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In legal situations, technology can deliver the best of times or the worst of times: it all dpends on how it is used

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Technology Transforms Criminal Law

Posted By: *Charles Davison*

As with society in general, the practice of criminal law has changed significantly over recent decades as a result of the amazing growth and development of technologies which, until now, were only ideas and imaginings of science-fiction writers. The lawyer of 20 or 30 years ago would likely be startled to see some of the innovations which are now commonplace in our courtrooms. Developments have taken place in virtually all aspects of this field, from the investigation of crime and the gathering of evidence, through to the prosecution and defence of cases in court. Hundreds of pages of legal texts and judicial decisions have been written discussing these changes. Here are some of the most notable ways in which modern technology has changed the practice of criminal law.

Evidence Gathering by Police

Perhaps the most significant technological leap in the area of evidence gathering over the last two or three decades is in the development of scientific means to detect and identify human DNA. Until the late 1980s, the best science could offer in the field of biological analysis of human fluids and substances were generalities: blood types could be matched, for example, and hair samples could be compared. When it came to linking such items to a particular person, however, the most that could be said was that one sample was similar to another.

With the development of the technology needed to break down and analyze Deoxyribonucleic Acid ("DNA"), all of that changed. DNA is often referred to as our individual genetic "blue print". Because each human being has a different code contained in our DNA at the cellular level, it is now possible for scientists to virtually match the DNA from one sample of human fluid or tissue, to that in another. (I have used the phrase "virtually match" because in fact, the results of comparisons are never described in terms of actually matching; rather, the odds of the two samples being from different persons are usually offered instead. But because these numbers are usually astronomical in nature – often one in

several trillion – it ends up being "virtually" the same thing as an actual match.) Now, for example, the DNA of a victim which is found in blood on the clothing of a suspect or accused will provide very powerful evidence in court. Even more damning is the identification of the DNA of an accused person in cases of sexual assault. And, it should not be completely forgotten that DNA can also be used to exonerate innocent persons. According to some sources the first time DNA was used in a criminal case was to demonstrate that the accused person was not the culprit in a 1986 trial in England.

Huge technological advances have also taken place since the 1970s in electronic surveillance over citizens by the police and other state authorities. Long gone are the days when police had to literally "tap" into telephone landlines in order to intercept and record the private conversations of other persons. Now, with computers and a vast selection of other electronic measures, it is possible to obtain all types of electronic communications remotely, without the targets ever having the slightest clue as to what is taking place. The main – though certainly not the only – area where this is seen is in the investigation and prosecution of drug trafficking operations.

Cellular telephone technology has proven useful in other ways, as well. For example, cellphones which have a working battery constantly send a signal to the closest cellphone towers even when they are not actually being used. Such signals are always recorded and, if obtained by the police, can be analyzed and interpreted so as to pinpoint, often to within a few feet or meters, where the cellphone was located at a particular time. Such evidence can be very useful in placing a suspect – or at least, his or her phone – in the vicinity of a crime scene or occurrence at a time which is of significance in the investigation.

Just as computers are now powerful tools which aid the police and other state agencies in the investigation of crime and the gathering of evidence, they are also vast receptacles of information which can be retrieved and provided in court to support criminal charges. It is sometimes surprising that persons who have committed crimes will lodge within their computers and similar devices extremely incriminating details and records which, when recovered by police computer specialists, help to prove their guilt in court. People have been convicted based upon videos, photographs and similar recordings of criminal activity; detailed diaries and journals containing confessions and other descriptions of criminal activity; and financial transactions and records, all found within personal electronic devices.

Our courts have commented a number of times about the special status of computers in our day and age. Because of the vast – almost limitless – amount of private personal information which can be stored within these devices the courts have said they must be treated effectively as separate "places" or receptacles of information under our search and seizure laws. Thus, if the police find a computer as they search a home, car, or other place, they are not entitled to open it and start examining its contents unless they first get permission from a judge in the form of a search warrant. By comparison, if the police find a briefcase, or filing cabinet or locked cupboard door as they search a home or office, they are entitled to open it and search its contents.

Computer Crime

The area where computers are actually central to the offensive conduct itself is in the possession and circulation of child pornography. In past times, accused persons might be prosecuted if they were found in possession of drawings or photographs of children engaged in sexual activities. Now, with computers and the Internet it is not uncommon for police to discover thousands of images and videos on the computers of persons being investigated for child pornography offences. In fact, it was only about 20 years ago that Parliament first enacted those parts of our *Criminal Code* which deal with this area of criminal activity and began equipping police with the tools needed to investigate and prosecute these horrible offences.

Conduct of Court proceedings

Technology has also changed a number of ways in which court proceedings take place. One of these is in the area of legal research and the preparation of arguments for court. In the not-so-distant past, lawyers' offices and courtrooms held large libraries of published case reports. Now, however, this has become relatively rare, because most legal research is conducted using various online databases and computer search tools. Law libraries are shrinking in numbers and size as lawyers, judges and members of the public turn to the Internet and various court and legal websites. Virtually every written decision (and many rulings delivered orally as well) can be found somewhere on one of the databases used by lawyers and judges.

Technology is changing the courtroom in relation to the record-keeping of the proceedings. Until recently, the court staff at every proceeding included a court reporter whose role was to keep a written transcript of everything said by any person while the court was in session. While tape recorders have long provided a "back up" function for the reporters, such recordings were not considered reliable enough to be used on their own. The court reporter's version of the transcript was considered the official record of the proceedings. Now, however, court reporters are being completely replaced by digital recording equipment operated by the clerk of the court, as governments across the country have decided that these systems are cheaper. As a result, court reporters are disappearing from the scene.

A further use for technology in the courtroom is in the increasing use of video connections in place of personal appearances of some witnesses and sometimes, for accused persons as well. The *Criminal Code* now allows a party to apply to the trial judge for permission to call a witness to testify by way of a video link. Especially where the witness's evidence is expected to be of a relatively minor or non-contentious nature, using a video link reduces monetary the costs and the personal inconvenience of travel for the witness.

Similarly, accused persons in custody are now able to make at least some of their court attendances by video link. In many situations, being required to attend in person means the accused must be transported from jail to the courthouse, for even short appearances. They often must then spend the remainder of the day in a small holding cell until the authorities are able to return them to the remand facility. Once back at the jail, the prisoner is subjected to security procedures such as personal search to

ensure that he or she has not come into possession of any form of contraband (drugs, weapons, etc.) while away from the institution. Making the appearance by video connection means the accused avoids all of these measures and also reduces public expense.

As technology continues to evolve, advance and change, so too will its use in our courtrooms. However, the basic strength of our court system is its humanity. For all its flaws and failings, our system is still the product of human beings, and still requires direct input, assessment and decision-making by individuals. In the coming years this may be the challenge: maintaining that “human touch” in the face of an increasingly pervasive role of technological advances and tools.

Social Media and the Law

Posted By: *Brian Vail QC*

I. INTRODUCTION

In today's world, a number of social networking sites ("SNSs") have arisen, whereby people from all over the world are beginning to communicate with each other in new ways on the Internet. SNSs are a cultural phenomenon which have revolutionized interpersonal communication and will continue to do so.

SNS users virtually trip over themselves to share a plethora of extremely personal details on their SNSs, including posts, photographs, residential details, hobbies, likes, dislikes, etc. Many SNS users seem to have no clue as to how little privacy they leave themselves. When people work on a computer alone in a room they can fail to appreciate that they are communicating with the world.

Many people have learned how to access a person's information by accessing their SNSs including:

1. Employers screening prospective employees;

2. Insurers monitoring the lives of people making disability claims or receiving benefits;

3. lawyers, police, investigators or others locating and communicating with witnesses, suspects and people they are trying to find; and

4. lawyers, police, investigators or others seeking information and evidence about suspects, opposing clients, witnesses and potential jurors.

Four aspects of SNSs are of particular interest:

I. **Privacy settings**. Most SNSs set default privacy settings which users may change (to increase or decrease privacy). Facebook employs the concept of registered "Friends" such that one can restrict accesses to his/her profile only to people accepted as "Friends". A user's privacy settings may be effectively downgraded if his/her information is shared with Friends who have lower privacy settings. You can find information about someone on a Friend's profile where access to it has been restricted on the subject's own profile.

II. **Account deactivation and deletion**. Deletion is the permanent removal of all user personal information from the SNS whereas deactivation merely renders the data inaccessible to other users (although it may remain on the SNS database indefinitely until deletion or reactivation is requested). Data on a deactivated profile can be accessed by request or litigation.

III. **Accounts of deceased users.** Many SNSs permit a user's profile to remain active after his/her death, so that its information can still be accessed.

IV. **Personal information of non-users**. SNS users often disclose information about non-users on their SNS profiles without the non-users' knowledge or consent. The most obvious example is that of posting and/or tagging photographs of non-users. So, if you do something embarrassing in this age of cellphone cameras, it may get posted without your knowledge or consent to someone's SNS profile.

II. CIVIL LAW APPLICATIONS

A. Background Information On Litigants And Witnesses

How does one find out important facts about key people, especially opposing litigants, witnesses or jurors, preferably without the search coming to their attention? Nowadays, information-gathering is much easier with SNSs which can be accessed by others.

One must scrutinize the authenticity of an SNS profile. Fake profiles can be set up to embarrass someone or to conduct questionable Internet activity e.g. where someone sets up an SNS profile in another's name and uses it to cyberbully others using that name.

SNS evidence has been instrumental in challenging credibility of personal injury plaintiffs. People who claim to be disabled have been "caught" being active by photos and posts on SNSs. Also, the pattern of use of one's site (reflected in the metadata) can be relevant. For example, in the 2009 case of *Bishop v. Minichiello*, the British Columbia Supreme Court decided that where a claimant alleges that fatigue prevents his working, his use of an SNS during night time hours was relevant.

There are two ways to get information on someone's SNS profile: accessing the public profile contents, and applying to court for orders to preserve and access them. The former can be done surreptitiously and sprung on the subject in court by ambush, while the latter requires notice to be given.

One can obtain access to an opponent's SNS profile through the pre-trial document production and discovery process and with assistance from the courts. Information about an SNS profile's contents can be elicited through questions at discovery, cross-examination on the affidavit of records, applications for preservation orders and/or interim injunctions, applications for production, or applications to compel the SNS site itself (as a third party) to disclose information.

Litigants must disclose relevant and material portions of their SNS profiles in the affidavit of records. Such materials are "documents", subject to disclosure.

A claim of a privacy interest over SNS contents will generally not preclude disclosure where disability or other relevant facts are in issue. Disclosure will not be ordered only where the probative value of the data is outweighed by the cost, expense and prejudice involved.

Under Rule 5.13 of the Alberta Rules of Court, one can compel production from third-party strangers to the litigation (e.g. SNS providers), including data on deactivated profiles. However, SNS servers can be based anywhere in the world, raising issues of jurisdiction. Under the *Canada Evidence Act* and the *Alberta Evidence Act*, one must ask the Alberta court to ask the foreign court to compel production.

B. Communication, Notice and Service

SNSs are places where you may be able to find and communicate with people. Courts now allow substitutional service by way of social networking sites. [*Knott v. Sutherland*; unreported, 5 February 2009, Action No. 0803-02267m AltaQB]

III. CRIMINAL LAW APPLICATIONS

A. Information/Evidence Gathering

SNSs can be employed in criminal law in much the same way. Credibility is often a critical issue in criminal cases. Counsel can and should look to SNSs when assessing a witness's credibility. SNSs can provide evidence that supports a litigant's position, including admissions by opposing litigants or witnesses. Various SNSs feature message boards, whereby local user networks can communicate with one another, from which information can be gleaned.

The criminal law does not provide the same judicial remedies to the defence to access private portions of a subject's SNS as does the civil law. However, police have search and seizure powers that provide them with more powerful tools to obtain access to SNS profiles, subject to the s.8 *Charter* right for individuals to be secure against unreasonable search and seizure. Also, under the *Criminal Code*, service of criminal pleadings online is not available.

B. Police On the Internet

Police are better trained, have better software and are more experienced in the employment of the Internet than the average person or counsel. Police employ SNSs for the following:

1. locating people (witnesses, suspects or persons of interest);

2. collecting evidence of crime (e.g. admissions of crime or other information), using false online profiles; and

3. identifying suspects from photos posted on SNSs that match information from witnesses.

Different SNS providers interact differently with police; some readily disclose information on request, while others require subpoenas or warrants. Nowadays, many Internet and cellphone providers are adverse to the expense and hassle of having to respond to a growing number of requests from police for access to their customer data. R. v. Telus Communications Co., 2013 SCC 16

C. Jury Trials

SNSs must be considered with respect to two aspects of jury trials: vetting of prospective ;and the conduct of jurors during the trial.

The courts allow prosecutors to have police review police records regarding the existence of criminal records of potential jurors *R. v Emms*, (2010), INCA 817. Nothing prevents defence counsel from accessing or monitoring the public portions of SNS profiles of potential jurors.

Concerns have arisen regarding juror online activity during trial, including:

1. seeking suggestions from online contacts and friends regarding how to vote;

2. "friending" and communicating with others (including the accused);

3. expressing views on the accused's guilt or innocence;

4. researching on their own, e.g. via Google searches; and

5. posting details of the jury's deliberations *AR. v. Shabir Ahmed***,** [2014] EWCA Crim 619.

Judges are now instructing juries against these practices.

D. Publication Bans

Canadian courts can impose publication bans on various proceedings pursuant to the *Criminal Code*, including bail hearings, preliminary inquiry evidence, complainant identities and *voir dire* evidence. Publication bans have been subverted by posting information to an SNS. The courts must grapple with enforcement of publication bans in light of such activity.

E. Criminals On The Internet

Criminals employ the Internet, including social networking sites, to commit crimes, including fraud, stalking and cyber-bullying.

The bottom line is that users must beware of what they post on SNSs as it can provide valuable information to others, such as opposing counsel, who may effectively employ SNSs to fight their cases.

Organizations Need to Build their CASLs: Information for Non-Profits and Registered Charities

Posted By: *Teresa Mitchell*

What is CASL?

CASL stands for Canada's Anti-Spam legislation. This anagram is the unofficial name for a new law that came into force across Canada on July 1, 2014. Because it is a federal law, it will apply to not-for-profit organizations and, with some limited exceptions, to registered charities across Canada.

While the unofficial title of the Act targets spam, it is actually much broader in scope. CASL deals with commercial electronic messages (CEMs) and it regulates a broad range of activities including:

- unsolicited commercial messages such as emails, texts and tweets;
- hacking, malware and spyware;
- "phishing" and other fraudulent or misleading practices;
- invading privacy through a computer; and
- collecting email addresses without consent.

Commercial Electronic Messages

A Commercial Electronic Message or CEM is an electronic message that has as its purpose encouraging participation in a **commercial activity** and that is sent from or received by a computer in Canada. A "commercial activity" means a transaction or act that is of a commercial character, whether or not it is done with an expectation of profit.

Exception for Registered Charities

There is a limited exception for registered charities. Any electronic message sent by a registered charity for the primary purpose of raising funds is exempt from the provisions of CASL. However, the definition of raising funds is unclear at this time. And, if a request for donations is placed within a newsletter, or some other form of communication with the public, it may be found that the primary purpose of the CEM was not to raise funds. This limited exception does not apply to not-for-profit organizations or Registered Amateur Athletic Associations.

Consent

Consent is really the key concept to be aware of in CASL. The Act creates a permission-based scheme under which consent is required before a CEM can be sent. Consent can be either express or implied.

Express Consent

Express consent means that a recipient has voluntarily agreed to receive a CEM and this consent is documented. Consent can be either oral or in writing, and "in writing" includes both paper and electronic forms of writing. The CRTC has set out guidelines that state the information that must be in a request for express consent:

- The purpose or purposes for which consent is requested;
- The name of the person seeking consent and the name of the person ,if it is different, on whose behalf consent is asked;
- A statement indicating which person is asking for consent and which person on whose behalf consent is being asked;
- If the person seeking consent and the person, if different, on whose behalf consent is sought are carrying on business under different names, the names of those businesses;
- The mailing address, and either a telephone number providing access to a person or a voice messaging system, an email address or a web address for the person asking for consent, and if different, the person on whose behalf consent is asked; and
- A statement that the recipient of the CEM can withdraw consent at any time in the future by using this contact information. This is called the "unsubscribe mechanism". You will find more information about the unsubscribe mechanism at the end of this section.

Once express consent is obtained, it does not expire, unless the person giving consent withdraws it at any future time.

The CRTC has issued Compliance and Enforcement Bulletin 2012-549 that gives guidance about obtaining express consent and gives two examples of forms that are acceptable. You will find these forms here. The Bulletin also states that since express consent must be positive or explicit, an opt-out mechanism is not acceptable, nor is a "toggle box" where permission to send CEMs is already checked off.

Implied Consent

Under CASL, consent can be implied in three situations:

- where there is an existing business relationship, or an existing non-business relationship;
- where the recipient has "conspicuously published" their electronic address without saying that they do not want to receive unsolicited CEMs and the message they receive has to do with their business, role, functions, or duties in their business or official capacity;
- where the recipient has disclosed their electronic address to the person who is sending the message; again, without saying that they do not want to receive unsolicited CEMs and the message they receive has to do with their business, role, functions or duties in their business or official capacity. An example of this could be a person who receives a CEM from a person to whom they gave their business card, with their email address on the card.

Generally speaking, implied consent lasts for two years, providing an opportunity for organizations to change an implied consent to an express consent. CASL includes a transition period that allows for implied consents to remain active until July 1, 2017. In addition, where there is an existing business relationship, each transaction renews the implied consent, so that the two-year existing business relationship starts over.

It is important to note that after July 1, 2014 CEMs may only be sent with the explicit or implied consent of the recipient. Because a message seeking explicit consent is, in itself, a CEM, after July 1, 2014 these can only be sent to people or organizations with which you have an implied consent relationship.

Existing Business Relationship

An existing business relationship between the sender of the CEM and the recipient will be found if, within the previous two years the recipient has:

- purchased, leased or bartered a produce, goods, services, land or an interest in land from the sender;
- accepted a business, investment or gaming opportunity offered by the sender;
- entered into a written contract or made inquiries about other matters with the sender for another matter not listed above;
- within the previous six months, made an inquiry or an application about any of the matters listed above.

The existing business relationship is renewed with each transaction, so that the two-year existing business relationship starts over.

Existing Non-Business Relationship

Existing Non-Business Relationships are of particular importance to registered charities and not-for-profits. An organization has an existing non-business relationship with a recipient if the recipient has, within the previous two years:

- In the case of a registered charity, made a donation or gift, or has performed volunteer work for the charity;
- In the case of a not-for-profit, has been a member of the organization, such as a club or association.

Each time that a recipient makes a donation or gift, or volunteers, the two-year implied consent period begins again. It is the same case for not-for-profits. Each time a member renews, the two-year implied consent period begins again.

Excluded Messages (1)

There are a number of CEMs to which CASL does not apply. These include messages sent:

- to someone with whom the sender has a personal or family relationship;
- to someone in a commercial activity making an inquiry or application about the activity, such as quotes or estimates;
- to another employee, representative, consultant or franchisee of an organization about the activities of the organization;
- to an employee, representative, consultant or franchisee of another organization, if the organizations have a relationship and the message is about the activities of the receiving organization;
- in response to a request, question or complaint, or is otherwise initiated by the recipient;
- by or on behalf of a registered charity and the message has as its primary objective raising funds for the charity;
- by or on behalf of a political party or a political candidate for publicly elected office, for the primary purpose of obtaining a donation or contribution.

Excluded Messages (2)

These types of CEMs are excluded from the provisions of CASL except that they must conform to the rules about providing sender identity information and an unsubscribe mechanism so that the recipient can opt not to receive future CEMs. These messages must solely:

- facilitate, complete or confirm a commercial transaction that the recipient previously agreed to enter into with the sender;
- provide warranty, product recall or safety and security information about a product or service that the recipient has used or purchased;
- provide product, goods or services updates or upgrades that the recipient is entitled to receive;

- provide ongoing information about a subscription, loan, membership or account that the recipient is currently participating or enrolled in;
- provide information directly related to an employment relationship or benefit plan in which the recipient is involved or enrolled.

There is some uncertainty at the moment about the meaning of "solely" at this time. Further clarification is expected from the CRTC.

Third Party Referrals

There is another limited exemption to the consent provisions of CASL for third party referrals. The CRTC states that the consent provisions do not apply to the first commercial electronic message that is sent by an individual for the purpose of contacting a recipient following a referral by someone who has:

- an existing business relationship;
- an existing non-business relationship;
- a personal relationship; or
- family relationship with the individual who sends the message as well as these relationships with the individual to whom the message is sent.

Third Party Referral messages must disclose the full name of the individual or individuals who made the referral and state that the message is sent as a result of the referral. These messages must also comply with the sender identity information and unsubscribe mechanism requirements. **Only one** Third Party Referral message may be sent under these terms, so it should contain a request for future consent.

Unsubscribe Mechanism

The Unsubscribe Mechanism is one of the most important components of the CASL scheme. Every CEM that an organization sends must provide a way for recipients to unsubscribe from receiving messages in the future. A Regulatory Policy from the CRTC states that the mechanism must be "readily performed" meaning that it must be accessed without difficulty or delay and should be simple, quick and easy for the consumer to use. It must also be **free of charge** to the user. The means to contact the sender must be operational for at least 60 days, and the unsubscribe request must be completed within ten business days.

An example of an unsubscribe mechanisms created by the CRTC can be found here [2] (under "Sample Forms" near the end of the page).

It is be very important for all organizations affected by CASL to set up a system to track and monitor unsubscribe requests, so that they know what electronic addresses cannot be sent future CEMs. This could be a system as simple as a spreadsheet or as sophisticated as a fully integrated database. Note too, that the tracking system should also be set up to watch for the expiration of the two-year period for implied consents. Failure to do so that results in CEMs being sent to parties who have unsubscribed or

have not been active with the organization for two years could lead to Notices of Violation from the CRTC, with the possibility of significant fines for the organization, and the officers and directors. After July 1, 2017, there is also the possibility of lawsuits by private citizens who allege harm and claim damages.

Relationships with Third Parties

Under CASL organizations must also be aware of what contracts they have entered into that may involve a third party sending CEMs on their behalf. Some examples of these contracts could include:

- advertising agencies;
- social media management companies;
- public relations or media advisory companies;
- lobbyists;
- sales or distribution agents;
- professional fundraising companies;
- investor services;
- suppliers of referral/contact lists.

If your organization has contracts with parties such as these, the contracts should be reviewed to make sure that any CEMs they send on your organization's behalf are CASL compliant. The contracts should contain clauses that ensure that the service provider will meet all applicable CASL requirements, will notify you if it is cited by CRTC for a violation, and will keep your organization indemnified for any costs or damages arising out of a breach. You should also ask your service provider to inform your organization of all unsubscribe requests and to keep records of CASL compliance.

For an example of how the CRTC is handling complaints under CASL, please see the following case comment on the Porter Airlines case by Martin Kratz, QC.

Porter Airlines: A case study in CASL

Posted By: *Martin Kratz, QC*

On June 29, 2015 the Canadian Radio and Television Commission (CRTC) announced that Porter Airlines Inc. had agreed to pay $150,000 as part of an undertaking in respect of alleged violations of Canada's Anti-Spam Law (CASL).

CASL requires consent to send commercial electronic messages to an electronic address unless an exemption applies. CASL also requires commercial electronic messages to clearly or prominently provide an unsubscribe mechanism and also comply with other very specific informational formalities.

In this case, it alleged that Porter Airlines had sent some commercial electronic messages after July 2014 (CASL came into force July 1, 2014) that were not compliant with CASL. Specifically, the CRTC has alleged that:

- some of the emails did not contain an unsubscribe mechanism;
- in other instances, the unsubscribe mechanism was not clearly or prominently set out;
- some of the emails also did not have the specific prescribed information required by CASL; and
- that Porter Airlines did not honour unsubscribe requests, in some cases, within ten business days, as required by the Act.

When challenged to prove it had consent to send some commercial electronic messages between July 2014 and April 2015 the CRTC reported that Porter Airlines was unable to provide proof as to those consents from each applicable electronic address.

CASL provides a mechanism under which a respondent may give an undertaking to the CRTC. Porter Airlines utilized that procedure and, as part of its undertaking, is reported to be committed to ensuring that its future communications are compliant with CASL. It is also reported that Porter Airlines co-operated with the CRTC and promptly took remedial action to address compliance. Porter Airlines will increase training and education for staff and improve its compliance policies and procedures.

This prosecution shows that the CRTC is targeting technical and other violations under CASL. The prosecution also shows the importance of both the establishment of due diligence as a defence and the

importance of being able to provide evidence of consents (or that an exemption applies) to send electronic commercial communications to each account.

The case is a reminder for all organizations that send commercial electronic messages to review their practices, policies and procedures so as best to seek to establish a due diligence defence.

R v Fearon: Can Police Search a Cellphone Upon Arrest?

Posted By: *Christine Chong*

IMPORTANT UPDATE: *Please see the article by Juliana Ho about the Supreme Court of Canada ruling in R. v Fearon. The Supreme Court of Canada decided that the police search of Mr. Fearon's cellphone did breach his* Charter *s. 8 right to be free of unreasonable search and seizure but decided that despite this breach, the evidence found on his cellphone could be used against him at his trial.*

Introduction

On February 20, 2013, the Ontario Court of Appeal released its decision on whether the police are required to obtain a warrant before searching cellphones that are seized from persons they have arrested. [*R v Fearon,* 2013 ONCA 106] Based on the doctrine of 'search incident to arrest', the Court ruled that a warrant is not required if the cellphone is not password protected or locked in any other way.

Facts

On July 26, 2009, Mr. Fearon and two other men were arrested for robbing a jewelry merchant with a firearm. At the time of arrest, the police conducted a pat-down search of the suspects and discovered a cellphone on Mr. Fearon. It was turned "on" and had no password restricting access. The cellphone contained photographs of a gun, identical to the one used for the robbery, and cash. The phone also contained an incriminating text message. At the police station, other officers further searched the cellphone.

Mr. Fearon asked to speak to a lawyer, but was unintentionally left alone at the station for five hours without being able to contact a lawyer. When the officers returned, Mr. Fearon voluntarily confessed his involvement in the robbery before speaking to a lawyer.

Mr. Fearon challenged the admissibility of the cellphone's content as evidence based on his *Canadian Charter of Rights and Freedoms* right to be secure against unreasonable search and seizure (section 8 of the *Charter*).[6] He also argued that his confession should be excluded from evidence because the delay between his arrest and being able to contact a lawyer breached his *Charter* right to counsel (section 10(b).

Procedural History

On December 23, 2010, the Ontario Court of Justice found that the police search of Mr. Fearon's cellphone did not breach section 8 of the *Charter.* The Court stated that the arresting officer had a reasonable belief that the cellphone might contain evidence relevant to the robbery. This meant that the common law doctrine of 'search incident to arrest' applied.[7] Hence, the search did not require a warrant. The fact that the cellphone was not password-protected reduced the strength of Mr. Fearon's expectation of privacy and thus his argument for *Charter* protection. As for the right to counsel, the Court found that there was a breach, but it was not serious enough to exclude Mr. Fearon's confession from being used as evidence.

Mr. Fearon appealed the trial decision to the Ontario Court of Appeal. He asserted that the search of his cellphone content at the time of arrest violated his *Charter* right to be secure against unreasonable search or seizure. Mr. Fearon also argued that the breach of his right to counsel was serious enough for the Court to exclude his confession from evidence.

Issues

1. Did the search of Mr. Fearon's cellphone violate his section 8 *Charter* right to be secure against unreasonable search or seizure?

    I. When is the common law doctrine of 'search incident to arrest' justified? [*Cloutier v Langlois,* [1990] 1 SCR 158 at para 61, 53 CCC (3d) 316]
    II. Does the common law doctrine of 'search incident to arrest' apply to the cellphone search in this case?
    III. Should cellphones be an exception to the common law doctrine of 'search incident to arrest'?
    IV. If Mr. Fearon's *Charter* right to be secure against unreasonable search or seizure was violated, what is the legal remedy?

2. Was Mr. Fearon's right to counsel under section 10(b) of the *Charter* breached? If so, is Mr. Fearon entitled to a legal remedy?

Decision

The Ontario Court of Appeal upheld the trial court decision and found no breach of section 8 or of section 10(b) of the *Charter.* The Court ruled that the absence of a password or any other security barrier on a cellphone permits the police to search upon arrest without a warrant. Hence, the common law doctrine of 'search incident to arrest' applies to the cellphone search in Mr. Fearon's case.

Court's Analysis

1. Did the search of Mr. Fearon's cellphone violate his *Charter* right to be secure against unreasonable search or seizure?

I) When is the common law doctrine of 'search incident to arrest' justified?

a. Concept and purpose of 'search incident to arrest' doctrine under common law

As a general rule, the police must obtain a warrant before searching a person or a place to investigate crimes. [*R v Wong,* [1990] 3 SCR 36] However, an exception to this rule is known as the doctrine of 'search incident to arrest'. To ensure proper administration of justice, this doctrine allows the police making a lawful arrest to conduct a brief and limited search of a person or place without a warrant. Such search is considered to be part of the normal procedure of making an arrest, hence, not in breach of the *Charter*.

b. What is the justified scope of the 'search incident to arrest' doctrine?

Under the doctrine of 'search incident to arrest', the police power to search without warrant is a limited one with a number of preconditions. First, the officer must provide a valid reason for the warrantless search related to the arrest – one that a reasonable person in the same situation as the officer would have. [*R v Caslake,* [1998] 1 SCR 51, 155 DLR (4th) 19] The search must also be brief. Unless there is contradicting evidence, the warrantless search will be considered to be part of the normal procedure of making an arrest.

To date, the Supreme Court of Canada has permitted only two exceptions to the common law doctrine of 'search incident to arrest' in relation to section 8 of the *Charter.* The first exception concerns the police seizure of a suspect's bodily samples (bodily substances such as blood, urine or saliva collected for forensic DNA analysis). The second exception involves the searching of homes during an arrest. The police must obtain a warrant in these two circumstances because they require a high level of privacy protection. [11]

II) Does the common law doctrine of 'search incident to arrest' apply to the cellphone search in this case?

The Court found that the search of Mr. Fearon's cellphone at the time of arrest and the search at the police station fell within the justified range of 'search incident to arrest'. At the time of arrest, the officer had reason to believe that Mr. Fearon may have communicated via cellphone with the two other suspects. The officer also knew that suspects sometimes take photos of the robbery which gave him reason to believe that there might be incriminating photos on the cellphone. This knowledge amounted to reasonable belief that the search of the cellphone content would yield relevant evidence. The further search conducted by other officers at the station pushed the limits of a brief search incident to arrest. However, the Court upheld the trial decision that it was an extension of the search at the site of arrest.

III) Should cellphones be an exception to the common law doctrine of 'search incident to arrest'?

The Court confirmed that if a cellphone discovered upon arrest is not locked in any manner, making the contents readily available to other users, and if the officer has a reasonable belief that the cellphone contains evidence relevant to the arrest, a warrantless search is justified as 'search incident to arrest'.

However, the Court found it impossible to generalize or to create a rule regarding the need for warrants to search cellphones upon arrest. While the Court recognized the private nature of information on cellphones, the ability of the police to search a cellphone upon arrest may vary depending on the capacities and functions of the device. For example, a cellphone with simple and limited functions such as making calls and taking pictures may require a different search procedure from a phone that can store confidential documents, videos, voice recordings, and other forms of data. In effect, the Court did not provide a general rule that limits or expands police power to search and seize cellphones upon arrest.

IV) If Mr. Fearon's *Charter* right to be secure against unreasonable search or seizure was violated, what is the legal remedy?

Under section 24(2) of the *Charter,* if the police search of Mr. Fearon's cellphone violated his *Charter* right to be secure against unreasonable search or seizure, the Court must exclude the cellphone content from being used against Mr. Fearon at trial. However, in this case, the Court found that there was no violation of Mr. Fearon's *Charter* right because the cellphone search fell within the justified scope of 'search incident to arrest'.

2. Was Mr. Fearon's right to counsel under section 10(b) of the *Charter* breached? If so, was Mr. Fearon entitled to a legal remedy?

Mr. Fearon's confession was voluntary and the police fully informed him of the consequences of making statements that might be used against him as evidence in court proceedings. The Court ruled that the delay in allowing Mr. Fearon to contact a lawyer breached section 10(b), but that the breach was not serious enough to grant him a legal remedy.

Significance of the Ruling

Based on the facts of this case, the police can search non-locked cellphones for information related to the crime at the time of arrest. Doing so without a warrant does not breach the *Charter* right. This widens the variety of evidence admissible in criminal proceedings. At the same time, it limits one's expectation of privacy with respect to information contained on cellphones. As such, the Ontario Court of Appeal did not recognize that the information on cellphones requires the same high level of privacy protection as a person's bodily sample or a person's home upon search or seizure.

However the Court refrained from establishing a standard rule for cellphones with respect to search incident to arrest. It was determined that a case-by-case approach is more suitable. In its ruling, the Court of Appeal quoted the reasons of Justice Sharpe from the Court of Justice decision:

> *"[It is] neither necessary nor desirable to attempt to provide a comprehensive definition of the powers of the police to search the stored data in cellphones seized upon arrest. It may be that some future case will produce a factual matrix that will lead the court to carve out a cellphone exception to the law as articulated in* Caslake. *This is not that case."*

In effect, the decision left open the issue of whether a warrant is required to search sophisticated cellphones like smartphones that can store more confidential and diverse information. It also left open the question of whether the police can search password-protected cellphones without a warrant as opposed to the non-locked cellphone dealt with in *R v Fearon*. Lastly, the applicability of the decision to other portable electronic devices such as tablets, which include functions similar to cellphones, may raise debate on the extent to which the administration of justice outweighs one's privacy interests and section 8 *Charter* rights.

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Some Observations about Evidence in the Electronic Age

Posted By: *Shaun Fluker*

Case Commented On: Kon Construction v Terranova Development, 2015 ABCA 249

This Court of Appeal decision concerns a dispute over the performance of a contract. Terranova retained Kon Construction to grade lands for residential development. The work was to be done in 2005 but was delayed into 2006 and the agreement went sour. Kon Construction filed a claim for unpaid invoices and Terranova counterclaimed that Kon Construction breached the agreement on a number of grounds thereby allowing it to retain another firm to complete the grading work. At trial Madam Justice B.A.Brown ruled that Terranova did not have grounds to terminate its contract with Kon Construction and was therefore liable for a portion of the unpaid invoices which she found had been improperly inflated (Kon Construction v Terranova Development, 2014 ABQB 256). The issues on appeal were primarily on the admissibility of certain electronic records.

Under the contract Kon Construction was to be paid on the basis of earth moved in the grading work. The evidence in dispute here was entries and calculations made by site surveyors to measure the amount of work completed. Terranova argued these electronic records were inadmissible because they consist of expert evidence which was not properly admitted through a qualified expert (at paras 11 and 12). The Court rejects both of these arguments, and in doing makes some remarks on electronic records and expert evidence. The Court makes reference to some law with respect to qualifying expert witnesses (at paras 30 to 43), which I do not comment on here. Terranova also argued the records are inadmissible as hearsay because the raw data was entered by surveyors who did not testify to its accuracy, and the Court rejects this argument on the business records exception to the hearsay rule (at para 49).

Evidentiary issues is not an area of law that I spend much time with, but the reason this decision caught my attention is because I do think about how the computer age – and the capability of the internet in particular – is affecting how we make and practice law. The Court of Appeal makes some brief remarks in this regard as it relates to electronic evidence:

> *The electronic age has affected many aspects of society and business, and has had a particular impact on record creation and management. Information gathering is increasingly automated, and record keeping is now commonly done in electronic format. This appeal requires an examination of the effect of electronic record management on the laws of evidence, which were formulated on different assumptions about how records are kept. The laws of evidence must adapt to accommodate the current reality of record management (at para 13).*

Electronically generated information is not a new concept for the law – but I do think the capacity of the internet and ever-increasing reliance on computers is stretching these issues into new territory: Consider the proliferation of Facebook or Twitter to communicate, and how email has almost replaced traditional means of information delivery. These mediums have and will continue to require some adjustments to traditional ways in the law.

One issue the Court looks at here is the reliability of mechanically generated records. A primary objective of the law on evidence is to screen out unreliable information. The Court observes that computer-generated records are generally admissible because of an inherent reliability, even though we are unable to precisely examine how the information is generated, and the person seeking to rely on this information does not have to prove the underlying processing technology works. The disputed evidence here consisted of survey data collected by electronic means and compiled in software, and the Court concludes this information easily passes the test for reliability (at paras 17 – 19).

Terranova also argued the compilation of information constitutes expert opinion and was not provided by a qualified expert. The admissibility of expert opinion evidence is a noted exception to the principle that opinions are generally not admissible (at para 21). The Court observes that the interpretation of computer-generated information may constitute expert opinion and require a properly qualified expert, but not in every instance. Certain programs are sufficiently routine or within common-usage such that the interpretation of information generated does not require specialized training or knowledge – the Court gives Excel as an example:

> *An example of a software program that does not usually rise to the level of "opinion", for the purposes of the law of evidence, is the commonly used data spreadsheet program Microsoft Excel. That program is specifically designed to record raw data in rows and columns. The program can then be told to automatically organize (alphabetically, by date, etc.) and process that data (add, subtract, multiply, divide, etc.). It can also be told to isolate out data by characteristics (by date, amount, or other ascribed characteristic). The ordinary use of arithmetic formulas, and sorting of data by type, does not require "specialized knowledge"; just because a computer can do it faster does not change its categorization as evidence. Many people use*

> *Microsoft Excel, but few could actually describe how it works or what it is doing to the data. Few users could actually explain why the data are reliable, yet the results it produces are routinely relied on. That is because the program has been designed, tested, and used so repeatedly that it has been shown to be inherently reliable. The results from such a program are not "opinion evidence", and they do not require introduction by an expert: R v George (1993), 146 AR 107 at para 34, 14 Alta LR (3d) 106 (PC) (at para 23).*

The line where information generated by software crosses into the realm of expert opinion is drawn on a case-by-case basis, and in the Court's words "[t]here is no automatic or universal rule that computer-generated reports are inadmissible hearsay, or only admissible through expert evidence" (at para 25). The Court rules that the records here did not require specialized knowledge to interpret and pass the test for reliability (at para 29).

The CFL, Concussions, and a $200 Million Court Case

Posted By: *Jon Heshka*

It was only a matter of time before the Canadian Football League (CFL) would be named in a concussion class action lawsuit. On the heels of the first CFL concussion lawsuit filed last year in The Supreme Court of British Columbia, a class action suit being filed last year against the National Hockey League over Canada's national winter sport, and no doubt emboldened by the $1 billion NFL settlement, two former players have filed a claim against the CFL for $200 million.

On May 29, 2015 Korey Banks and Eric Allen filed a statement of claim on behalf of all retired CFL football players since 1952 with the Ontario Superior Court. Banks is a former Mississippi State standout and played in the CFL from 2004 to 2014. He won the league championship Grey Cup twice and was named CFL All-Star four times.

Allen was a star running back at Michigan State and played for the Toronto Argonauts from 1972 to 1975. The lawsuit names Mark Cohon, the commissioner of the Canadian Football League, the CFL, all nine teams in the CFL, an internationally renowned doctor who specializes in sports concussions, and a medical centre which employs the doctor. The claim states that the defendants caused or contributed Banks and Allen to suffer brain injuries due to multiple sub-concussive and concussive blows and that the brain injuries have and will continue to cause suffering. The lawsuit alleges negligence and negligent misrepresentation. Tearing a page from the NFL class action lawsuit, Banks and Allen claim that the CFL profits from the glorification of the brutality and ferocity of the game and has taken insufficient steps to make football safer.

Banks and Allen claim that:

1. the CFL denied a scientifically proven link between repetitive traumatic head impacts and later-in-life cognitive brain injury including Chronic Traumatic Encephalopathy (CTE);

2. that the CFL misled, downplayed, and obfuscated the true and serious risks of these hits;

3. that the CFL failed to warn them of the long-term medical risks associated with repetitive head impacts; and

4. they relied upon these statements in playing professional football.

They similarly allege that Dr. Charles Tator, whom the CFL partnered with as part of its Canadian Sports Concussion Project at the Krembil Neuroscience Centre, is negligent for an article entitled "Absence of chronic traumatic encephalopathy in retired football players with multiple concussions and neurological symptomatology" published in *Frontier in Human Neuroscience.* Banks and Allen claim that the findings in the article were false or misleading and that CFL players relied upon these misrepresentations.

Citing the *Journal of the American Medical Association* (JAMA), the *New England Journal of Medicine, Neurology* and *The Lancet*, the suit makes a number of claims, including that medical studies have collectively established that "football players should cease to play football after receiving their third concussion," in effect a "three strikes and you're out" approach to multiple concussion management. Banks and Allen claim that the CFL is negligent for failing to impose rules to protect them from brain injuries and for not promulgating such a "three strikes and you're out" rule. They also claim that Dr. Tator is negligent for failing to acknowledge such a rule and for not warning about the risks of multiple sub-concussive and concussive blows to the head. No specific sources are cited to support these claims.

It is interesting, though, that a 2007 *New England Journal of Medicine* article simply entitled "Concussion" stated that, "There are scant data to guide decisions about the timing of a return to sports after concussion." The same article cited a 2003 JAMA article which said that, "Given our finding of a 3-fold greater risk of future concussions following 3 concussions vs no concussions, athletes with a high cumulative history should be more informed about the increased risk of repeat concussions when continuing to play contact sports such as football." Further, A report of the American Academy of Neurology entitled "Summary of evidence-based guideline update: Evaluation and management of concussion in sports" published in *Neurology* in 2013 states that licenced health care providers **might** (emphasis mine) refer professional athletes with a history of multiple concussions and subjective persistent neurobehavioral impairments for neurologic and neuropsychological assessment." At first blush, there appears to be no authority behind the claim of a "three strikes and you're out" approach to multiple concussion management on the gridiron.

The lawsuit claims that, "Since at least 2007, Commissioner Cohon knew of the long-term harmful effects of multiple sub-concussions and concussions on the plaintiffs' and other class members' brains [and that] in spite of that knowledge, Commissioner Cohon actively concealed and/or systematically failed to disseminate those facts to the plaintiffs and the other class members."

To wit, at the CFL Players Association AGM in 2011, players learned – for the first time – according to Winnipeg Blue Bombers defensive tackle Doug Brown who was present and wrote the following in the *Winnipeg Free Press*:

"According to information from a UNC study we were shown, 'Repeatedly concussed NFL players had five times the rate of mild cognitive impairment (pre-Alzheimers) than the average population.' The same study also showed that, 'retired NFL football players suffer from Alzheimer's disease at a 37 per cent higher rate than average.' Going into this conference we were all somewhat familiar with the long-term consequences of playing football, but not to the depth that was introduced at our meetings. Next we were shown that Time Magazine had produced a story about football called The Most Dangerous Game, and the author, Sean Gregory, concluded that, 'Men between the ages of 30 and 49 have a one in a thousand chance of being diagnosed with dementia, Alzheimers, or another memory related disease. An NFL retiree has a one in fifty-three chance of receiving the same diagnosis.' This was around the moment in Las Vegas where a collective 'thunk' was heard as all of our jaws hit the floor. These are not CFL statistics, but you would have to be pretty naive to think that these facts do not apply to our game as well."

While the CFL and Dr. Tator have yet to respond to the Banks and Allen lawsuit, their defences will no doubt be similar to those of the *Bruce* CFL concussion case. Just as with the NFL's initial stance, the CFL has filed a *Weber* motion with the Supreme Court of British Columbia to the effect that this matter should be subject to the grievance and arbitration procedure of the Collective Agreement. In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, the Supreme Court of Canada held that an exclusive jurisdiction model to labour disputes should be adopted and that, "Under this approach, if the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement."

The Supreme Court of Canada subsequently clarified the principle of arbitral jurisdiction in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 SCR 185, 2004 SCC 39 *General)* holding that: "Weber does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction." The Supreme Court of British Columbia has yet to decide in the *Bruce* case if it should fall within the ambit of the collective agreement or not.

Dr. Tator's defence in *Bruce* deserves some exploration in that it is unique that a leading neurologist be named in a concussion lawsuit. Dr. Tator's position is three-pronged:

1. that the claims are subject to the grievance and arbitration procedures of the collective agreement;
2. if they are not subject to grievance and arbitration, then Dr. Tator denies that a duty of care was owed, or if a duty was owed that it was not breached and that he was in no way negligent and;

3. that Bruce was contributorily negligent for failing to take all reasonable steps to minimize or avoid injury.

The creation of a duty of care from a physician to a professional football player through research findings published in a medical journal would, at the very least, be novel.

Another question will be to what extent head shots are risks that are inherent to professional football and whether or not players consent to, or voluntarily assume the risks associated with such contact. Indeed, the lawsuit is critical of the CFL's failure to implement policies and protocols or to make the necessary changes to its existing rules to protect players from concussions and other head injuries. The leading Canadian authority on the extent to which violent contact can be consented to and considered part of the game is the hockey case of *Agar v. Canning* where the court said: "Since it is common knowledge that such injuries are not infrequent, this supports the conclusion that in the past those engaged in this sport have accepted the risk of injury as a condition of participating." The plaintiffs will have to show that such knowledge was not common and prove that the CFL actively concealed it from its players.

In the end, given their choice of profession, its occupational hazards and inherent risks, and the recent history of concussion litigation with the NFL, Banks and Allen have a steep hill to climb in having the claim go to court, getting the class action certified, proving the CFL and Dr. Tator were negligent, and that they were unaware of the risks of brain injuries in professional football.

Using Waiver Agreements in Sports

Posted By: *Rachel Corbett*

As a professional working on the legal side of sport and recreation, I am often asked questions along the lines of the following: “When I register my child in a program, we are asked to sign a waiver form. Do these have any legal validity?” What follows is my answer to a not-so-simple question.

Any adult who is physically active, or who is a parent with children involved in sports, has signed waivers at one time or another. This question about their validity arises all the time – I could be doing a workshop on employment contracts, and invariably a participant asks this question at some point!

The answer is – both yes and no. Waivers are hopelessly misunderstood and are often improperly used. Most people who sign them think they are meaningless (and if they thought otherwise, they wouldn’t sign them!). Most organizers who use waivers don’t really think about them at all, but just consider them to be part of the necessary registration paperwork. To answer the above question, some legal background is needed.

The term ‘waiver’ is short form for ‘waiver of liability for negligence’. A waiver is a contract by which the person signing it agrees to give up something. They are ‘waiving’ a right or entitlement that they otherwise would have. In the sporting context, the person signing it is usually a participant in a sport program or activity who agrees, by signing this contract, that they will give up their right to sue the organizer of the program or activity for negligence. In other words, the person who signs a waiver agrees to forfeit their legal right to pursue a legal remedy, should they come to harm as a result of their participation and should this harm be caused by the organizer’s negligence (as opposed to being caused by other factors).

It should also be noted that ‘negligence’ is a precise legal concept. Being negligent means that a person who had a duty of care towards another did not fulfill the reasonable standard of care that such duty imposed. Put another way, negligence may result when an organizer fails to behave as a reasonably prudent person would behave. To be negligent is to have failed, legally, in fulfilling your ordinary and reasonable responsibilities. Our legal system provides that someone seriously harmed by such a failing has a legal remedy.

A waiver is thus a method a sport organization uses to transfer risk, in this case from the organization back to the participant. That is essentially what any contract does, and a waiver is simply a very specific form of contract. A waiver is also said to be a very onerous contract, because by signing a waiver, a person is relinquishing a very closely held and important right – the right to seek compensation or legal damages in the event that person is harmed by another person's negligence. Put another way – when I sign a waiver I am essentially agreeing that if the organizer of the program I am enrolling in is negligent, I will accept the result of that and not pursue any legal action.

In my opinion, waivers are perfectly acceptable from a legal and contract point of view. Transferring risk is a good risk management practice for any sport organization. In certain circumstances waivers are a good idea – where the activity is inherently risky, the environment in which the activity occurs cannot readily be controlled or managed, and the participants are skilled adults. Back-country skiing, deep sea diving or bungee-jumping might be examples of situations that call for adult participants to sign a waiver.

However, the use of waivers also raises many ethical and moral issues. The organization that uses them is attempting to contract out of legal responsibility for its own negligence. This may be appropriate in certain limited circumstances. In my view, however, using waivers for ordinary sport programs or after-school recreational activities is not appropriate. As well, waivers have no legal effect if used for children. Remember that they are an onerous legal contract and minors cannot sign contracts, and likewise, parents or guardians cannot sign contracts on behalf of a child that are not in the best interests of the child. A waiver is never in the best interest of the person who signs it – in fact, it is a terrible bargain all around when you consider what is forfeited (the right to sue for liability for negligence) versus what is gained (the opportunity to participate in a particular sport activity).

So what is the short answer to the above question? Waivers can and do hold up legally, when they are properly written and executed and when they are used in appropriate high-risk situations with adult participants. However, the vast majority of waivers are poorly written, casually executed, used for minors and used in low-risk situations that simply do not justify their use. These waivers would not withstand legal scrutiny.

This is not to say waivers are a wasted effort – they aren't – because a fortunate side benefit of using a waiver is that it brings to people's attention that the activity being undertaken presents risks and a participant could be harmed as a result of those normal and inherent risks. Thus, they have considerable educational value, and education of participants and/or their parents is always a good idea.

This article was originally published as a Risk Management Expert column on the website of Imagine Canada. It was later republished in the quarterly newsletter of the Sport Law & Strategy Group. It is reprinted here with permission.

Sports Teams and Scandals

Posted By: *Jessica Geense*

For as long as organized sport has been around, athletes have appeared to occupy a social class of their own. Held in the highest regard by their fans and with the ability to flaunt their 'jock' status, athletes have often been accused of not only receiving special treatment, but of acting entitled to that special treatment. Up until recently, this attitude had been shrugged off as the status quo, but as a new generation of athletes has emerged, it seems things have gone too far. Many critics are now citing a trend of what they call "sexual entitlement" among athletes, following several high profile episodes of sexual assaults involving athletes at the amateur, college, and professional level.

Newly familiar to this arena is the University of Ottawa, courtesy of their men's varsity hockey team. In early February of 2014, the team travelled to Thunder Bay to face the Lakehead University Thunderwolves in a weekend double-header. During their stay, two of Ottawa's players allegedly raped a 21-year-old woman in a Thunder Bay hotel room. While all of the players and coaching staff became aware of the incident within hours of its occurrence, no action was taken in the situation until University of Ottawa administration was informed almost three weeks later by a friend of the alleged victim. The University immediately contacted the police, and a week later, announced its decision to suspend the men's hockey program for the balance of the season and to launch an internal investigation into the matter.

Upon completion of the investigation in late June of 2014, the University announced that the suspension would remain in place for the following competitive season. For readers unfamiliar with school-based sports, a suspension of just one season can be a death sentence for a team, as current players flee to other schools who are able to give them playing time, and its ability to recruit future players is seriously compromised. It can take a college program many years to recover from the impact of a single season suspension.

Some have criticized the University of Ottawa for disciplining the entire team for the actions of but a few – at least so harshly – in what is a criminal matter. This begs the question of jurisdiction in situations where athletes not only defy standards of decent conduct, but also cross the legal line. What are an institution's responsibilities in handling cases such as this?
The University of Ottawa found itself in an extremely difficult place. Their ultimate decision to suspend the entire team has provoked a defamation lawsuit of $6M by the non-implicated players, but the risk of

doing nothing and appearing nonchalant towards victims of alleged sexual assault in today's climate might have had even more severe consequences for the University.
Over the past few years, allegations of sexual assault against university athletes have been reported in a steady stream, and in some cases, the accused are walking away unscathed. In a case against three members of McGill University's football team in 2012, for example, the players in question were allowed to remain on the team and play while they awaited trial for their rape charges of a female student. A similar situation at Boston University in 2009 saw multiple players get away with non-consensual sexual acts because the university didn't have proper policies in place to reprimand the team and not enough evidence to take the case to the police.

Disturbingly enough, this behaviour and sense of "sexual entitlement" has even trickled down to the high school level. A 2012 case in Steubenville, Ohio saw multiple high school football players go to trial for the sexual assault of a female minor, who had been drugged, and the distribution of photos and video footage of the incident. Many of the athletes involved in this incident and later convicted by the courts were as young as 16. Chillingly, many residents of this small town supported these athletes through the trial, even though clear evidence of their crime was there for all to see.

Edmund Burke's famous call to action states, "All that is necessary for the triumph of evil is for good men to do nothing". Sometimes, doing nothing seems to be the natural reaction of those in authority over these athletes. The University of Ottawa took the road less travelled by taking a firm stand against this culture. Perhaps it was not an absolutely perfect solution, but it was significant because it is the closest that an institution has come thus far to addressing head on the culture of sexual entitlement among athletes. The University's situation was made more difficult by the lack of policies in place for dealing with such crises. However, the administration has taken note and has begun to develop more specialized internal conduct codes for players who venture over the line into law-breaking territory.

While criminal acts are dealt with by the courts, a university or sport organization has every right to protect its name and reputation by ceasing the operation of a program in which its employees – or in this case, players – are engaged in conduct that does not fulfill the values or personal expectations outlined by the organization. In order to avoid future confusion, however, all Canadian colleges and universities should re-evaluate the terms of the written agreement used with players, and where needed, clarify behaviour expectations and the policies outlining disciplinary action. It may be valuable as well to establish connections with local police authorities or legal counsel so that they may be able to help advise in the development of these new policies.

In a serious situation of athlete misconduct, it is important to allow the proper authorities to do their job where needed, but it is also important for institutions to respond on their own, keeping in mind that every decision is a message to both athletes and to the public. Think: What kind of statement does this make about the institution's values and priorities? The lines can be blurry, but implementing new policies in preparation for the storms ahead can provide much clarity.

For the record, as an avid lover of all sports and a former competitor myself, I recognize that jocks often get a bad rap. I also recognize, however, that athletes often end up in a social class all their own as a result of their athletic abilities and this is where entitlement often starts. There is a serious cultural problem with the idea that stickhandling or swinging a bat or [insert athletic ability here] justifies a 'get out of jail free' card.

Universities must do their part to hold athletes accountable to a publicly acceptable standard. This means implementing specific conduct policies, addressing problems proactively, and most importantly, refusing to do nothing.

Viewpoint

Posted By: *Amelia Martin*

LawNow and the Centre for Public Legal Education Alberta (CPLEA) is celebrating its 40th anniversary this year and we would like to thank you – our dedicated *LawNow* reader – for your ongoing support! *LawNow* began as an in-house produced newsletter about the law and legal developments in the Alberta justice system. Over the past 40 years it has grown from its humble beginnings to the sophisticated online product that you see today. There have been so many changes, so many expansions of range and content, so many technological advancements and so many moments of excitement, trepidation, improvisation, fun, and pride. But some things have remained constant: our wonderful contributors whose generosity, intellectual curiosity, and spirit of engagement have made *LawNow* possible; CPLEA's tireless and committed staff; and the support of CPLEA's funders, in particular, the Alberta Law Foundation.

I would also like to take this opportunity to introduce myself as CPLEA's new Executive Director. I joined CPLEA in January 2015 as our new public legal education lawyer and was appointed as Executive Director in June 2015. While I may seem relatively new to the CPLEA family, my relationship with CPLEA actually began many years ago while I was completing my Master of Library and Information Studies at the University of Alberta. Issues around access to information and access to justice have always interested me and CPLEA was the perfect marriage of the two. Needless to say, I am excited to be back with CPLEA and look forward to leading us into the future.

I am also happy to announce that *LawNow* will feature three new columnists in the months ahead. Melody Izadi will provide lively and thoughtful analysis of criminal law issues. She is a lawyer in private practice in the Toronto area. Doug Hoyes will join *LawNow* as the new Debtor and Creditor Law columnist. Doug is a Trustee in Bankruptcy, Consumer Proposal Administrator and Founder of Hoyes, Michalos & Associates Inc. with offices in Ontario, and has extensive experience in resolving financial issues Caroline Wawzonek will reintroduce our readers to an Aboriginal Law column, which we have been sorely lacking the last few years. She is a lawyer practicing with the firm of Dragon Toner in Yellowknife and is the Chair of the NWT Canadian Bar Criminal Law Section. We welcome these new contributors as they join our other superb columnists and feature article writers.

From all of us at CPLEA, thank you for your support and look forward to continuing to relate law to life in Canada for another 40 years!

Amelia Martin

Bhasin v Hrynew – An Innovative Expansion of the Common Law Doctrine of Good Faith

Posted By: *Olugbenga Shoyele*

The creation of "a general duty of honesty in contractual performance" by the Supreme Court of Canada in *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin* SCC] simply recognizes that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" (para 73). The highest court in Canada generated this conclusion from the gravamen of Moen, J's seminal decision, which resulted from a trial that spanned the period from May 2 to May 26, 2011 at the Alberta Court of Queen's Bench (Edmonton Judicial Centre). In the case, Mr Bhasin had sued Canadian American Financial Corporation [Can-Am] and one, Mr. Hrynew for, inter alia, breach of an enrollment director's agreement on the marketing of education savings plans to investors, as indexed at: 2011 ABQB 637.

The Supreme Court succinctly captured the background facts to Moen J's findings of dishonesty and breach of the implied term of good faith against Can-Am, when it broadly outlined that:

There were two main interrelated story lines.

The first concerns Mr. Hrynew's persistent attempts to take over Mr. Bhasin's market through a merger — in effect a takeover by him of Mr. Bhasin's agency. The second concerns the difficulties [that] Can-Am was having with the Alberta Securities Commission, which regulated its business and its enrollment directors in Alberta. The Commission insisted that Can-Am appoint a full-time employee to be a [provincial trading officer] PTO responsible for compliance with Alberta securities law. Can-Am ultimately appointed Mr. Hrynew, with the result that he would audit his competitor agencies, including Mr. Bhasin's, and therefore have access to their confidential business information. Mr. Bhasin's refusal to allow Mr. Hrynew access to this information led to the final confrontation with Can-Am and its giving notice of non-renewal in May 2001. Can-Am, for its part, wanted to force a merger of the Bhasin agency under the Hrynew agency, effectively giving Mr. Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

The trial judge concluded that Can-Am acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to Mr. Hrynew's role as PTO. Her detailed findings amply support this overall conclusion.

At the trial level, Madam Justice Moen found that the Defendant, Can-Am, was either dishonest or misleading in its communication with the Plaintiff, Bhasin, regarding matters that directly involved the performance of the contract between the parties. Based on her findings, she profusely used the words "dishonest" and "misleading" or their variants throughout her written decision, to describe the conduct of Can-Am. Justice Moen demonstrates the conviction that the facts of the case before her required the application of the good faith principle, notwithstanding the constraints or limitations around that legal concept at the point she was writing her decision. Prior to Justice Moen's decision, the type of agreement between the Plaintiff and the Defendant did not fall within the traditional categories of contract that required good faith performance: e.g. employment, insurance and franchise agreements.

On appeal by the Defendant Can-Am, the Alberta Court of Appeal (ABCA) dismissed the Plaintiff's lawsuit. It held that Justice Moen's conclusions were erroneous because: (i) the Plaintiff's pleadings were insufficient, and (ii) the trial judge implied a term or duty of good faith in the context of an unambiguous contract containing an entire agreement clause, and thereby violated the entire agreement clause in this case.

Absolutely convinced that there was something unfair about the ABCA's clinical construction of the law, Mr. Bhasin embarked on a mission "to make sure that justice was done": The Globe & Mail (14 November, 2014) A-16. He filed an appeal to the Supreme Court of Canada. Justice Cromwell, writing for a unanimous Supreme Court of Canada [SCC], effectively reversed the critique by the ABCA. The Supreme Court upheld Justice Moen by confirming that: (i) "the question of whether [a conduct] amounted to a breach of the duty of good faith is a legal conclusion that did not need to be pleaded separately"; and, (ii) "the trial judge did not make a reversible error by adjudicating the issue of good faith".

Justice Cromwell outlined that the development in this area of law is desirable for specific reasons, which include "First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada – Quebec and the United States": I cannot agree more with the erudite jurist.

A few of the laudable features of this new, common law "duty of honest performance" – which is not to be construed as an implied term, but as a general doctrine that imposes a contractual duty – are as follows:

1. it applies to all contracts;

2. it contemplates "active dishonesty" and a conduct or action of "actively misleading or deceiving the other contracting party in relation to performance of the contract."

3. it is distinguishable from a duty of disclosure or the higher obligation of fiduciary loyalty;

4. it has significant similarities with the law relating to civil fraud and estoppel, although not subsumed by them and,

5. it requires the contracting parties to be honest with each other in relation to the performance of their contractual obligations.

According to the Supreme Court, the duty of honest performance is akin to equitable doctrines that impose some form of limitations on the freedom to contract in a manner similar to the doctrine of unconscionability. The justification for the limitation imposed by this new common law duty is that parties to a contract "will rarely expect that their contracts permit dishonest performance of their obligations".

By virtue of her pioneering trial decision – which led to the crystallization of the new duty of honest performance – Justice Moen of the Alberta Court of Queen's Bench has bequeathed an indelible legacy to the common law of contract in Canada.

When Children Refuse to Visit: Alienation and Estrangement in Family Law Disputes

Posted By: *John-Paul Boyd*

Separation is a difficult time for parents, even those who "consciously uncouple" like Gwyneth Paltrow and Chris Martin. The emotional trauma of separation becomes significantly more challenging, however, when the legal consequences of separation steer parents toward conflict in court rather than compromise out of court.

In this three-part article, I'm going to talk about how a child's relationship with a parent can break down when parents separate, and the theory of parental alienation syndrome that tries to explain the breakdown of the parent-child relationship. In Part Two, I'll talk about what happens to allegations of parental alienation in court and how cases of parental alienation can be distinguished from situations in which children are justifiably estranged from a parent. In the last part, I'll talk about the legal and therapeutic options that are available when allegations of alienation are proven.

Parental alienation "syndrome"

Our court system is adversarial. Although processes are in place to promote settlement, if separated parents can't agree on how they'll care for the children, they'll wind up fighting each other to get the result they each think best. This sort of competition encourages parents to take extreme positions, and makes extreme positions difficult to back down from for fear of looking weak or losing face. The stakes, of course, are astronomically high when what a couple is arguing about is their children. With emotions running high, it's easy to forget how important it is that the children maintain a positive, loving relationship with each parent and that children's exposure to their parents' conflict is limited.

In the early 1980s, psychologists began to notice that some children of separated parents developed an alignment with one parent, and a rejection of the other, that was so strong it resulted in the child refusing to visit the rejected parent and became a factor in the litigation. In *Surviving the Breakup*, prominent American psychologists Judith Wallerstein and Joan Kelly wrote about certain self-absorbed parents and vulnerable older children who "waged battle" together in an "unholy alliance" to hurt the other parent. Five years later, in an article called "Recent Trends in Divorce and Custody Litigation," psychologist Richard Gardner used the term "parental alienation syndrome" to describe cases of alignment in which children not only engaged in a "campaign of denigration" against the other parent

but were actually prepared to reject their relationship with that parent altogether. Gardner believed that such extreme alignments were caused by the efforts of one parent, usually the mother, to indoctrinate the children against the other parent, usually the father.

Gardner's parental alienation syndrome quickly became a flashpoint of controversy. Men's rights groups loved the theory because most of the parents said to engage in alienation were mothers; women's groups loathed it as it seemed to downplay the impact of family violence on children's interests and preferences. Psychologists were skeptical because:

- there was so little good research on alienation;
- the theory didn't meet the scientific criteria to be labeled as a diagnosable "syndrome,"; and
- it seemed overly simplistic and was frequently misapplied in court.

The courts weren't fond of parental alienation syndrome as alienation was often difficult to establish as fact and the recommended solution, removing the child from the home of the favoured parent, seemed drastic and at odds with the child's expressed preferences.

In 1997, Deirdre Rand, another psychologist, wrote in "The Spectrum of Parental Alienation Syndrome" that parental alienation syndrome is a risk *whenever* parents go to court about a custody dispute She said that the risk of alienation increases: when one or both parents make claims that attack the integrity, moral fitness, or character of the other parent; when the parent seen as responsible for the breakdown of the relationship becomes involved in a new relationship shortly after separation; and, when a parent leaves the relationship suddenly, with little or no warning.

Drawing on work by James Garbarino, Edna Guttman and Janis Wilson Seeley in *The Psychologically Battered Child,* Rand described five types of parental behaviour that are hallmarks of parental alienation syndrome:

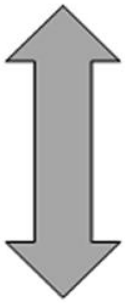
1. **Rejecting**: The favoured parent rejects the child's need for a relationship with both parents. The child fears abandonment and rejection by the favoured parent if he or she expresses positive feelings about the rejected parent.
2. **Terrorizing**: The favoured parent bullies the child into being terrified of the rejected parent, and punishes the child if he or she expresses positive feelings about the rejected parent.
3. **Ignoring**: The favoured parent withholds love and attention if the child expresses positive feelings about the rejected parent.
4. **Isolating**: The favoured parent prevents the child from participating in normal social activities with the rejected parent and that parent's friends and family.
5. **Corrupting**: The favoured parent encourages the child to lie and be aggressive toward the rejected parent. In very serious cases, the favoured parent recruits the child to assist in tricks and manipulative behaviour intended to harm the rejected parent.

As a family law lawyer, two other behaviours have also struck me as indications that the alienation of a child is a risk:

6. ***Distracting**: The favoured parent sets up activities, goals or interests which conflict with the other parent's time with the child, such as enrolling the child in a sports team and placing such a high value on the child's participation that the child is upset to miss a game or practice to spend time with the rejected parent.*
7. ***Resigning**: The favoured parent stops accepting responsibility for the child's time with the rejected parent, and leaves it up to the child to decide whether to spend time with the rejected parent or not. This puts the child in a loyalty bind by forcing the child to make the choice to see the rejected parent, knowing that the favoured parent doesn't want the child to go at all.*

Alienation, or justified estrangement?

In 2001, however, Joan Kelly and Janet Johnston published an important article in *Family Court Review* called "The Alienated Child: A Reformulation of Parental Alienation Syndrome" that focused more on the alienated child than the alienating parent. In their view, parent-child relationships can break down for reasons not involving the malicious interference of the favoured parent and can be described on a scale of quality between positive and secure on one hand and negative and alienated on the other:

Positive Relationships	**Positive relationship** with both parents	*Child prefers contact and has secure relationships with both parents*
	**Affinity** toward a parent	*Child prefers contact with both parents but prefers one parent over the other*
	Alliance with a parent	*Child prefers one parent and is ambivalent toward the other*
	Estranged from a parent	*Child rejects one parent and is either ambivalent toward that parent or expresses a dislike of that parent*
Negative Relationships	**Alienated** from a parent	*Child rejects one parent and expresses a strong dislike for that parent*

Kelly and Johnston recognized that there may be objectively valid reasons for the breakdown of a child's relationship with a parent, reasons that might actually justify the child's rejection of and refusal to visit that parent, such as:

- the child witnessing or experiencing family violence at the hands of the rejected parent;
- the rejected parent having a rigid or authoritarian approach to discipline;

- the rejected parent displaying inconsistent and unpredictable expectations and behaviour;
- the immaturity and self-centeredness of the rejected parent;
- the rejected parent being emotionally unavailable to the child; or,
- the rejected parent having problems with substance abuse impairing his or her parenting capacity.

All these things might cause a child to become estranged from a parent, rather than being *alienated* from the parent as a result of the favoured parent's efforts to poison the parent-child relationship. In such cases, they wrote, children also typically wish to severely limit contact with the rejected parent, and their estrangement from that parent is "reasoned, adaptive, self-distancing and protective."

The problem, of course, is that certain groups remain smitten with Gardner's original theory of parental alienation syndrome and it can be terribly easy, and rather tempting, to mistake cases of estrangement for cases of alienation. Many parents frankly find it easier to blame the other parent as the cause of the breakdown of their relationship with the children than to find fault within. However, although parental alienation is often claimed, it's not often established.

In the next part of this article, I'll talk about what happens to allegations of alienation in court and how cases of parental alienation can be distinguished from situations in which children are justifiably estranged from a parent.

Do I Need A Lawyer To File For Bankruptcy?

Posted By: *J. Doug Hoyes*

If you are struggling with more debt than you can repay, you may be considering either bankruptcy or a consumer proposal to help you deal with those debts. If you are, then you need to speak with someone who is a licensed Bankruptcy Trustee; in Canada, that person is not a lawyer. A Bankruptcy Trustee often has an accounting background and is licensed through the Canadian federal government.

Bankruptcy law in Canada is administered under the *Bankruptcy & Insolvency Act* (the Act or BIA). The Act provides for two possible debt relief solutions for individuals: personal bankruptcy or a consumer proposal. Both options are legal processes filed under the Act and administered by a Bankruptcy Trustee, or in the case of a consumer proposal, the Trustee may also be called a Consumer Proposal Administrator. The reason for this is that, while bankruptcy is a legal process, the courts rarely get involved. Instead, there are a series of regulations and rules, that when followed, allow a person to go through the bankruptcy process without the need to appear in court. In most cases, an individual files for bankruptcy, performs their required duties and receives an automatic discharge at the end of the process all without ever having to talk with a lawyer or appear in court.

The role of the Bankruptcy Trustee is to be an impartial administrator. The Trustee makes sure that all rules and regulations are followed and that the bankruptcy process is fair to both the debtor and the creditor. This concept of fairness begins even at the initial consultation stage. By law, a Bankruptcy Trustee is required to review the debtor's financial situation and explain all possible solutions, not just bankruptcy. This ensures that the person choosing to file for bankruptcy is well-informed and makes the best decision for their individual situation. This is another reason why the Act requires that a Bankruptcy Trustee be trained specifically in the provisions of the Act and in issues related to debt management.

While most Bankruptcy Trustees are also accountants, it is not a prerequisite. To become a Trustee an individual must complete an extensive training program over several years, have practical experience in the area of insolvency and must pass both written exams and a final oral examination before a three-person board that includes a representative from the Office of the Superintendent of Bankruptcy, a licensed Bankruptcy Trustee and a bankruptcy lawyer.

If you choose to file for bankruptcy your Trustee will file the necessary paperwork with the Superintendent of Bankruptcy, notify your creditors of the bankruptcy or proposal, review and approve claims from creditors, realize on any assets that must be surrendered to the Bankruptcy Trustee, ensure

that you have completed your duties and apply for your discharge once the bankruptcy process is complete.

It is rare for a bankrupt to need to appear in court, however, it does happen. If the bankrupt does not complete their required duties, or a creditor wishes to object to a person's discharge from bankruptcy, the Bankruptcy Trustee will apply to court for a discharge hearing. Again, it is important to understand that even during this process, the Trustees are impartial administrators. They represent neither the debtor nor the creditor, but instead advise the court as to the facts of the situation and may provide a recommendation as to the outcome.

Then what do bankruptcy lawyers do? Lawyers who practice in the area of insolvency law primarily work either on corporate insolvency files or occasionally provide legal advice to Bankruptcy Trustees and undischarged bankrupts about court actions. A lawyer's role is that of an advocate. When lawyers work on a corporate file they are typically representing a creditor, a business or another interested party to a legal outcome. They would argue, either in negotiations or in court, the position of their client. If a Bankruptcy Trustee needs legal advice, perhaps about a dispute as to a creditor's claim or an asset of the bankruptcy, he or she may request a legal opinion from an insolvency lawyer. In the rare instance that a debtor may need legal advice during a discharge hearing, then the debtor would engage the services of an insolvency lawyer. Again, it is important to understand that this very seldom occurs. Most bankruptcies are completed within nine months with no court involvement.

A final word of caution. As mentioned, bankruptcies and consumer proposals can only be administered in Canada through a licensed Bankruptcy Trustee. There are, however, many other debt consultants who provide information about bankruptcies or consumer proposals on their websites and will offer to walk you through the process, for a fee. Others provide non-legislated debt management services and if you need to file for bankruptcy, will end up referring you to a Bankruptcy Trustee anyway. Neither of these approaches are necessary. Most Bankruptcy Trustees will provide a free initial consultation. If you are uncomfortable with the advice provided by one trustee, you should contact another trustee in your area for a second opinion prior to filing. To be sure that the individual you are dealing with is a licensed trustee you can search their name or firm name with the Office of the Superintendent of Bankruptcy.

Interesting Result in Human Rights Supreme Court of Canada Case

Posted By: *Linda McKay-Panos*

[1]

A recent Supreme Court of Canada case, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Centre)*, 2015 SCC 39, provides guidance on the complainant's burden of proving discrimination. The case law on discrimination provides for a two-step process: the complainant's burden of making out a *prima facie* [at first appearance] case of discrimination, followed by the respondent's burden of justifying its actions. According to the SCC, the confusion stems from the use of the term "*prima facie*", which does not lower the burden of proof. The case also demonstrates how difficult it is for complainants to effectively prove the claim they have been denied something on the grounds of "national security".

Javed Latif, a Canadian citizen born in Pakistan, held both Canadian and United States (U.S.) pilot's licences. In 2003, Mid East Jet offered Latif work flying a Boeing 737 under his U.S. licence. He registered for training and was issued a U.S. security clearance in 2003. Unfortunately, this job opportunity fell through, but he received another offer from ACASS Canada Ltd to pilot a Bombardier Challenger 604 aircraft. He again applied for training under his U.S. licence at Bombardier's Dallas training centre. There was another required security clearance from the U.S. Department of Justice. This time, there was a delay in receiving the clearance, partly because the U.S. has passed stricter requirements in 2004. Because he did not want to lose the job opportunity, Latif registered for training under his Canadian licence.

In April 2004, Latif was informed that Bombardier has received an unfavourable reply to his security screening request from the U.S., which meant he could not receive training there. No explanation was provided for the denial, but Latif thought it must be due to an identification error. Because Latif was denied security clearance in the U.S., Bombardier refused to provide him training under his Canadian licence.

Latif complained to the Quebec Commission des droits de la personne et des droits de la jeunesse ("Commission") that Bombardier had discriminated against him on the grounds of ethnic or national origin. Quebec's Human Rights Tribunal addressed the burden of proof and said that the burden was on the Commission to prove the following three elements on a balance of probabilities:

1. a distinction, exclusion or preference;
2. based on one of the grounds listed in the legislation;
3. which has the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom.

The Tribunal held that the refusal to train Latif under his Canadian licence was not directly dependent on his Pakistani origin, but on the refusal of the U.S. authorities to give him security clearance. The Tribunal had considered an expert report filed by the Commission indicating that since September 11, 2001, several U.S. agencies had engaged in racial profiling against people of Arab origin, Muslims or people from Muslim countries. The Tribunal held that the U.S. authorities' decision about Latif had been made in that context and thus constituted discrimination based on ethnic or national origin and had the effect of nullifying or impairing the full recognition and exercise of his rights. Thus, Latif was successful at the Tribunal level.

The Quebec Court of Appeal disagreed with the Tribunal, and held that the Commission had not shown a causal connection between Latif's exclusion and a prohibited ground. While a connection might be proven through circumstantial evidence or presumptions, there was no such proof in this case. Because Bombardier's decision had been based solely on the decision of the U.S. authorities, the Tribunal could not find that Bombardier had discriminated against Latif without proof that the decision was itself based on a ground that is prohibited under human rights law.

The Supreme Court of Canada (SCC) noted that the case raised three issues:

1. What is '*prima facie*' discrimination, and what degree of proof is required in order to establish it?
2. Has p*rima facie* discrimination on Bombardier's part been proven?
3. Was the mandatory order against Bombardier justified?

The SCC held the central issue was whether the complainant had established that the discrimination was based on one of the grounds listed in the human rights legislation. The Court held that it was not enough that the prohibited ground played a role in the discrimination, but rather that there needed to be a "connection" between the prohibited ground of discrimination and the impugned decision. The SCC held that: "…the plaintiff has the burden of showing that there is a *connection* between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a *factor* in the distinction, exclusion or preference." [emphasis original]. ….

The SCC also noted that it had never clearly stated the degree of proof of discrimination associated with the complainant. The SCC clarified that the use of the term "*prima facie* discrimination" refers only to the first step of the process but does not alter the degree of proof required. It is not a relaxation of the complainant's obligation to satisfy the tribunal on a balance of probabilities of the connection between the prohibited ground and the decision.

The SCC concluded that the Tribunal's decision was unreasonable, and thus must be set aside. The parties agreed that Bombardier's decision to deny Latif's request for training was based solely on the fact he had not received security clearance from the Department of Justice to receive training under his U.S. licence. Further, the Commission had not adduced sufficient evidence to show that Latif's ethnic or national origin played any role in the unfavourable reply to his security screening request. The evidence adduced at the hearing was not sufficient to support an inference of a connection between Latif's ethnic or national origin and his exclusion. Thus, the Tribunal's finding of fact on this issue was unreasonable.

The SCC held that social context evidence of racial profiling of a particular group was not itself sufficient to presume that a specific decision against a member of that group was necessarily based on a prohibited ground under human rights law.

The SCC noted that its conclusion in this case did not mean that when a company is caught in a conflict between foreign and Canadian laws, it can blindly comply with a discriminatory decision of a foreign authority without exposing itself to liability under human rights law.

This case also demonstrates the difficulty of proving whether the motives of another country were discriminatory, especially if the basis for the decision is stated to be "national security". The SCC decision appears to relegate adverse effect discrimination to the back burner, because it is fairly clear that the U.S. policy did have an adverse effect on people of certain ethnic origins or religious affiliations. Mr. Latif testified that four of the five candidates who were refused security clearance by the U.S. authorities were from Arab or Muslim countries.

Progressive Discipline

Posted By: *Peter Bowal*

Introduction

When faced with problematic workers, employers are expected to progress through a discipline procedure. In other words, firing the employee should be the last resort. Weak performance and undesirable behaviour can be improved by a series of escalating corrections that involve both employee and employer.

Progressive discipline will contribute to a positive work environment. It also will provide a record and legal support for employers who ultimately have to fire a worker.

Examples of Progressive Discipline

If an employee's behaviour or performance falls below an acceptable standard, the employer should discuss it with the employee and get that employee's feedback. If conduct is sanctionable, the employer might issue a written warning or reprimand, impose a reasonable period of probation, or suspend, reassign or demote the employee. This is also called "performance management." The employee receives written reasons for the discipline, expectations and steps that must be achieved, a statement of consequences in the future if the conduct continues or performance expectations are not met, and this is all placed on the personnel record. Every employee's file is considered on a case-by-case basis.

Performance Management is intended to bring about improved work performance and conduct. It is considered fair to the employee because we all make mistakes and we all have bad days. Firing is sometimes said to be "the capital punishment of employment" and can demoralize and stigmatize workers going forward. It is also thought to be good management on the part of the employer for whom a reformed and rehabilitated employee may be a better business decision than a termination and starting all over again with recruitment and training. Today, it is also a legal requirement that arbitrators and judges expect to see before a firing can be justified.

Incompetence or Misconduct?

Performance management must be able to distinguish between incompetence (which can be remedied by training or re-assignment) and misconduct (which lends itself to second chances in appropriate cases).

Ms. Mardi Dawson was first reprimanded and later dismissed from her job. The problem was incompetence, as she was unfamiliar with how to use a single-point diamond grinder. Her employer offered no additional training to help her succeed in her work. The Ontario Superior Court of Justice awarded Ms. Dawson damages of ten months of salary (*Dawson v. FAG Bearings Ltd*. (2008) http://canlii.ca/t/21c13).

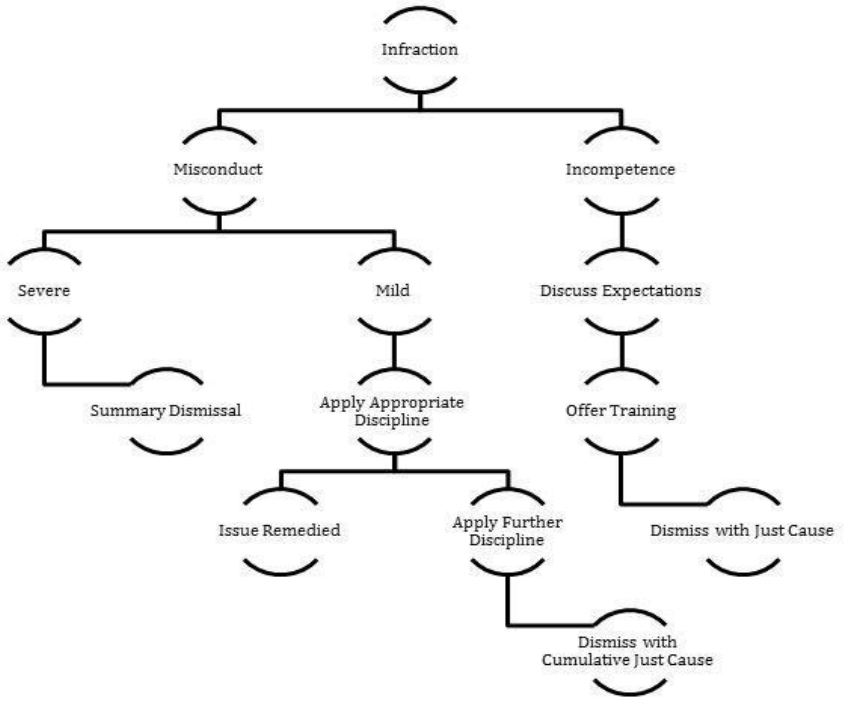
Occasional cases of serious misconduct will justify summary dismissal without progressive discipline. Examples include so-called 'zero tolerance' policies such as pilots consuming alcohol in the cockpit or employees sexually harassing others (eg. See *Payne v. Bank of Montreal,* 2013 FCA 33 http://canlii.ca/t/fw1vr).

In employment law, as in criminal law, the "punishment must fit the misconduct (or crime)."

Cumulative Just Cause

Employers may be able to justify firing on the basis of multiple, cumulative employment transgressions that are not individually serious enough for termination. The time period of employee accountability should be relatively short, probably no longer than a few years.

Gian Daley was fired after nine incidents over the course of two years. The Ontario Superior Court of Justice upheld the termination as reasonable because the employer had acted quickly, took appropriate steps in progressive discipline, and effectively communicated throughout the process by informing Mr. Daley what disciplinary steps would be taken if he failed to improve his performance (*Daley v. Depco International Inc.* (2004) http://canlii.ca/t/1hchf).



Conclusion

Ascertaining the nature of the performance concern (whether incompetence or misconduct) is usually easy. The severity of the concern must be assessed, which determines the appropriate level of discipline.

The flowchart below outlines a typical set of progressive discipline options.

The Holy Grail

Posted By: *Melody Izadi*

The Ontario Court of Appeal this year in *R. v Nguyen [2015])NCA 278* has decided that the spousal incompetency rule, which forbids spouses to be compelled to testify against each other, and spousal privilege, does not extend to common-law couples [1]. A very clear line has been drawn between those who are legally wed and those who are not, irrespective of how long a couple has been in a common-law relationship or why they have not yet married. In effect, a couple who marries but met for the first time on their wedding day is deemed to have "…the protection of marital harmony and the avoidance of the natural repugnance resulting from one spouse testifying against the other," while a couple who has been living together for several years creating a life, a home, and children, does not.

The challenge to include common-law spouses was made by defence counsel, acting for their clients whose common-law spouses were compelled to testify as Crown witnesses in a first-degree murder trial. Defence counsel sought to exclude this testimony on appeal, and through a *Charter of Rights and Freedoms* section 15(1) challenge, in which it was argued that the spousal incompetency rule discriminated against common- law couples. The Court of Appeal agreed with defence counsel that the spousal incompetency rule did, in fact, discriminate against common-law couples under the *Charter*. However, the Court found that this violation was saved under Section 1 of the *Charter*. The law remains unchanged.

The Court seems to hinge its decision on the "choice to marry," and a common-law couple's decision not to make that choice. The Court of Appeal posits that if a couple does not "choose" to be legally wed, then they choose not to "accept the state-imposed responsibilities and protections associated with that status."

The very purpose of spousal privilege is to preclude 'secrets of the marriage bed,' that were disclosed in confidence to one's spouse, to be used against a spouse in court, by legal force. This connotes a state interest in staying away from any big-brother parallels that could be drawn and private conversations in the home. Yet, it is not clear why this protection is any less deserved by those without a marriage licence, except for the fact that they do not have the paperwork.

The Court of Appeal admits that the negative impact on common-law spouses "…denies common-law spouses the benefit of the rule, namely, protection of their matrimonial harmony and prevention of the indignity of one spouse participating in the prosecution of the other." The Court justifies its ruling by

stating that extending the rule to common-law partners would infringe respect for their autonomy, freedom of choice, and human dignity under the *Charter* because neither partner would be free to choose to testify if they wanted to. However, this conclusion does not seem to marry with (pun intended) the very core purpose of the spousal privilege and spousal incompetency rule.

It's not news that marriage is a legal union between two consenting parties, and upon marrying, certain rights and privileges flow from its legality. However, the spousal incompetency rule is a rule that exists to prevent the state from compelling one's partner to assist in the other partner's prosecution. Not because they are married *per se*, but because the fact that they are married is seen as a declaration of their partnership and union, and frankly, their love. It is the relationship between the two individuals that is what gives the spousal incompetency rule its validity, not the marriage licence. In 2015, it's remarkable that the concept of marriage is still perfumed with Victorian-era legitimacy and necessity.

The validity of marriage transcends jurisdiction and culture, and is treated as the ultimate status of a relationship. The Court of Appeal certainly perpetuates this problematic social construction of marriage. The Court reasons that any harm caused by the denial of extending the rule to common-law couples can be saved "by the availability of the choice to marry." So if your common-law partner is criminally charged and you want to protect him or her, don't fret! The Court of Appeal wants to let you know that common-law partners "may choose to marry at any time before a trial," and any time after an indictment is laid in order to benefit from the law. How romantic!

So it seems that the Court of Appeal views a marriage licence like a golden Wanka ticket, neatly placed between a bar of chocolate and shiny foil that anyone who wants it can have. This may have been a more sound view several years ago, but in today's gluten-free, Stevia-laden, low-carb world, not everyone is going to buy that bar of chocolate. Nor should they have to.

Notes:

1. The spousal incompetency rule has exceptions and limitations; see R. v Nguyen Para 10-20; *The Canada Evidence Canada Act* s. 4 (2). See also *The Canadian Victims Bill of Rights Act*, in force as of July 23, 2015

Public Television Association of Quebec v. Minister of National Revenue: A Case Comment

Posted By: *Peter Broder*

This past July, the Federal Court of Appeal released its decision in *Public Television Association of Quebec and Minister of National Revenue (P.T.A.Q.)*. The decision remains subject to potential appeal to the Supreme Court of Canada. The outcome reinforces the status of Canadian charity law as an outlier in international jurisprudence dealing with public benefit organizations, subjecting Canadian registered charities to significantly more stringent rules than are typical in other countries.

(Full disclosure: in my role as Executive Director of the Pemsel Case Foundation, I, and several of my Foundation colleagues, assisted in preparing the legal arguments made by Imagine Canada, which was granted Intervener status in the proceeding. So I am not a disinterested observer here.)

With all due respect, it is suggested here that the case, as decided, represents a missed opportunity to provide more scope or greater flexibility – or, at a minimum, increased regulatory certainty – for Canadian charities conducting their work through non-charitable intermediary groups. The Federal Court of Appeal, as is not unusual in charity cases, restricted itself in this decision to a narrowly-focused, fact-driven analysis, and declined to examine broader considerations that might have informed its reasoning.

The tendency of federal charity law jurisprudence to emphasize fiscal implications and undervalue common law precedent or equitable principles with respect to conferring or maintaining registered charity status has been documented by academics and other commentators. The effect of such an approach is both to disenfranchise the potential beneficiaries of a disputed organization's work and to create a more ambiguous and, often, a more difficult regulatory environment for voluntary sector organizations to work in.

In *P.T.A.Q.*, the proceeding concerned a Canadian registered charity's dealings with Vermont Public Television, which is a 501(c)(3) organization – the U.S. *Tax Code* status under which charity-like groups are afforded favourable tax treatment and gain the right to issue tax receipts to their donors. Notably, if the Quebec organization had had a similar relationship with a Canadian educational broadcaster recognized as a registered charity, such as TV Ontario or Tele Quebec, it is unlikely that its conduct would have been questioned.

The Canada Revenue Agency argued, however, that the Quebec organization was a conduit for Vermont Public Television and therefore did not qualify for status as a registered charity. The charity asserted that it had adequate legal arrangements – in this circumstance, an agency relationship and fundraising documentation – in place to satisfy Canadian regulatory requirements and ensure that its mandated charitable work was carried out.

There was no allegation of misuse or diversion of monies. Both sides agreed that the resources were used for their intended purpose. At issue was whether the fundraising activity and financing of programming that took place was in accordance with Canadian law. The test that the organization had to satisfy was that it exercised "direction and control" over the portions of the programming and fundraising purportedly carried out as Canadian charitable work. At issue was whether the fundraising activity and financing of programming that took place was in accordance with Canadian law. The test that the organization had to satisfy was that it exercised "direction and control" over the portions of the programming and fundraising purportedly carried out as Canadian charitable work.

Although there were agreements between the charity and the station providing parameters within which the programming and fundraising were to be undertaken, the Court ruled that the Minister was reasonable in having found these agreements lacked certain provisions or were not adhered to sufficiently closely to meet the "direction and control" test. Specifically, the Court found reasonable the Minister's position that a protocol entailing the Quebec charity annually choosing among packages of programming options prepared by Vermont Public Television was not enough to show "direction and control". This suggests that a relationship where a Canadian charity relies on a non-charitable intermediary to advise on need and possible ways to address that need, with a view to having the intermediary later deliver the selected services, may not be sufficient for the charity to satisfy Canadian law.

The alternative – the charity independently specifying what work is to be done without significant input from an intermediary that has expertise and experience in the area – seems a sure recipe for inefficiency and mistakes. Moreover, in the context of international development work, such an approach would run contrary to the current widely-accepted view that success is most often achieved when groups collaborate closely with overseas partners, rather than dictating the nature of the work to be undertaken from a privileged position as the funder. Even domestically, best practice is not for funding bodies to micro-manage project development and content, but instead to engage and communicate with service deliverers to ensure wise and prudent use of resources.

With respect to the Fundraising Agreement, the Court pointed to a lack of evidence that Vermont Public Television adequately distinguished and documented its work on behalf of the Quebec charity from its own fundraising efforts. On the record, it appears that the provisions in the Fundraising Agreement could have been more extensive and that the paper trail with respect to Canadian donation could have been better. This led to a further finding of a lack of sufficient direction and control.

The more immediate, if unstated, problem for the Minister (and for the Court) may have been the fact that Vermont Public Television was contracted both to deliver the programming and to raise the funds. This approach created a seamless arrangement between the Quebec charity and the Vermont station, and undoubtedly contributed to the Minister's characterization of the relationship as a "conduit". However, from a public policy perspective – especially if a premium is put on delivery of services to the beneficiaries of a charity, rather than minimizing the draw on the federal coffers –, there is little reason to quarrel with such an arrangement. Indeed, the better view is that it is a smart approach to leveraging the value of scarce charitable resources, and that such integration of functions promotes efficiencies and synergies. In contrast, focusing on the technicalities and minutiae of direction and control mitigates against this, if not undermining it altogether.

Taking into account these broader considerations, Imagine Canada, in its submissions to the Court, argued for moving away from a strict "direction and control test", and suggested – based on a close reading of the cases and an understanding of the statutory history – endorsement of another, more flexible approach. This approach would have relied on showing that there was a "reasonable expectation" that the resources in issue would be used for charitable work.

The submission built on a position already found in Canada Revenue Agency guidance. The Agency's guidance on "Canadian Registered Charities Carrying Out Activities Outside Canada" indicates that:

- where the nature of the goods being transferred is such that it can reasonably be used only for charitable purposes;
- where both the charity and a non-charitable intermediary understand and agree the property is to be used only for the specified charitable activities; and,
- where an investigation into the intermediary allows the charity to reasonably have a strong expectation that the organization will use the property only as intended;
- the charity will be considered to be carrying out its own activities (i.e., having sufficient direction and control over the transfer).

The "reasonable expectation" standard would have entailed the same sort of requirements, but would not have applied only to goods necessarily of a charitable nature, and consequently could cover a transfer of money or other resources.

Adoption of such a test – as well as being more in keeping with the way contemporary organizations often operate or are encouraged to operate – would avert the need for charities to enlist a passel of lawyers and accountants when, for logistical or other reasons, they want to support charitable work that they are unable or don't want to take on themselves or through another registered charity. It would also simplify and clarify the law and, we believe, bring Canada more into line with practice in other jurisdictions.

Whatever Happened to … Confidential Sources at the National Post

Posted By: *Peter Bowal*

"[N]o journalist can give a secret source an absolute assurance of confidentiality."
–Supreme Court of Canada, per Binnie J.

Introduction

People who speak to and inform Canadian journalists often ask to be protected by confidentiality. Journalists depend on these tips and will promise not to disclose their sources to police, courts or other legal authorities. The *National Post* case answered how journalists can guarantee the confidentiality of their sources [*R. v. National Post*, [2010] 1 SCR 477, 2010 SCC 16 (CanLII) http://canlii.ca/t/29l77].

Facts

In 1999, Andrew McIntosh, a reporter for the *National Post,* began investigating what was known as the "Shawinigate" scandal and would over the next decade become the focus of that story. The newspaper wanted to determine Prime Minister Jean Chretien's ownership interest in the Grand-Mère Auberge and Golf Club, and any role he played in that business's acquisition of a federal Business Development Bank of Canada (BDC) loan that was originally declined.

McIntosh first published pieces on the transaction in the *National Post* on January 23, 1999, and January 25, 1999. In the fall of 2001, a confidential source "Y" contacted McIntosh. Y claimed to speak on behalf of another confidential source, "X". Both of these sources would only provide information if they could be promised confidentiality. McIntosh gave them blanket, unconditional assurances of confidentiality.

On April 5, 2001, McIntosh received a sealed, plain brown envelope with no return address. It contained a copy of a document that appeared to be a bank loan authorization which related to the $615,000 mortgage loan granted to the Grand-Mère Auberge (Inn) by the BDC in 1997. The footnotes showed the Inn owed a debt of $23,040 to "J & AC Consultants". This was a Chretien family holding company.

McIntosh thought if the document was genuine, it could have consequences for the political career of the Prime Minister. So he forwarded copies of the document to the Bank, the Prime Minister's Office, and the Prime Minister's lawyer, requesting their comments on the contents.

The Bank said the document appeared to be a copy of a document from the Bank's record, but it was a forgery. The Prime Minister's lawyer agreed that the document was forged and said the Prime Minister had no debt with the Inn. On April 7, 2001, the Bank asked the RCMP to investigate the document.

A week after receiving the brown envelope, McIntosh was contacted by X, requesting a meeting. X revealed he or she sent McIntosh the document after receiving it in the mail from an anonymous source. X asked for an undertaking of confidentiality and asked McIntosh to destroy the document so fingerprints or DNA would not disclose the identity of X. McIntosh instead stored the document in a secure location. He believed X to be a reliable source and the loan authorization to be genuine. As long as he believed he was not being misled, McIntosh told X, he would ensure confidentiality.

The Matter Goes to Court

On July 4, 2002, the Ontario Superior Court of Justice issued a general warrant and assistance order. The *National Post* was to make the document available to the RCMP. The newspaper applied to quash this order on July 29, 2002.

Almost a year and a half later, on January 21, 2004, the Ontario Superior Court Justice quashed the warrant and order on the basis of the *Charter*'s protection of freedom of expression. This ruling was overturned by a unanimous three-judge Ontario Court of Appeal on Leap Day four years later. The Supreme Court of Canada agreed to hear the appeal and rendered a final decision some nine years after McIntosh received the first confidential contact.

Supreme Court of Canada Decision

Section 2(b) of the *Charter of Rights* protects the freedom of expression, including freedom of the press. News gathering is an inherent part of news publishing. However, today anyone can be a journalist and publisher. There are many news-gathering techniques and it is unreasonable that every technique be protected in the *Constitution*. Accordingly, confidentiality of sources is not automatically protected. Yet, the law must provide immunity from compelled disclosure of secret source identities in some situations.

A case-by-case analysis must be followed. The four elements required to establish privilege for a journalist and confidential source are:

1. the communication must originate in a confidence that the identity of the informant will not be disclosed;
2. the confidence must be essential to the relationship in which the communication arises;
3. the relationship must be "sedulously fostered" in the public interest; and

4. in the case at hand the public interest served by protecting the public identity of the informant from disclosure outweighs the public interest in identifying the informant.

The Supreme Court of Canada was satisfied the *National Post* had met the first three criteria, but not the fourth. The document and envelope were not mere pieces of evidence but the very essence (*actus reus)* of the alleged crime. The Court dismissed the appeal and ruled (8-1) the warrant and assistance order were properly issued. The *National Post* had to deliver the document and envelope to the RCMP, even if this might reveal the identities of X and Y.

Today, journalists cannot guarantee anonymity for their sources because the courts will make the final call by applying this criteria.

Where Are They Now?

Chretien has long retired from politics. Andrew McIntosh left the *National Post* during this litigation that had put his career on hold in Canada. He moved to Sacramento, California in 2005 to work for the *Sacramento Bee* newspaper. He now is an investigative editor in Montreal for QMI News Agency with whom he won a journalistic award in 2012.

In the end, we believe the Supreme Court of Canada made the wrong call. The high cost and effort of nine years of procedural wrangling was the main practical legacy of this case. The matter died. X's identity was never disclosed to the public. No crime of forgery was ultimately charged. Freedom of the press lost ground and journalism in Canada became slightly more tentative.

Lessons from the Truth and Reconciliation Commission

Posted By: *Caroline Wawzonek*

Antoine was mid-40s, tall and lean with shoulder length black hair. I met him in jail to prepare his sentencing for stealing lotto tickets from a corner store and many breaches of his release condition not to drink. He had never served federal time but had spent more than half of his past 20 years in provincial jail or on some form of court ordered restrictions. He was serving a life sentence for a life of petty crime. He was also articulate and insightful so I asked him why he was spending his life this way, "I was raised in an institution. An institution is all I really know." Both he, like his parents before him, spent their formative years as children in the confines of a Residential School.

The Truth and Reconciliation Commission of Canada (TRC) recently published 94 Calls to Action as part of its final report on the Indian Residential School legacy. They touch every aspect of Canadian life from sports and recreation (87-91) to health (18-24) to the corporate business sector (92). Two speak directly to lawyers, law schools and law societies, three call for equity for Aboriginal people in the legal system and 16 address the justice system generally. Many intersect with Canada's various legal regimes, such as child welfare laws, and legal commitments, including the United Nations *Declaration on the Rights of Indigenous People.*

The Truth and Reconciliation Commission observed in the Executive Summary to the Final Report that:

> Too many Canadians know little or nothing about the deep historical roots of these conflicts. This lack of historical knowledge has serious consequences for First Nations, Inuit, and Métis peoples, and for Canada as a whole. In government circles, it makes for poor public policy decisions. In the public realm, it reinforces racist attitudes and fuels civic distrust between Aboriginal peoples and other Canadians. Too many Canadians still do not know the history of Aboriginal peoples' contributions to Canada, or understand that by virtue of the historical and modern Treaties negotiated by our government, we are all Treaty people. (emphasis added)

I spent my childhood in a middle class suburban home and attended a well-funded school that my parents chose for me. I learned about explorers opening up eastern Canada and pioneers taming the land in the west. I did not learn that simultaneous to these European-style ventures, Indian children were being rounded up and sent away from their parents to have the Indian educated out of them.

I attained undergraduate and law degrees. Still, I learned nothing about the residential school system that so deeply impacted the lives of the First peoples who lived on the land I now call mine as a Canadian. Even as a lawyer, after studying Canadian constitutional law, property law, family law and human rights law, I could not describe what a residential school was. So, I listened to Antoine but was ill-qualified to truly understand my client or interpret his experience to the court in a meaningful way.

I believe that lawyers have a particular obligation and strong position from which to advance reconciliation and mend relationships with Aboriginal people across Canada. But reconciliation between Canada's aboriginal peoples and the rest of Canadian society demands the awareness and involvement of every Canadian.

The average Canadian may be misinformed about the reality of being Aboriginal. The void of knowledge is too often filled with inaccurate prejudice: whether about free education (when in fact on-reserve education is comparably underfunded), free health care (a quick glance at health demographics should dispel this notion) or a lack of governance (despite the successful negotiation of self governance agreements by diverse groups across Canada).

The TRC reminds us:

> Violence and criminal offending are not inherent in Aboriginal people. They result from very specific experiences that Aboriginal people have endured, including the intergenerational legacy of residential schools.

It should not be surprising that those who experienced and witnessed very serious violence against Aboriginal children in the schools frequently became accustomed to violence in later life. It should not be surprising that those who were sexually abused in the schools as children sometimes perpetuated sexual violence later in their lives. It should not be surprising that those who were taken from their parents and exposed to harsh and regimented discipline in the schools and disparagement of their culture and families often became poor and sometimes violent parents later in their lives. It should not be surprising that those who were exposed to poor education and to spiritual and cultural abuse in the schools later turned to alcohol and drugs as a means to cope.

The fact that there may not be appropriate alternatives for criminal sentences or that there are jurisdictional wranglings over education funding, for example, are explanations for ongoing injustice. It is our inaction that allows these explanations to remain excuses. Aboriginal peoples have not and are not treated equally or with justice. Lawyers play diverse roles in the administration of justice and who are governed by a code of ethics, that I propose obliges us to be part of the solution to the crisis of the Canadian relationship with Aboriginal people. Our profession should be in an uproar.

Making available more and better information is only one aspect of the problems facing Aboriginal offenders and communities trying to help them reintegrate into society. The TRC notes:

Even if excellent Gladue reports were prepared from coast to coast, they would still fail to make a difference in the amount of Aboriginal over-representation in the prison system without the addition of realistic alternatives to imprisonment, including adequate resources for intensive community programs that can respond to the conditions that caused Aboriginal offending.

The ethical duty on defence counsel to seek the best possible outcome for a client and to make every reasonable argument in their favor makes the need to find alternative sentences more pressing. It may mean contacting a band council or community organization and discussing capacity and funding. Where there truly are no alternatives because of poor funding, a lack of training or underdeveloped programs, should we not consider whether there are *Charter* rights at stake?

Child welfare models are based on the best interests of the children but too often these proceedings end up focused on what programs or services a parent in crisis may or may not have access to. The result is that children are removed from their homes and may wind up shuttled between caregivers or institutionalized. Creative solutions are emerging such as removing the parent or guardian who needs help from the home while keeping the child there. There are also opportunities for community-led committees to help define what the best interests of a child in their community are and how to achieve them. These efforts require funding, capacity and possibly a rethinking of how child protection work is done. Lawyers, social workers and community leaders have the skills to accomplish changes while maintaining the best interests of the child and the spirit of the relevant laws.

The TRC's Call to Action is an opportunity for other professions to question their relationships with their Aboriginal colleagues, clients or neighbours. It is an opportunity to examine whether they as individuals can rise to the challenges set out by the TRC in their area of influence, practice or experience whether, for example, in health care, education, or media.

Canadians should not accept complacency in the face of challenges for fundamental change. We have a collective responsibility to seek and demand equal justice for all.