter for debate, but the current passive approach seems unlikely to be the best long-term solution.

Admittedly, one does not have to look back too far in history to realize that even in a regulated environment – think Bernie Madoff or the 2008 crash – things can go wrong. While that may be so, as the Muttart Foundation's *Talking About Charities* survey regularly affirms, charities enjoy among the highest levels of trust of any group in contemporary society. That trust isn't likely to last very much longer if social investment debacles become front-page news too often.

When Free Trade is Not Free: the Abitibi Case

Posted By: *Peter Bowal*

We will not give away our valuable timber and water resources to a company that does not honour its historic commitments … [w]e will, therefore, today introduce a bill to ensure these valuable natural resources are returned to their rightful owners – the people of Newfoundland and Labrador.

– Newfoundland and Labrador Premier Danny Williams, December 16, 2008

The legislation, which is without precedent in Canada, and is reminiscent of decrees emanating from jurisdictions with less democratic traditions, shocks common sensibility.

– David J. Paterson, CEO of Abitibi to Premier Williams, December 19, 2008

Introduction

The North American Free Trade Agreement (NAFTA) came into effect on January 1, 1994 between Canada, Mexico, and the United States. It purports to "promote conditions of fair competition in the free trade area", "increase . . . investment opportunities in the territories of the parties", and "facilitate the cross–border movement of goods and services between the territories of the parties" [Article 102 (1)(a)–(f)].

Not only do trade barriers among these three countries remain, NAFTA also regulates government contracts, intellectual property and investments. One of the most serious rules is that no government may expropriate assets of a company from another member country. Article 1110 of NAFTA is labeled "Expropriation and Compensation". It says "no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment" unless it is on a non-discriminatory basis for a public purpose in accordance with due process of law and is accompanied by payment of fair compensation.

This article describes the recent Abitibi case in Newfoundland.

Expropriation Legislation

AbitibiBowater Inc. (Abitibi), a U.S.-based global forest giant incorporated in Delaware, had operated several mills throughout Newfoundland and Labrador (Newfoundland) from the early 1900s. In 2005, Abitibi closed its Stephenville mill. Three years later, it announced plans to end 800 jobs and shutter the

Grand Falls-Windsor mill, its last in the province. For Abitibi to cease operations which began more than a century earlier was the final straw for Newfoundland Premier Danny Williams.

Less than two weeks later, on a cool, gray day before Christmas 2008, Premier Williams stood in the legislature to speak in support of Bill 75, the *Abitibi-Consolidated Rights and Assets Act (ACRAA)*. This new legislation was read, debated and enacted within about two hours. All political parties voted for it. It authorized the province to expropriate Abitibi's assets in the province, without compensation.

Abitibi, one of the largest pulp and paper companies in the world, immediately decried this new law as "arbitrary, discriminatory and illegal under international law." Abitibi's CEO dispatched a letter to the Premier denouncing *ACRAA* as "an entirely unfounded and unscrupulous attack" on Abitibi that was "unequivocally . . . illegal" under NAFTA. He attached the applicable NAFTA provisions to his letter. The company threatened that if a satisfactory resolution was not reached, it would make a claim under NAFTA.

Premier Williams declared, "Abitibi has reneged on the bargain struck between it and the province [in 1905] over the industrial development of the province's timber and water resources for the benefit of the residents of the province. We cannot as a government allow a company that no longer operates in this province to maintain ownership of our resources." The Premier said Abitibi breached its legal obligations to operate a mill in the province.

Former Abitibi Bowater mill in Grand Falls-Windsor, Source: The Telegram

However, Abitibi's last mill at Grand Falls-Windsor was hemorrhaging money from high operating costs and low pulp demand, one result of widespread use of the Internet. The paper mill that had built the town, and was a key contributor to the region's economy, was now one of the most unprofitable of its kind in North America. After months of negotiations between the mill's union and Abitibi, no restructuring agreement could be reached on wages and benefits. Management had warned the community that this was coming in mid-August 2008, but waited until early December to announce the mill would be closed by March 31, 2009.

Apart from the pulp and paper plant, Abitibi still retained numerous property rights and assets in Newfoundland which comprised well over $300 million in value. In addition to the plant, this included interests in hydroelectric facilities, water and surface rights, and timber rights, all of which the company planned to retain and work. Suddenly, *ACRAA* stripped the company of all its assets without compensation.

Abitibi v. Canada

The province pressed on with *ACRAA*. The holdings of Abitibi – not only the pulp and paper plant but all of Abitibi's hydroelectricity and timber rights in Newfoundland – were placed under the control of a provincial Crown corporation. The Premier reiterated Abitibi's mill closure justified the expropriation of its assets: "We will not give away our valuable timber and water resources to a company that does not honour its historic commitments."

For this, and other actions on his province's resources, the Premier was nicknamed Danny Chavez, an unflattering reference to the Venezuelan socialist leader. In addition to the free trade challenge, commentators, policy-makers and economists issued ominous warnings that businesses would flee the province and future investment would decline precipitously.

On February 12, 2009, Abitibi's Grand Falls-Windsor paper mill filled its last order and closed. On April 16, 2009, four months to the day after the expropriatory *ACRAA* was enacted, Abitibi filed for bankruptcy protection in both the U.S. and Canada to buy time and opportunity to find some acceptable plan of debt repayment to creditors. The company was short of cash and struggled to come up with severance owed to its former employees.

One week later, Abitibi filed its intent to submit a claim to arbitration under the NAFTA anti-expropriation provisions. Abitibi's formal claim on February 25, 2010 demanded $500 million against the Government of Canada for permitting Newfoundland to expropriate its assets without compensation.

Outcome of the NAFTA Claim

The Government of Canada agreed with Abitibi that the Newfoundland expropriation was illegal and the country and the company soon entered into settlement negotiations. On August 24, 2010, it announced that it had settled with Abitibi for $130 million, "for the benefit of Canada's long-term economic interests". It added "[i]n reaching this agreement, the Government of Canada is avoiding potentially long and costly legal proceedings." This settlement constituted the largest expropriation payout ever made by any North American government.

There were many critics of the large settlement. Many were disgruntled by the notion that the federal government, via Canadian taxpayers, had to pick up the tab for the illegal actions of a testy, grandstanding Premier and an inattentive opposition. Prime Minister Harper promised not to recover this sum from Newfoundland.

What Happened to the Parties?

The people of Canada paid $130 million to Abitibi, even though they had no part in the expropriation. Free trade is not so free after all.

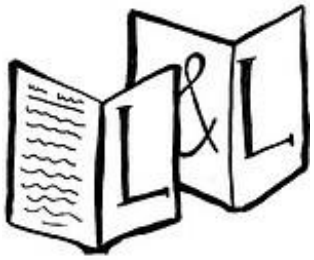
Premier Danny Williams left politics on December 3, 2010 about two years after this Abitibi debacle, and around the time the settlement was paid. His departure did not end the fallout from this expropriation. Newfoundland found itself saddled with massive environmental cleanup costs on the expropriated Abitibi property. The company's insolvency in the United States and Canada stayed its liabilities. Newfoundland took the issue of who was responsible for clean-up to court, arguing Abitibi was responsible for these costs even though it was protected by the insolvency status. This matter went to the Supreme Court of Canada which decided that Newfoundland had to pay for the clean-up (*Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 SCR 443) along with the costs of the protracted litigation.

Abitibi emerged from bankruptcy and creditor protection in Canada and the United States on December 9, 2010. It is currently incorporated in Québec under the name of Resolute Forest Products. It operates in pulp and paper, wood products, woodlands, recycling and sustainable energy.

NAFTA continues in force with other regions and continents following this lead by negotiating free trade agreements of their own. Recently, Canada inked a comprehensive free trade agreement with the European Union. Ironically, two Newfoundland ministers travelled to Ottawa to warn European ambassadors that Newfoundland will not comply with this new trade deal unless the Canadian government pays hundreds of millions of dollars they say is owed by Canada relating to another matter.

The Contemporary Progressive Political Novel: The Rotter's Club

Posted By: *Rob Normey*



In my university days and for years after I made a point of seeking out the best literary criticism to further my appreciation of the classic novels and poems I was reading. One work of criticism that has been a lodestar for me over the years is Irving Howe's impressive account, *Politics and The Novel*. Howe includes the usual suspects – such masters as Dostoevsky, Conrad and Orwell, and then in the revised edition more recent writers like Garcia Marquez, Milan Kundera and Nadine Gordimer. I note, though, that there is a complete absence of comic novelists from his study. Using Howe's definition of a political novel as "a novel in which political ideas play a dominant role or in which the political milieu is the dominant setting", I would count several comic novels and satires as major contributions to the field.

Canadian novels are absent from the U.S. critic's book, and indeed, with the honourable exception of novels on Aboriginal themes, the political novel, as a study of our national politics, is something our writers have largely taken a pass on. Perhaps our country is too sprawling, or Ottawa is just too distant from most people's frame of reference. There are many American writers of political novels – the late, great Robert Stone and Philip Roth being just two recent examples. Canadians admire them and also watch the dystopian take on American politics, the television series *House of Cards*, in droves.

I do have on my bookshelf the excellent comic novel by Sarah Jeanette Duncan, dealing with perhaps the most burning topic of her day – the need to examine our ties to Great Britain, in *The Imperialist* (1906). Despite high praise from the few critics looking at our domestic fiction, the book sold poorly and she soon departed with her husband to serve in the far reaches of the British Empire, ruefully avoiding Canada and its politics as a subject from that point on.

In recent times, those of us with an abiding interest in our nation's politics will be aware of Terry Fallis' light comic novels such as *The High Road*. These are delightful but tell us very little, in my view, about the momentous changes in our national politics this century, which have so transformed the country and discombobulated a number of us. Whatever the reasons, we clearly lack a writer who has attempted and so magnificently achieved work like that of Britain's Jonathan Coe. His most well-received novel was a classic take-down of the pretensions of the Thatcher Revolution of the 1980s, *What A Carve Up!* This satirized the members of the Winshaw family who choose to capitalize on

the new opportunities to become wealthy and who illustrate what it is like to live by Margaret Thatcher's dictum that "there is no such thing as society."

Another of Coe's marvellous accounts of the political and cultural life of Britain, this time in the 1970s, can be found in his novel *The Rotter's Club* (2001). This is a comic coming of age tale of Benjamin Trotter, talented but dreamy and tentative in his dealings with the world, and his family and friends. They live through the thrills as well as the agonies of school days and gain an understanding of the critical political and social issues of the times – class struggles, racism, and the deafening calls for anti-terrorist measures in a context of apparent chaos.

Two aspects of the novel are worth highlighting. They reveal a great deal about the growing sense of breakdown in the last days of Labour Party rule before the 1979 general election, which ushered in the long and divisive rule of Margaret Thatcher and a newer, much tougher Conservative Party. They may also, paradoxically, provide insight into the excitement and sense of liberation that could be felt, particularly by youth as it sensed that perhaps some bright new future was in store.

The first element is the inclusion of a number of scenes depicting the impact of the exciting popular music of the era. There is the "art rock" which inspired Benjamin and some of his friends wishing to form a rock band. As the group of friends meet, we see the gradual change wrought by the new London sound, punk rock, which has coursed through the nation and to their home town of Birmingham. The new music was a clarion call for resistance, and is dubbed "dole queue rock " in the novel.

Coe shows his readers the impact this rebellious music has in wider society. One friend, Doug, writes in a music magazine about a concert performance in Birmingham by Eric Clapton, the rock/blues guitar wizard. Clapton infamously hurled warnings from the stage to his audience about the dangers of England becoming a "black colony." The magazine's editors respond enthusiastically to Doug's piece and offer to send him to London to cover the Rock Against Racism concert that had been organized to counter the growing threat of racism and discrimination against many black immigrants.

Doug arrives in a London brimming with excitement on the eve of the big concert, sponsored by the Anti - Nazi League. He is fortunate to find his way to a pub where none other than the Clash are performing. They would soon headline the first major Rock Against Racism concert and would in time come to be regarded as the greatest rebel rock group of all time. Here is Coe's description of Doug losing himself in the high-energy of the band, as his immediate problems are forgotten:

> *Doug had never heard any of these songs before but in the months and years to come they would become his closest friends:* Deny, London's Burning, Janie Jones. *He was transfixed by the sight and sound of Joe Strummer shouting, screaming, singing, howling into the microphone: the hair lank with sweat, the veins of his neck tautened and pulsing with blood.*

The second aspect *of The Rotter's Club* is the manner in which the horrific evening of the Birmingham Pub Bombings – Nov 21, 1974 – manages to shatter the innocence of the Trotter family and forever cast

Benjamin's sister Lois into a netherworld of disorientation. She is passionately in love with Malcolm, who is killed in one of the bombings, which was widely believed to have been the responsibility of the IRA. It is the height of irony that we have been introduced to Malcolm, an ordinary bloke in certain respects, but a democratic socialist and believer in racial equality and social justice, and allowed to see the manner in which his encounters with Benjamin will lead to the latter's developing a greater awareness of the need to support human rights, before his untimely death. The bombings that evening lead to the rushing through of emergency anti-terrorism legislation by a government, that itself, calls "draconian" and a concomitant unleashing of anti-Irish sentiment throughout Birmingham and other cities and towns throughout England. These events would in fact be the last thing Malcolm would have wanted to see happen and something he would have courageously opposed.

In highlighting these dramatic episodes I do not want to leave readers with an impression that this is a heavy and overly serious account of the political and legal events presaging the profound changes that were to sweep across Britain. In fact, there are many humorous and touching scenes which manage to convey the wonderful opportunities Benjamin and his cohorts had to participate in the dynamic and often-hopeful era that seems so remote from the fractious 21st century we now inhabit. It was a time when Malcolm and people like him would ask "what kind of a society have you got?" if there are no longer idealists to champion; people who are not just in it for the money.