Magna Carta
Vol 40-2: Magna Carta

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View of the Magna Carta Memorial, Runnymede, Surrey.
The memorial marks the spot where the Magna Carta was sealed in 1215.

The Great Charter

The Great Charter of 1215 is one of the most significant historical documents in the English speaking world. The Great Charter marked the first instance of a King being compelled to accept a list of terms drafted by his subjects. In 1770, British Prime Minister William Pitt the Elder described the Great Charter as “The Bible of the English Constitution” and the full document remained on the national Statute Book until the passing of the Law Reform Act in 1863.

As Great Britain developed an Empire that spanned across the globe, British common law shaped the development of modern commonwealth nations, including Canada. Magna Carta’s guarantee of individual liberties contributed to the development of the American Constitution. Today, three key clauses from Magna Carta remain in force in the United Kingdom: the freedom of the English Church, the “ancient liberties” of the City of London, and the right to due process.

In 1215, however, King John’s rebellious barons were not setting out to remake the English political and legal systems. There was a consensus that the King had pushed his traditional prerogatives too far and infringed on the accepted right of the nobility. The Great Charter unified rebels with differing interests. King John’s predecessors had all battled rebels who sought to place another member of the royal family on the throne. Magna Carta was the rallying point for the first English rebellion in the name of ideals.
The Making of a Controversial King

John was not born to be King. At the time of his birth at Beaumont Castle in Oxford on Christmas Eve in 1166, his parents, King Henry II of England and Queen Eleanor, Duchess of Aquitaine already had three surviving sons and three daughters in addition to Eleanor’s two daughters from her first marriage, to King Louis VII of France. By 1166, Henry had already made plans to divide the vast Anglo-French Angevin Empire between his three elder sons.

According to Henry II’s vision, the eldest son, known as Young Henry, would inherit England and Normandy from his father. The second son, Richard, would succeed his mother in Aquitaine. The third son, Geoffrey, would receive Brittany by marrying its young heiress. The King’s subsequent attempts to provide for his youngest son by giving him lands and castles previously promised to his elder sons became a major source of conflict within the royal family. Young Henry, Richard and Geoffrey all rebelled against Henry II, seeking influence over the governance of their intended territories. This warfare and treachery within the royal family may have shaped John’s approach to leadership, influencing his eventual opportunistic relations with his English barons as King.

After Young Henry died of dysentery in 1183 and Geoffrey died after falling off his horse in a tournament in 1186, the King expected Richard to cede part of his inheritance to John. Richard had other ideas. When it became clear that Richard would prevail with the assistance of King Philip II of France, John switched sides, leaving his dying father cursing the treachery of his sons. When Richard I “the Lionhearted” became King in 1189, he made clear that he too did not trust John’s loyalty. Before leaving on the Third Crusade, Richard declared that Geoffrey’s posthumous son, Arthur of Brittany was heir to the throne, and forbade John from visiting England for three years.

While Richard was on crusade, John allied himself with Philip II and invaded Normandy. Richard quickly defeated this revolt once he returned from the Crusade and subsequent imprisonment by the Holy Roman Emperor. John lost all his lands and revenues except those in Ireland, a situation that compelled him to provide loyal service to Richard until Richard’s death from a crossbow wound in 1199. John had a lingering reputation for treachery and double dealing but as an adult male with military experience, he attracted more supporters for his claim to the throne than his teenaged nephew, Arthur of Brittany. King John was the great-grandson of William the Conqueror and the younger brother of King Richard the Lionheart.

King John’s Transgressions

Although the modern constitutional monarchy did not develop in England until after the Glorious Revolution of 1688, there were accepted limits on a medieval King’s authority. At his coronation as King of England in 1199, John swore to observe peace, honour and reverence towards God and the Church, provide justice and equitable treatment for his subjects and keep good laws. In return, the one hundred and sixty five barons at the time of the King’s ascension were obliged to contribute military service and revenue for the crown. The King could demand noble hostages to ensure that the barons met their obligations to the crown and dictate the remarriage of widowed and orphaned heiresses.
Within a few years of King John’s ascension, it was clear that he was unwilling to respect the informal limits on his authority or the rules of chivalry that governed thirteenth century warfare. After a brief war for control of the Angevin Empire’s continental possessions, John captured his nephew Arthur in 1202, sending him to Rouen in the custody of a trusted Baron, William de Braose. Rather than coming to terms with an adversary, John decided to eliminate Arthur. According to the Margam Annals, “After King John had captured Arthur and kept him alive in prison for some time, at length, in the castle of Rouen, after dinner on the Thursday before Easter [1203], when he was drunk and possessed by the devil, he slew him with his own hand, and tying a heavy stone to the body cast it into the Seine.” Like the Princes in the Tower nearly three hundred years later, Arthur simply disappeared, allowing rumours to circulate about the involvement of his uncle in his demise.

After Arthur’s disappearance, John’s barons were reluctant to allow their family members to be delivered to the King as hostages. When John demanded that William de Braose send his eldest son to court in 1208 as surety for a debt of five thousand marks, William’s wife, Maud, protested that “she would not deliver her children to a king who had murdered his own nephew.” In response, John confiscated William’s lands and castles along the Welsh border and took Maud and her son prisoner, leaving them to starve to death in a dungeon.

William de Braose’s fellow barons were horrified at what they perceived as John’s unjust and disproportionate response to William’s debts and Maud’s accusations. The fate of the de Braose family inspired the thirty-ninth clause of Magna Carta “No man shall be taken, imprisoned, outlawed, banished or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgement of his peers or by the law of the land,” the right to due process that remains part of British law to the present day.

The Death and Rebirth of Magna Carta

By 1215, the increased military and financial obligations that John imposed on his English barons in attempt to regain his continental possessions had provoked open rebellion. Philip II had long exploited divisions within the English royal family to his own advantage and he saw the conflicts between John and his barons as an opportunity to expand France at the expense of the Angevin Empire. By 1205, John had lost Normandy, Anjou and Poitou, retaining only Aquitaine. John’s 1215 campaign was a notable failure, ending in defeat at the Battle of Bouvines and an unpopular truce that obliged John to pay compensation to Philip.

Since John’s eldest son, Henry was only eight years old in 1215, the rebels could not rally behind the leadership of an alternate ruler. In these circumstances, Magna Carta emerged as a symbol of a uprising based on ideals. At first, this new form of rebellion appeared unsuccessful. Within months of affixing his seal to Magna Carta, King John appealed to Pope Innocent III to be released from the terms of the Charter. Although John had been in conflict with the Papacy for much of his reign, the Pope agreed to disavow the Charter because it negated a previous agreement that stated that he was the King’s feudal
Lord. Within months of the historic meeting between John and his barons in Runnymede Meadow on June 15, 1215, the Great Charter had been abandoned by both sides. Once the Pope had released King John from the terms of the Charter, it was of little use to the English nobility. After decades of mistrust between John and his barons, few were interested in refining Magna Carta into a more lasting agreement.

With the outbreak of the First Baron’s War in the fall of 1215, the English nobility returned to the traditional form of rebellion, inviting Prince Louis of France, the husband of John’s cousin, Blanche of Castile, to invade England. It was the sudden death of King John on October 18, 1216 from dysentery following “a surfeit of peaches and cider” that revived Magna Carta. The ascension of King Henry III at the age of nine allowed for a regency by one of the barons, William Marshall, who respected the traditional prerogatives of his fellow noblemen. The child king’s ascension was in keeping with the third, fourth and fifth clauses of Magna Carta, which guaranteed the inheritance rights of minors. In these circumstances, support for Prince Louis collapsed in England and Henry III began a fifty-six year reign shaped by the terms of the Great Charter of 1215.

This article was first published at magnacartacanada.ca.
Let us begin with a confession. When presented with the opportunity four years ago to become involved in bringing Magna Carta to Canada for its 800th anniversary commemoration, we were not very well-versed in what exactly Magna Carta was. For starters, we were still calling it “the Magna Car” which, now that we have had our knuckles rapped a few dozen times, we realize is tantamount to sporting t-shirts that read “IMPOSTERS!”

We knew it had something to do with the rule of law and habeas corpus, was English in origin, was written in Latin, was really old, and ... that was about it.

The reason we were involved at all is that an English friend had asked us, “Would your country be interested in hosting an original copy of Magna Carta if a loan of the document from the U.K. to Canada could be arranged?” Our answer was “of course.” But given that our tastes do not always run with the crowd, we thought it best to ask some of our 35 million fellow Canadians.

Given that it was 2011 and, south of the border, the U.S. presidential primary season was in full swing, we did what everyone else seemed to be doing: we formed an exploratory committee. We canvassed members of the legal community, cultural community, corporate community and, of course, academic
community. A resounding “absolutely!” was the consensus. And so, with zero experience in the world of museums, fundraising, committees and priceless treasures hailing from the Middle Ages, we jumped in.

A Magna Carta and a Charter of the Forest, both issued by King John’s grandson Edward I in 1300, have left the grounds of Durham Cathedral for the first time in 715 years and travelled across the Atlantic under heavy security and secrecy so that they may be put on display in four Canadian venues over a six-month period. To say we are excited is an understatement. Actually a misstatement. What we are is terrified. What if we are imposters?

We are not academics, nor are we historians. But we do possess a keen awareness and fervent belief that when the gifts of the past reveal themselves, they are worth a moment (or four years) of our time. As a result, we committed ourselves, as willingly as unwittingly, to the task placed before us. We say unwittingly because it never occurred to us what lay ahead. We assumed that we would find a capable and enthusiastic organization to which we would simply supply our recently acquired charitable foundation number and email contact list for the folks at Durham Cathedral and then step back and eagerly anticipate the documents’ arrival on our shores with the rest of the country.

It turned out that there was no such organization capable of, enthusiastic about, and standing ready to, among other things, navigate the various levels of both the U.K. and Canadian governments for approvals, raise tremendous sums of money from both the private and public sector, design and build a website and sponsorship materials, liaise with public relations and marketing firms, engage in cocktail party conversations with and make boardroom pitches to countless potential donors, assemble steering and honourary committees, navigate the options of gift shop merchandise, become social media mavens, commission a book and a film to complement the exhibition experience, generate lesson plans for students across the country and wade in to the world of museum exhibit design. All of which, as we discovered, somebody would have to do.

So how did we do it? Simple. We didn’t.

It turns out that there are many others like us out there … except for the bit about having no idea what we were doing. Dozens of people came forward willing to contribute their talent, time, energy and enthusiasm. Many of them have become our friends and all of them have changed not only the trajectory of this endeavour but the two of us forever. We have heard from people across the country asking for nothing except the opportunity to become involved, from descendants of barons volunteering as docents, to teachers working to ensure that students have access to engaging learning tools, to professionals offering their time and expertise, to those with connections sharing their networks, to lovers of history whose imaginations were captured. All of them populating our world and enhancing this endeavour beyond measure.

Since we became parents 25 years ago, we have tried to instill in our sons a sense of where they fit into an ongoing story. Not just in terms of the black and white photographs that adorn the walls of our home, but where their footprints lie on the path of human history. Our children have been raised in a
generation where the next greatest thing is always just a few months away. Nothing astounds them. Nothing compels them to stop in their tracks and be amazed. The incredible has become ordinary; the inconceivable, the norm.

What moments like this 800th anniversary of Magna Carta give us is a reason, an excuse, to pause and to ponder the long arduous journey that began long before us and will continue long after us. Do we truly appreciate the gift that is Canada and the mix of materials that built the foundations that hold us steady as the world around us stumbles and falls?

What this moment offers all of us is a tactile, tangible, teachable one. It’s an extraordinary opportunity to place all of our sons and daughters, or grandsons and granddaughters, squarely before the piece of parchment that is arguably the quickening moment of our democratic ideals, rule of law and human rights standards. Today, where the history we teach is more often than not lifeless words on a textbook page, won’t it be something to be able to stand behind young people, place our hands on their shoulders, lean forward as one and fix our collective national gaze on this transformative document that has cast one of the brightest lights in human history?

What we are celebrating is not just the launch of an exhibition, the publication of a book or the screening of a film. We are celebrating the acknowledgement that the message of the written word may have changed modes of dissemination over the centuries — first scribed by hand, then printed by press and now sent virtually through the touch of fingertips (or nowadays thumbs) to keyboard — but its power to inspire people and effect change has not been diminished. Little did we realize when we stepped outside of our comfort zones and immersed ourselves in medieval times that it would serve to cultivate an appreciation for just how very lucky we are to live here and now. But it has, and we are better people for it.

In a short time, many of you will have the opportunity to visit the document and the exhibition that amplifies it. For those who are unable, our website will offer reading materials and educational tools that will enhance your understanding of and appreciation for the gifts of Magna Carta. You will learn what Magna Carta meant to people 800 years ago and how, across the centuries, it has served to shape the rule of law that protects us, the system of government that answers to us, and the human rights that strengthen us.

Because the “here and now” is a direct result of the “there and then.” It always has been and it always will be.
The Emergence of a Human Rights Legal Culture: A Quick Tour Through 800 Years of Western History

Posted By: Peter Bowal

*Durham Cathedral is in possession of three separate issues of Magna Carta – making it the repository of a wealth of knowledge that shaped Medieval England. Photo Credit: Durham Cathedral*

The river of refugees from Syria reminds us that human history is full of examples of how states have abused their unlimited sovereign power against their citizens. They may have denied them basic rights to express themselves or to vote for their political leaders. People may have been tried and punished without a reasonable opportunity to defend themselves. Adherents to certain religions may have been persecuted only because of their particular honestly-held religious beliefs. Others of certain races in the society may have been denied access to education or to hold good jobs and own land. The worst used state power to capture, imprison, torture and kill their own. Almost all countries have denied basic human rights in some way to their people at times during their history.

**Magna Carta**

In early 13th century England, the rich barons rebelled against the King. This was due to the King’s demand for overseas service that they felt was not owed, from his practices of intimidation to ensure personal loyalties, and from domestic policies, especially, increased taxes. The barons sought to restore the good old days of the Norman kings, but instead got pragmatic reforms. Magna Carta, a form of Charter of Rights, attempted to reform specified abuses raised by the rebels.
Magna Carta specified liberties for all free men so that all might be insulated from royal whim. Certain taxes were not to be levied without the common consent of the kingdom, whose representatives’ decisions were binding on all (forerunner of “no taxation without representation”). Churches were set free. Legal reforms and procedural rights required proper trials and judgments to occur before sentences were carried out.

Many of Magna Carta’s 63 clauses dealt with feudal privileges of benefit only to the barons. Moreover, Magna Carta was soon violated by the King, bringing a resumption of civil war. The next King reissued the Carta, and by 1225, when it received its final form, it was accepted by all parties. It was the first statement of rights against absolute power of the state, in favour of the people – something we mostly take for granted today.

The English Bill of Rights
In the 1600s, human rights were synonymous with political rights. The Bill of Rights (1688) in England ensured that Parliament was finally and effectively sovereign over the monarch. The king had governed by an inherent Royal Prerogative which dated to the Middle Ages. Now the king could not interfere with Parliamentary legislation or impose taxes. Indeed, Parliament itself could limit the exercise of Royal Prerogative. Democratic representative government that we enjoy today in Canada was established by a Bill of Rights.

The United States’ Bill of Rights
The natural law thinking of the last few centuries emphasized that a number of essential liberties and rights were owed to all human beings at all times. This was reflected in the American Bill of Rights of 1791. The rights to speak and to follow one’s religion without fear of punishment from the state are examples. Moreover, these basic rights were immutable (unchangeable). While economic cycles, political priorities and governments would all change through history, the essence of humanity wherever situated on earth and the need for a guarantee of minimum human dignity would never change. Unreasonable searches and arbitrary detentions by the state would almost never be justified.

The United Nations’ Universal Declaration of Human Rights
Human rights, also known as civil liberties, became a significant international concern after the scale of the Second World War’s state-sponsored atrocities was known. In its aftermath, the nations of the world came together to create an international body called the United Nations.

One of the earliest objectives of this new forum for the community of sovereign nations was to articulate a clear statement of basic human rights for the whole world to accept. If many countries accepted this statement, political pressure would fall on the others to do likewise. This layer of supranational or international law would see nations, as individual parties, give up some of their sovereignty and submit to the United Nations’ agencies and its courts (International Court of Justice) to further these basic human rights principles.
The *Universal Declaration of Human Rights* was adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948, “as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”

This Declaration, drafted by Canadian John Humphrey, contains a Preamble and thirty articles. It sets forth the human rights and fundamental freedoms to which all men and women in the world are entitled. These include civil, political, economic, social and cultural rights. It was conceived as a common ideal of achievement for all peoples in all nations and still serves as the inspirational standard by which all human rights around the globe are measured. It has always been the most important and far-reaching of all United Nations declarations.

The *Universal Declaration of Human Rights* is the cornerstone of the *International Bill of Human Rights*, which developed from other subsequent, related United Nations documents. These include the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights. These two Covenants and the Protocol were introduced in 1966 by the General Assembly of the United Nations and opened for ratification by all member nations. They came into effect a decade later.

**Human Rights Come to Canada**

At this same time, provincial legislatures in Canada began to enact a number of human rights statutes designed specifically to prohibit discrimination. For example, Ontario’s *Racial Discrimination Act* of 1944 illegalized the publication or display of materials that racially discriminated. Other early human rights legislation protected fair employment and accommodation.

In 1947 Saskatchewan was the first province to enact a broader *Bill of Rights Act* [SS 1947, c. 35]. This legislation pioneered to its residents such fundamental freedoms as speech, press, assembly, religion and association. However, it was little more than a statement of good intentions as there was no effective enforcement mechanism in the legislation, such as a supremacy provision to apply in the event that the Saskatchewan legislature did pass freedom-violating measures. This Act was repealed and replaced by the *Saskatchewan Human Rights Code* [SS 1979, c S-24.1], which now provides that its freedom and equality rights apply unless non-compliant provincial legislation “expressly declares” that it overrides them [section 44].

Saskatchewan’s John Diefenbaker championed human rights as a Member of Parliament in 1945. As leader of the Progressive Conservative Party in the national election of 1958, Diefenbaker campaigned for a *Canadian Bill of Rights*, which was enacted in 1960 [Chapter C 12.3 (1960, c. 44)].
The provinces were invited to join the *Canadian Bill of Rights* but asserted their own autonomy and refused. Two other provinces passed their own Bill of Rights: the *Alberta Bill of Rights* in 1972 and the *Quebec Charter of Human Rights and Freedoms* in 1975.

**The Canadian Bill of Rights**
The shortcomings of the 1960 *Canadian Bill of Rights* paved the way for the 1982 *Canadian Charter of Rights and Freedoms*. The *Canadian Bill of Rights* only applies to federal laws and jurisdiction. It could be easily amended or repealed by Parliament through the British constitutional tradition called “parliamentary sovereignty”. There were no restrictions on Parliament other than democratic elections every four or five years which would pass collective judgment on the acceptability of political actions. There was no real way to ensure that the laws would be fair, much less that we would enjoy basic human rights against abusive government action over the long term. Parliamentary sovereignty represented a major obstacle for constitutional rights.

The courts saw this problem when they interpreted and applied the *Canadian Bill of Rights*. When asked to enforce the *Bill of Rights*, courts usually concluded that the federal government could always later change its mind according to the doctrine of parliamentary sovereignty. In the end, the courts refused to give the *Canadian Bill of Rights* any teeth.

In western developed countries, there are certain unchanging fundamental values which give expression to the dignity and liberty of mankind. These values and rights should be captured and buried deep in the constitution of the nation. The early 1980s provided the momentum for such an initiative and process in Canada. The limited federal scope, the lack of enforcement and the very prospect that the *Bill of Rights* could be easily repealed all stirred the Trudeau government to protect these rights by clothing them with decisive, all-governmental constitutional effect and limiting the opportunity for amendment and repeal.

A set of absolute and universal, unchanging rights was prepared. A way was found to “entrench” or “enshrine” this set of immutable human rights. That put them out of the reach of self-serving, mortal, short-term politicians in any particular government mandate, regardless of the current social conditions. This meant that several special majorities, supported with broad national consensus, must agree to a change or repeal of these constitutional rights. It would be a profound political challenge to achieve that.

**The Canadian Charter of Rights and Freedoms**
This inter-governmental consultation process of entrenchment was undertaken and accomplished in April 1982. The *Canadian Charter of Rights and Freedoms* is not an ordinary piece of legislation that can be readily changed. It is entrenched and is a constitutional document that contains the basic, supreme human rights law for all of Canada. Its origins are found in Magna Carta.
Magna Carta was signed in June 1215 in an effort to end an internal conflict between King John and a group of barons who were opposed to his conduct as sovereign. Much of the document (also known by its English name, “The Great Charter”) addresses the rights of the church and of businessmen and property owners, but included within its terms are a number of ideas and principles which have evolved over the last eight centuries to become key elements of our modern criminal court system.

The original was in Latin, and was a single “run on” document (that is, it was written as a single sentence several hundred words in length). The words and clause numbers I will use in this article are taken from an English translation found on the website of the British Library, which is now the home to two of the four remaining copies of the Charter.

Perhaps the underlying theme of those parts of Magna Carta which is most relevant to this discussion can be summarized as follows: prosecution and imprisonment based upon the arbitrary whim of the sovereign was to be ended, and would now take place only according to law. While English history after the signing in 1215 is full of examples where this principle was clearly not followed, nonetheless, a number of the clauses recognized fundamental protections which went some distance towards ending arbitrariness. There remained centuries of struggle – both armed and otherwise – to lead us to where we stand today, but in 1215 this general theme found voice in a number of the terms of the Great Charter.
The Rule of Law

Clause 39 of the document provided that “no free man” (at the time, this mainly meant the barons) could be imprisoned, lose his possessions or be “deprived of his standing in any way … except by the lawful judgment of his equals or by the law of the land”.

Its concluding phrase – that no one could be punished or penalized except “… by the law of the land” – is perhaps the most significant of all, both in relation to criminal law and indeed, to our entire system of governance. This concept describes the Rule of Law, which underlies our form of democracy and law: the government, at whatever level and through whatever agency, may only act against a citizen where the law gives it authority to do so. Most important for criminal law, these words meant the state could only imprison or otherwise punish individuals where properly enacted legal provisions say this is possible. Arbitrary and illegal detention and imprisonment would not be tolerated any longer; citizens were no longer subject to being locked up simply because the king or queen took a disliking to their words or actions.

Today, this finds expression in our basic constitutional law: in the principles recognized by the courts as forming part of our “unwritten” constitution prior to the enactment of the Canadian Charter of Rights and Freedoms in 1982, in the Constitution Act, 1982 and in other foundational parts of our constitution and Criminal Code. Specific provisions in the Charter provide examples of this principle: Section 9 ensures we all have the right not to be arbitrarily detained or imprisoned, and Section 7 guarantees that, if we are to be deprived of “life, liberty or security of the person”, this will only take place “in accordance with the principles of fundamental justice”. Furthermore, Section 11(d) provides that if we are charged with an offence we must be tried “according to law” before we can be punished.

Jury Trials

Clause 39 is also important for the other concept it describes: the right of the barons to be judged by their peers. This is, of course, an early description of our modern right to be tried by a jury. By agreeing that “no free man” could be punished in any way “except by the lawful judgment of his equals …” the King conceded that that instead of his officials – including those he appointed as judges – deciding the guilt or innocence of an accused person, that decision would now be made by the peers of the accused.

Today, centuries later, the right of trial by a jury of one’s peers is enshrined in our own Constitution, in Section 11(f) of the Canadian Charter of Rights and Freedoms. The constitutional right to a jury is enshrined for the most serious cases, where the possible punishment is imprisonment for five years or more. The concept of who are one’s “peers” is fairly flexible. In May 2015, the Supreme Court of Canada held that we have the right to a jury which is “representative” of the community, which may or may not be the same as a jury composed of persons who are the accused’s “equals”. In law, all persons are considered equal, but outside of the legal context we know society is composed of many different groups and levels. Thus, when it comes to factors such as social and economic standing, racial or ethnic background, and religious heritage the 12 citizens chosen to sit as a jury in any particular case may share only some – and sometimes, none – of the background characteristics and features of the accused.
Nonetheless, the idea that important questions of guilt or innocence should at least sometimes be decided by members of the community and not always by government-appointed judges, remains a strong protection for the liberty of all of us. It has been observed that tyranny has never succeeded in a country where the right to trial by jury exists. Indeed, in a very real way, despite the personal inconvenience to individual jurors, bringing 12 members of the community into court to make decisions is an essential characteristic of our democracy. Perhaps the most well-known example of this value in action is the repeated acquittals of Dr. Henry Morgentaler by juries in the 1970s and 80s who refused to find him guilty of conducting illegal abortions even though the Criminal Code still contained this offence.

Appointment of Qualified Judges
Another part of Magna Carta which foreshadowed an aspect of our present situation which we now take for granted is Clause 45, which stipulated that “only men who know the law of the realm and are minded to keep it well” would be appointed as justices and other law enforcement officials. We now live in a country where only lawyers with several years experience (usually ten) may be appointed as judges, and where other legal officers must usually be educated and trained in the law before they are placed into their positions of authority. And upon taking office, most such officials are required to swear obedience to the law and their duty to uphold it in good faith and to the best of their abilities.

Use of Evidence at Trials
The concept of conducting trials by way of evidence was also mentioned in the Great Charter. In Clause 38, the King agreed that “no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.” While it sounds somewhat bizarre by today’s standards, the implication of this provision seems to be that until 1215, individuals could be forced to defend themselves against an allegation of misconduct made by a government official, and nothing else.

Now, of course, trials by their very nature involve a hearing where witnesses are called and evidence is introduced by the prosecution in an effort to prove the truth of the allegations being made. To ensure court proceedings are not brought frivolously the charge(s) of wrong-doing must be made under oath or affirmation, and any evidence given can also only be received after the witness has sworn or affirmed that he or she will tell the truth. The accused always has the right to question witnesses who are called to testify against him or her, may call evidence in response to the case introduced by the Crown, and may make submissions and offer argument before the court makes its decision about whether he or she has been proven guilty.

Access to Justice
Clause 40 of Magna Carta also described principles we continue to value and attempt to follow today: in this provision the King agreed not to “sell … deny or delay right or justice.” The barons who were making the agreement with the King were to have equal access to justice and to be able to assert their rights without regard to their financial status and without having to pay for that right. Furthermore, King John
apparently agreed that justice should not be delayed and that court hearings should occur within a reasonable time.

Today, we continue to try to keep delay to a minimum, and Section 11(b) of our Charter of Rights provides us all with the right to be “tried within a reasonable time.” Our courts recognize that even when the accused is on bail, merely facing charges of criminal wrongdoing saddles him or her with a “cloud of suspicion” in the eyes of others. Bail usually comes with a number of conditions and terms which restrict the freedom of the accused, so delay in the proceedings can unfairly continue these limitations. Society at large also has an interest in avoiding delay: victims of crime face psychological pressures as they wait for their day in court, and the passage of time can mean memories fade and witnesses die or move away.

However, the realities of modern life are such that what is a “reasonable time” is a fairly elastic concept: much depends on the complexity of the case, the seriousness of the charges, and the number of witnesses to be called. Nonetheless, even with serious charges, proceedings may not be drawn out indefinitely, and there have been cases under the Charter in which even murder prosecutions have been halted by judges who have ruled that the Crown has taken too long to bring the allegations to trial.

In the context of criminal law, everyone has equal access to the courts without regard for financial standing and without being required to pay the Crown in order to exercise this right. Complainants who make allegations of criminal activity, and accused persons who must respond to such charges, are able to do so without paying fees or court charges of any kind. Those who wish the assistance of a lawyer and who cannot pay for one themselves usually have a form of Legal Aid to ensure their rights are protected and they can defend themselves in court. Police investigations and criminal prosecutions are funded by the state and do not depend upon financial contribution or payments by individual persons. Indeed, it is a serious criminal offence to offer or pay a bribe to a police officer, prosecutor or any other public official in order to have them investigate or prosecute a case, and attempting to influence a decision-maker by way of such improper inducements is an equally serious crime.

Proportionality
Another principle included in Magna Carta which continues to play an important role in our system of criminal justice today is that of proportionality. Clause 20 provided that “for a trivial offence a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly...” and Clause 21 went on to provide for earls and barons that they too would only “be fined by their equals, and in proportion to the gravity of their offence.”

For many years after 1215, the criminal system in England continued to impose punishments which were grossly disproportionate to the offences committed. For centuries, death remained the sentence for many offences: until the early 1800s, capital punishment was still the penalty for even fairly minor crimes such as theft, forgery and counterfeiting. Drawing and quartering was the punishment for treason until 1867. In Canada, whipping remained a lawful form of punishment until the 1970s for
offences as varied as sexual crimes, strangling, some forms of burglary, and for breaching rules of prison discipline. Nonetheless, the idea that a punishment to be imposed for an offence should be proportionate to the crime itself has remained with us. Section 12 of the Charter of Rights prohibits “any cruel and unusual treatment or punishment”, which the courts have said prevents sentences which are “grossly disproportionate” and contrary to community standards of decency. Our Criminal Code now describes proportionality as the “fundamental principle” underlying all of our sentencing laws. We reject “revenge” as a sentencing principle or factor as being contrary to our values and practices. The principle of “proportionality” directs our judges to fashion punishments which are a measured, restrained response to criminal conduct based upon the degree of responsibility of the offender, and the gravity of the offence itself.

Conclusion

When they forced King John to sign Magna Carta, the barons were motivated mainly by their own self-interest: they wanted to secure and protect their own rights and positions, and were not aiming to guarantee the rights of others in English society at the time. In fact, Magna Carta contains some clauses which are shocking in their anti-Semitic content, while others are clearly aimed at subjugating women and denying them many rights we now take for granted. In the 800 years since that day on the field at Runnymede when the document was signed there have been many situations in which those values have been openly rejected and violated by the sovereign of the day. But despite – and through – all of that, these ideas have survived, and have evolved to become some of the most important aspects of our modern day criminal justice system. It is now unthinkable that our criminal legal and court system would exist without these basic principles at its heart.

Magna Carta: A Guide for Educators

Posted By: Nathan Tidridge

It has been 800 years since King John stayed at Odiham Castle on his way to sealing the Magna Carta at Runnymede.

In a world that increasingly asks our students to tweet, post, snapchat, google, and otherwise digitize their educational experiences, Magna Carta Canada has done the extraordinary by bringing to Canada a document that provides a direct link to eight centuries of legal history, including humanity’s struggle for universal rights. In a century that has become increasingly intangible in its struggle to become virtual, nothing can replace the experience a student will have when they come face to face with the faded parchment and King Edward’s ancient royal seal of Durham Cathedral’s Magna Carta. As an educator that brought nearly eighty students to view the priceless artifact ensconced at Toronto’s Fort York, I cannot emphasize enough the importance of getting your students to the new Visitor Centre of the Legislative Assembly of Alberta from November 23rd to December 29th, 2015, the last host of this document’s remarkable national tour.

Accompanying the Great Charter is a collection of excellent resources that have been broadly developed to enhance the delivery of provincial curricula across the country. Written by the Magna Carta Canada Education Committee, (chaired by Historica Canada’s Education Manager Bronwyn Graves) an Education Guide and Magna Carta Timeline are intended to complement Alberta’s social science, and Indigenous studies courses.
The centerpiece of Magna Carta Canada’s Education Program is a guide, available at www.magnacartacanada.ca, created to address intermediate and secondary curricula across the country. Focused around the “big ideas” manifested by Magna Carta and the Charter of the Forest, the flexible activities presented in the Education Guide ask students to learn about the Great Charter and then engage in activities, such as write a biography as if it were an individual with specific hopes and dreams. Other activities ask students to explore their provincial legislatures, travel back in time, and fine tune their sense of historical significance (all concepts touched upon by Alberta curricula). There are other activities for students who want to dig deeper into the Charters, including specific clauses and their importance to Canadians in the 21st century. The beauty of the Education Guide is that educators are free to adapt the activities to whatever programming that they have in mind for their classrooms. Looking at the Alberta social studies curriculum, any one of the suggested activities meet general outcomes mandated for grades six and nine, and touch on all of the “Core Concepts of Citizenship and Identity” that are threaded through every year of instruction from kindergarten to grade twelve. Moving into the senior social studies courses, the grade 12 “Perspectives on Ideology” or “Understandings of Ideologies” could easily incorporate some, or all, of the lessons presented by Magna Carta Canada.

Another key resource that is available to teachers is the Magna Carta Timeline. Originally developed in the United Kingdom by What on Earth Publishing, the timeline has been amended to weave key Indigenous and Canadian milestones into the Great Charter’s story. The Royal Proclamation (cited as the Indigenous “Magna Carta”), Treaty of Niagara, Louis Riel’s “List of Rights,” and the Supreme Court of Canada awarding of title to Tsilhqot’in Nation for their traditional territory are highlighted to acknowledge Indigenous People’s struggles with Canada throughout their shared history. Other events include Upper Canada’s abolishment of slavery in 1793 (the first jurisdiction in the British Empire), Confederation, the Person’s Case, and Queen Elizabeth II’s proclamation of the Constitution Act and Charter of Rights and Freedoms. International events are also cited to show the world-wide scope of the spirit of Magna Carta. Beautifully illustrated, the timeline is designed to be mounted in any classroom or public space for people to explore for years to come. A touch point for discussions on the importance of human rights and the documents that enshrine them, the timeline is intended to be both a versatile resource and a piece of art.

Magna Carta provides educators with a unique opportunity to explore Indigenous perspectives, and many conversations have occurred during this national tour around the notion of Treaties being “Magna Cartas” in their own right. Many scholars describe the Great Charter as a living document whose message transcends the ages, begging us to debate and renew the relationships it attempted to establish between people and those in power – such a description can be understood as the intent of Treaties negotiated between the Crown and Indigenous Nations. The Royal Proclamation of 1763 has often been characterized as the “Indian Magna Carta,” forgetting that it was an imposed document by a far-off king. Many Indigenous scholars such as Canada Research Chair Dr. John Borrows argue that the Royal Proclamation can be seen as the true foundation of the intended relationship between Indigenous Peoples and the Crown only when the Treaty of Niagara (concluded using Indigenous diplomacy that included wampum in 1764) is included. Educators in the Aboriginal Studies 10 or 20 courses could start from the question “Is the Royal Proclamation Canada’s Magna Carta with Indigenous Peoples?” and
through students’ own independent research and inquiry, as well as discussions with elders within Indigenous communities, explore some very complex and important relationships in these lands. I offer as a starting point an article I wrote for Magna Carta Canada entitled The Royal Proclamation and Treaty of Niagara as an Indigenous Magna Carta [http://www.magnacartacanada.ca/the-royal-proclamation-and-treaty-of-niagara-as-an-indigenous-magna-carta/]. I would also suggest contacting Richard Hill of the Deyohahá:ge: Indigenous Knowledge Centre (Six Nations Polytechnic) who offered a fascinating talk on October 21st entitled “Covering the Grave: Indigenous-Anglo peace-building traditions” that asked if the Royal Proclamation offered non-Christian inhabitants of North America the principals enshrined within Magna Carta.

Magna Carta Canada has provided Canadians with the opportunity to come face to face with a tangible document that has come to them through the centuries, an ocean and a continent away from the meadows of Runnymede. If you can, get your students standing in front of it (an experience recently denied to the students at the Renmin University of China in Beijing [http://www.nytimes.com/2015/10/15/world/asia/china-britain-magna-carta-renmin-university.html?_r=1]). Such a moment in a young life embeds itself in the psyche, creating an opportunity to better understand and respect the conventions and traditions inherited from generations of ancestors. With such awareness, opportunities to dig into some of the key principles of our parliamentary democracy are created, which I think is the point of the whole exhibition. To use the latest edu-jargon, the program designed by Magna Carta Canada is inquiry-based learning at its best.

Nathan Tidridge is a member of the Magna Carta Canada Education Committee, and was recently named a director of the Ontario Heritage Trust by the Lieutenant Governor in Council. Nathan is the author of four books, including The Queen at the Council Fire: The Treaty of Niagara, Reconciliation and the Dignified Crown in Canada (Dundurn Press, 2015), and teaches Canadian history and government at Waterdown District High School. Nathan maintains a website dedicated to teaching Canadians about their constitutional monarchy at www.canadiancrown.com.
Tax Issues for Older Adults
Posted By: Caitlin Butler

In our working years, determining our personal tax burden can be quite simple – earn income and pay personal tax at the graduated rates. In our senior years, the formula is less straightforward. Though seniors pay tax at the same graduated personal tax rates as the rest of the population, senior-specific benefits, programs, and credits may be negatively impacted by their income. Programs vary, from nursing home and health care premium subsidies to Old Age Security payments. Further complicating matters, the type of earnings, such as employment income versus eligible dividends versus ineligible dividends have different impacts.

There are numerous other provincial/territorial credits and programs available to seniors which are often paid only if applied for, and commonly rely on personal income tax return filings to support eligibility. Many income-tested programs are available only to the lowest-income seniors, making an understanding of the impact of various types of income critical. Below we will discuss the types of income a senior may receive and planning considerations for managing the income. Also, we will consider tax credits and other programs commonly available to seniors.

Old Age Security (OAS) and Guaranteed Income Supplement (GIS)
OAS and GIS are monthly payments available to most Canadians aged 65 and greater. The age of eligibility will gradually increase to 67, commencing in April 2023, delaying access for those born after 1957. To qualify for the full pension, an individual must have 40 years of Canadian residency after age 18.

OAS and GIS payments vary depending on the recipient’s “net income” for tax purposes. The maximum GIS amount for the third quarter of 2015 for a single, divorced or widowed pensioner is $765.93. These amounts are eroded as the recipients earn income. GIS payments are eliminated quite early; for 2015, at approximately $17,000 for single persons and $22,000 for married couples. Generally, each additional dollar of income on this year’s tax return reduces next year’s GIS benefits by $0.50 – equivalent to an additional 50% tax on these earnings.
OAS payments are eroded at a higher level; in 2015, at $72,809 and fully eliminated at $117,954. Every extra dollar earned reduces the OAS benefit by $0.15, effectively a 15% tax.

Seniors whose OAS would be fully clawed back may consider deferring the commencement of payments until age 70. This provides the benefit of higher future payments (0.6% per month of deferral, so 7.2% per year or 36% for the maximum five-year deferral).

In April 2013, the Government began automatically enrolling certain eligible seniors for OAS. While this assists many in receiving timely payments, those who wish to defer should be diligent to avoid automatic enrolment. Individuals must still apply and file tax returns, to receive GIS, if eligible. Therefore, even low-income seniors who are not taxable should file tax returns and apply for GIS. Other payments, such as the GST/HST credit, depend on filing tax returns.

Canada Pension Plan (CPP)
The CPP provides taxable benefits to contributors who retire, become disabled or die. Unlike OAS and GIS, the CPP is based past contributions, regardless of current earnings.

Like GIS and OAS, the standard age to receive CPP is 65. Also like OAS, individuals can defer receiving CPP up to age 70. The increase in monthly payments for deferral are slightly larger for CPP; an increase of 0.7% per month (8.4% for each year, 42% for the full five-year deferral). Alternatively, individuals can choose to receive a reduced CPP payment as early as age 60. From 2012 to 2016 the early pension reduction is being gradually increased. By 2016, an individual who starts receiving their pension at 60 will receive 36% (0.6% x 12 months x 5 years) less than if they had commenced the pension at age 65.

For those working aged 60 to 65, contributions to the CPP (creating a post-retirement benefit (PRB) are mandatory. Individuals aged 65 and over can choose to stop contributing when receiving CPP payments. To do so, the individual should complete Form CPT30 and provide the original to CRA and a copy to their employer. Working individuals aged 65 to 70 should consider whether it is more beneficial to:

- stop contributing to CPP, which would require the individual to collect CPP payments (ie. the option to defer is unavailable); or,
- continue to make CPP contributions (leaving the options to collect or defer CPP payments).

Individuals aged 65 and greater who have already qualified for maximum CPP payments can enjoy an additional PRB on top of the regular CPP payment by continuing to contribute.

**TIP:** Service Canada’s calculator at [http://www.servicecanada.gc.ca/eng/services/pensions/cric.shtml](http://www.servicecanada.gc.ca/eng/services/pensions/cric.shtml) provides retirement income information on OAS and CPP.

Investment Income
Earlier, we noted that benefits were reduced based on a tax concept called “net income”. Different types of investment income increase “net income” at different rates. For example, a $100 eligible dividend received in 2016 is grossed-up to “net income” of $138. A dividend tax credit mitigates the tax, however, the net income is still $138. Contrast that to a $100 non-eligible dividend or $100 of interest income, which for 2016 “net income” purposes are $117 and $100 respectively. Care should be given to understanding the consequences of dividends on income-tested benefits.

**TIP:** Consider earning investment income in a Tax Free Savings Account such that income earned will not erode income-sensitive benefits such as OAS and GIS.

Registered Retirement Savings Plan (RRSP) & Registered Retirement Income Funds (RRIF)
Withdrawals from both RRSPs and RRIFs are taxable to the recipient and may impact the above noted income-tested benefits. However, income on growth within the plan is deferred and not taxed until withdrawal.

While individuals are not required to withdraw amounts from an RRSP, except possibly at age 71, they are required to withdraw a certain amount from their RRIF based upon their age. For 2015 and subsequent years the minimum RRIF withdrawal has been reduced.

At age 71, individual holders of an RRSP must:

- withdraw the funds;
- transfer them to a RRIF; or,
- use them to purchase an annuity.

**TIP:** Consider earning investment income in a [Tax Free Savings Account](#) such that income earned will not erode income sensitive benefits such as OAS and GIS.

Keep in mind that any amounts removed from a RRIF or RRSP will increase the individual’s “net income”, thereby causing a potentially significant tax bill and eroding benefits. The impacts can be very large if an individual chooses the default option to withdraw all funds at age 71.

**Tax Credits and Programs**

In addition to managing the cash inflows and the impact on benefits, seniors should also ensure they are fully accessing tax credits available to them. Some common non-refundable tax credits they may benefit from include:

- Medical Expense Tax Credit – A tax credit based on the cost of certain medical expenses, such as prescription medicine:
• Disability Tax Credit – A tax credit for individuals with a severe or prolonged impairment in physical or mental function. This credit can be transferred between spouses or common-law partners;
• Age Amount – A tax credit for individuals 65 years and older. This credit, which is transferrable to a spouse or common-law partner is income-sensitive, fully eroding at $82,353 (for 2015);
• Pension Amount – A tax credit for those with an eligible pension, superannuation, or annuity payment, which can be transferred to a spouse or common-law partner;
• Public Transit Amount – A tax credit based on the cost of certain public transit passes; and
• Home Accessibility Tax (HAT) Credit – New for 2016 and later tax years, the HAT credit will provide a maximum $1,500 tax credit to seniors (65 years or older at the end of the tax year) or certain related persons who spend up to $10,000 on eligible renovation expenses per year. These renovations must be of an enduring nature which allow a senior (or an individual eligible for the disability tax credit) to be more mobile, safe and functional within their home.

In addition to claiming tax credits, individuals receiving certain pension income (such as life annuity payments, RRIF payments and RRSP annuity payments) may consider splitting, or shifting their pension income from the higher income to the lower income spouse. Though there will be a tax benefit from shifting income from a higher to a lower tax bracket, consideration should also be given to other income-tested benefits such as OAS which may be impacted by this shifting of income.

There are numerous other provincial/territorial credits and programs available to seniors which are often paid only if applied for, and commonly rely on personal income tax return filings to support eligibility. For example, the Alberta Seniors Benefit (detailed at http://www.seniors.alberta.ca/seniors/seniors-benefit-program.html) provides cash payments to seniors with income under $26,400 ($43,000 combined income for couples).

**Conclusion**

The numerous pensions, benefits, tax credits and other programs available to seniors can be generous, and the income can create significant consequences. Eligibility for certain programs outside the tax regime (e.g. nursing home subsidies, provincial health subsidies) depends on tax returns. Failing to file, even if not required, may impede access to these programs and benefits, even where income levels do not impact them.

Managing cash flow and preserving retirement capital can be counter-intuitive and confusing.

Seniors must be especially careful to consider the costs related to their income, and the critical importance of filing a tax return.
**Estate Administration Act: Significant Changes in the Law**

Posted By: Sherrilynn Kelly

**Introduction**

The *Estate Administration Act* was proclaimed in force June 1st, 2015. It replaces the *Administration of Estates Act*. As such, the new Act applies to the administration of all estates, applications and grants. For many seniors, whose Wills stipulate that they will act as their spouse’s executors, this is an important new law. There will be advantages and disadvantages with this transition rule. Importantly, it is possible to apply to the court to have the Act not apply; to rely on the prior Act; or to modify the application of the Act.

**The definition of a personal representative has changed**

A personal representative includes an executor, administrator and judicial trustee, as well as a personal representative named in a Will, whether or not a grant is issued. This latter point is of particular importance! The new Act creates a process to administer an estate without a grant of probate of the Will. For many older adults, whose assets such as their home may be jointly owned, probate may not be necessary. However, there are many reasons why a grant of probate may still be required. What is important to note is, whether a Will is probated or not, an executor has the same responsibilities in administering the estate.

**Duties of a personal representative**

These duties underscore the fiduciary role of a personal representative in plain language and require a personal representative to distribute the estate as soon as possible. In addition, a professional personal representative is required to exercise a greater degree of skill than a layperson personal representative.

The requirement that a professional personal representative is required to exercise a greater degree of skill than a layperson personal representative is a codification of the duty developed in the case law for a professional personal representative. The duties of any personal representative are:
• to act honestly and in good faith;
• in accordance with the testator’s wishes and the Will, if a valid Will exists; and
• with the care, skill and diligence a reasonably prudent person would exercise in similar circumstances.

Core tasks of a personal representative
It is helpful to older adults that the Act clearly identifies that the core tasks of a personal representative are to:

• identify the assets and liabilities of a deceased;
• administer and manage the estate;
• satisfy the debts and obligations of the estate; and
• distribute and account for the administration of the estate as soon as reasonably practicable.

A Schedule in the Act provides helpful examples that an older adult can check to gain an understanding of what is involved in administering an estate.

Many of the provisions in the Schedule in the Act are familiar, as they also appear in Schedule 1, Table on Legal and Personal Representative Compensation in the Alberta Surrogate Rules. However, some of the provisions in the Schedule under the Act are new, such as identifying the nature and value of online accounts, creating and maintaining records, and regularly communicating with beneficiaries.

Notices
An executor named in a Will who does not apply for a grant of probate must still provide notices to beneficiaries, family members, a spouse, adult interdependent partner, former spouses and adult interdependent partners, and the Public Trustee where applicable.

This notice requirement is functionally equivalent to what one does now when applying for a grant of probate or administration. The more informal manner the Act provides for now means the executor of a Will does not have to serve anyone, but give the required notice in a manner that is likely to bring it to the attention of the intended recipient. There are suggested forms in the Alberta Surrogate Rules.

An application may be brought to the Court if a personal representative fails to perform a duty or core task or provide notice

The Act does not say who can bring the application, but presumably it is a beneficiary or the Public Trustee. This is in addition to other applications already allowed for elsewhere in the Act, the Alberta Surrogate Rules or the Trustee Act.
A new provision provides that a personal representative stands in the shoes of the deceased and has all the same powers as the deceased, but only to administer the estate subject to the Will and the Act.

A personal representative has the authority to:

- take possession and control of the deceased’s property;
- do anything in relation to the property that the deceased could have done if he or she were alive and of full legal capacity; and
- do all things concerning the deceased’s property that are necessary to give effect to any authority or powers vested in a personal representative.

This part of the Act replaces all kinds of provisions in the former Administration of Estates Act as well as other Acts.

New rules when assets gifted in a Will have to be used to pay the deceased’s debts

Statutory marshalling rules replace the common law marshalling rules when the property in an estate is insufficient to pay all of the deceased’s debts and make the specific gifts to the beneficiaries in the deceased’s Will.

This is not the same as when an estate is bankrupt. Here, there are enough assets to pay the debts; the issue is the order in which the assets have to be realized upon to pay the debts.

If there are just residuary gifts in the Will (assets less debts), then it is not an issue. But when a Will has many gifts of various kinds of assets and not enough cash to pay the debts, there may be a problem. Historically, this was an extremely complicated area of the law that was not very well understood. It is unlikely anyone would make an attempt to apply the old rules unless a beneficiary is affected differently, depending on which rules are applied.

This in turn raises the issue of whether a personal representative has to tell a beneficiary of the difference in applying these rules, since as noted above, it is possible to make an application to the court to apply the old rules.

All provisions relating to the trusteeship of a minor’s estate have been moved to the Minors’ Property Act.

Prior to the proclamation of the Estate Administration Act, some of the law dealing with minors’ property was in the old Administration of Estates Act. It made sense to put the law in one place – the
Minors’ Property Act. This is a special area of the law that requires careful consideration should a minor have an interest in a deceased’s estate. But what is worth reiterating is that parents are not automatically the trustees of their minor children’s property.

Conclusion
Anyone and perhaps especially an older adult who is appointed as an executor in a Will or who is considering applying to be appointed as the administrator of a deceased person’s estate where there is no Will, should familiarize themselves with the legislation. The new simplified, plain language content should make a daunting task a bit easier. And always, seek professional advice as required.
Preventing Financial Abuse of Seniors: My little Johnny would never do anything to harm me!

Posted By: Doris Bonora

There is something very sad about reaching your golden years, thinking that you will enjoy golf, grandchildren and giving sage advice, but instead, you are faced with abuse by those you trusted the most. Financial abuse of seniors by family members is becoming common and creates great family discord. There are steps to take to prevent financial abuse by little Johnny.

It is important to have an Enduring Power of Attorney in order to appoint a person to take care of your financial affairs if you become incapacitated. Without an enduring power of attorney you are vulnerable and there is no one to protect you when you are ill. Whether the incapacity results from a short term condition or is permanent, the enduring power of attorney provides a seamless transition to allow a trusted relative or friend to pay bills, file tax returns and generally make and carry out all financial matters. The enduring power of attorney also allows access to information. In our current system, privacy is protected. When your mom is ill and you want to make sure her utilities are paid, you will not be able to access even information about her utility payments if she has not done an enduring power of attorney.

While the enduring power of attorney is easy and so useful, it also is an easy tool for a rogue to financially abuse a senior. Unfortunately, the rogue may come in the form of sons and daughters and other relatives who were trusted and yet, when put in power, suddenly help themselves to the senior’s finances. It is an abuse of trust by that little Johnny.

When preparing an enduring power of attorney, the first and most important decision will be who to appoint as your “attorney.” Who is the person that you trust to manage all your financial affairs? If you are married or have an adult interdependent partner or common law spouse, you will likely appoint that
person to be the primary attorney. But, even this decision requires consideration. If you are in a second marriage and do not share your finances, it might be useful and best to appoint another trusted advisor or person to manage finances either with your spouse or alone.

You must also consider who will be appointed if the first named person cannot act. A named alternate is very important. The first named attorney may be in the same accident that incapacitates you and also may be unable to act.

First, pick someone you trust to be an attorney to manage your finances if you become incapacitated. This may seem like a trite statement because you are unlikely to appoint someone you do not trust. But you really should consider prevention of abuse. So, the best choice is to have at least two people appointed. This way the two attorneys can oversee each other and make sure there is no financial abuse.

Please do not make the mistake of thinking that one of your children would never abuse you. Every senior who has been abused believed they could trust the person they appointed. If there is abuse, a court application must be made to remove the attorney and judgments must be obtained to collect the stolen money. Often, seniors do not want to report abuse because they do not want to report that their child abused them. Also, an incapacitated senior will not be able to take the actions themselves. Thus, the family is torn apart by some children bringing actions against other children. That is certainly the end of a joyous Christmas dinner!

In addition, in a power of attorney you could say that your attorney could continue to make gifts to friends and family after you are incapacitated. This should also be avoided. There is no reason gifts should be made after you are incapacitated. If you allow gifts to be made, it is easier for abuse to occur.

We encourage planning and preparation of an enduring power of attorney but also wise choices on the appointment of more than one person to prevent abuse by little Johnny.
The Mike Duffy trial, now adjourned to November, has revealed the inner workings of our highest political office. The trial has unearthed raw material that will be analyzed by political scientists for years to come, making the trial a seminal contributor to the understanding of Canada’s democratic institutions.

This inside view of Canadian governance has been aided by five key structural features of our legal system, operating in sync and in high gear.

First and foremost is the independence of our justice machinery – police, Crown prosecutors, defence lawyers, and judge. The Duffy trial has unfolded without even a whiff of political interference that can silence a justice system’s professionals. How many other countries could accomplish a similar feat? Precious few. The Duffy trial shows that Canada possesses the virtue of a staunchly independent justice system.

Second is the long, sturdy reach of police search and seizure powers. No stone was left unturned by the Duffy investigators, not even those ensconced in the Prime Minister’s Office. The best investigative journalist armed with freedom of information requests could not have obtained the same breadth of documents that generated the headlines from the Duffy trial. Search and seizure powers can be misused, and so must always be closely monitored. But the Duffy trial shows how vigorous search and seizure powers are vital to the quest for truth, especially from high places.

Third, there is what lawyers call the right to disclosure. Simply put, the right to disclosure means all the information and documentation police investigators gather must be given to the defence long before trial. The Duffy proceedings are a master class on the importance of that right. The defence team has been empowered to mount its detailed, sustained, and often devastatingly effective attack on prosecution witnesses largely because of the right to disclosure. Armed with full disclosure of the police file, the defence has pored over those materials for months, diligently rooting out fibs and flaws, and carefully constructing the artfully detailed lines of attack we have watched unfold.

Fourth, there is the right of cross-examination. In talented hands, cross-examination is a scalpel, disemboweling even the cleverest dissembler. Politicians’ media talking points, which evade the question being asked, are meekly accepted as answers in far too many public settings outside the
courtroom. But talking points are easily cut to ribbons by an adroit cross-examiner and the result, very often, is truth laid bare in all its potential ugliness. We can thank a vigorous right of cross-examination, conducted tenaciously at the Duffy trial, for allowing us to see layers of political spin stripped away from the PR masters. And if the defence chooses to present a case, we can look forward to equally vigorous prosecution cross-examination, exposing and stress testing any shaky foundations the defence might rely on.

Fifth, is what lawyers call the open court principle. All of the justice system’s independence, search and seizure powers, disclosure and cross-examination – and everything those mechanisms revealed – would go unnoticed and unappreciated were it not for the open court principle.

The Duffy courtroom is typically packed to the rafters, mostly with journalists acting as eyes and ears for the rest of us. The symbiotic relationship between journalists and courts is the embodiment of the open court principle, which ensures that nothing revealed in court will be missed by the public at large, no matter how unflattering it may be to a person or organization. The open court principle ensures that potential teachable moments in the courtroom become actual teachable moments for the entire community. We care about the lessons from the Duffy trial largely because we know about them – and we know about them through the open court principle.

Our legal system is rife with shortcomings. It is expensive, cumbersome, inaccessible to many, and seems chronically unable to deliver justice to particular constituencies like First Nations and sexual assault survivors. But our justice system has strengths as well, and when they work together – mostly silently and in the background – they are powerful weapons in the hunt for truth.
Talking to Siri

The Nova Scotia Supreme Court has upheld a ruling by a provincial court judge about the definition of “using” a cellphone. Dr. Ajirogho Ikede is a medical officer in the Canadian Forces. A policeman observed him driving his car while holding his cellphone in his hand. He was charged under the Nova Scotia distracted driving law with using a cellphone while driving. Dr. Ikeda pled not guilty, explaining that he was asking Siri for directions on his cellphone using a voice-activated navigation system. He argued that he was not using his phone in the traditional sense of sending or receiving a phone call, sending or listening to a voice mail or communicating with anyone. He asked the phone for directions and then put it down and just listened. The Crown argued that use is use: applying the device for some purpose. The Court noted that there is no definition of “use” in the Motor Vehicle Act which is a bit unusual. Other provinces do offer a definition. Justice Campbell wrote: “Use” is not just “use”. It rarely, if ever, is.” He stated that “use does not encompass all interactions with hand-held devices that have cellular telephone functionality.” He concluded that when a driver, without looking at the screen of the device, engages a voice-activated navigational system related directly to the safe operation of the vehicle, through a hand-held electronic communication device, he was not “using” a cellular telephone. Dr. Ikede was acquitted.

*R v Ikede, 2015 NSSC 264 (CanLII)*

Till Death Do Us Part?

A Supreme Court of British Columbia judge recently had to sift through the details of a relationship to determine the factors that would define a spouse. Penny Neufeld said that she had been in a marriage-like relationship with Norman Dafoe for eleven years. However, he did not make any arrangements for her in his will, and so, after his death, she brought an action under the Wills Variation Act for a share of his estate. His children argued that she was just someone he had taken in when she was in tough circumstances and that their relationship was not intimate. Her children took a different view: testifying to a warm and loving bond. Ms Neufeld maintained that she and the deceased had an exclusive relationship that was at least occasionally sexual. The trial judge assessed the evidence in this case and referred to a 1980 Ontario case that set out indicators of co-habitation, such as:

- shelter (living under one roof, sleeping arrangements);
- sexual and personal behaviour (sexual relations, fidelity);
- services (preparing meals, laundry, shopping);
- social activities (participating in community activities, relating to family);
- societal attitudes and conduct; (were they perceived as a couple?)
- support (financial arrangements, buying property); and
- children (attitude and conduct toward children).

Based on the evidence and all of these indicators, the trial judge had no difficulty concluding that Penny Neufeld was a spouse. He awarded her the sum of $60,000 out of an estate of approximately $160,000.

Neufeld v Dafoe, 2015 BCSC 1898
In the previous part of this article, I talked about Richard Gardner’s concept of parental alienation syndrome, some of the controversy Gardner’s theory raised in the mental health community and the important contributions made by Joan Kelly and Janet Johnston when they distinguish cases of parental alienation from situations in which children have become justifiably estranged from a parent. According to Kelly and Johnston, children’s relationship with a parent can break down for reasons other than the efforts of the other parent. Sometimes, a child’s rejection of a parent is a reasonable consequence of the child’s experience of that parent, as might be the case if the child witnesses family violence or the parent has issues with substance abuse that impair his or her parenting.

Alienation claims in court
Nicholas Bala, Suzanne Hunt and Carolyn McCarney reviewed 175 Canadian court decisions involving allegations of alienation between 1989 and 2008. Of the 40 decisions made between 1989 and 1998, 24 concluded that alienation had occurred, and of the 135 decisions made between 1999 and 2008, 82 concluded alienation had occurred. In the majority of the cases where alienation was not found, the court decided that the child was instead estranged from the rejected parent:

- in 7% of these cases, the court found justified estrangement resulting from abuse or violence;
- in 35% of cases, the court found justified estrangement resulting from poor parenting;
- in 20%, the court found that the child was disengaged but not alienated from the rejected parent; and,
- in the remaining 38% of cases, the court found insufficient evidence to establish that alienation had occurred.

The Canadian Research Institute for Law and the Family recently took a similar look at court decisions from Alberta. Between 2005 and 2015, we discovered 37 cases involving allegations of alienation that were relevant to the claims the court was being asked to consider:

- in 54% of these cases, alienation was alleged in argument but no finding was made;
- allegations of alienation were rejected in 16% of these cases;
- in 8% of cases, the court held that a risk of alienation had been established, but not alienation itself; and,
• in 22%, the court held that the allegation of alienation had been proven.

In these Alberta cases, as in the cases examined by Bala, Hunt and McCarney, mothers were more often accused of engaging in alienating behaviour than fathers and other family members:

As these cases suggest, it’s much easier to allege that a parent is engaging in alienating behaviours than it is to prove that alienation has actually occurred. (Over the course of 13 years of practice, I became involved in only three, perhaps four, cases in which it was evident that alienation had occurred, and in two of those cases I was counsel for the child rather than a parent. However, my custody clients often started their work with me convinced that alienation was a live issue.) Part of the difficulty with allegations like these is that there are a number of reasons other than alienation why a child might resist contact with a parent, including:

• normal, age-appropriate separation anxiety;
• a reasonable reaction to the rejected parent’s parenting style;
• fear for an emotionally vulnerable favoured parent;
• a reasonable response to the rejected parent’s repartnering, new partner, or new partner’s family; and,
• a normal, age- or gender-appropriate preference for one parent over the other.

A child might also be justifiably estranged from a parent, rather than alienated, for the reasons pointed out by Kelly and Johnston, including:

• the presence of intense conflict between the parents during their relationship and after their separation;
• the parents’ involvement in hotly contested, highly conflicted litigation;
• the child witnessing or suffering emotional abuse or family violence;
• the rejected parent having substance abuse problems, especially problems affecting parenting; and,
• the rejected parent having an unpredictable or disciplinarian parenting style.

Finally, some parents just don’t want to admit they are poor parents or have an imperfect relationship with their children. It’s always easier to blame someone other than yourself when your child is resisting seeing you. It can also be difficult to admit your own weaknesses to your lawyer, a mental health professional or the judge.

Recognizing the risk of alienation
Thankfully, Nicholas Bala and Barbara Jo Fidler provide a helpful list of red flags that suggest when alienation may be a risk in their 2010 article *Children Resisting Post-Separation Contact with a Parent*, including the following, some of which I have paraphrased and expanded:

**Badmouthing the other parent**
- portraying the parent as dangerous or mean
- using other parent’s first name with the child
- attributing negative qualities to the other parent when talking to the child

**Limiting the child’s contact with the other parent**
- arranging activities that conflict with the other parent’s contact with the child
- frequently calling or messaging during other parent’s time with the child
- moving away from other parent with the child

**Declining responsibility for parenting arrangements**
- telling the child that the judge has tied parent’s hands and the child’s contact with the other parent is beyond the parent’s control
- giving the child a choice about attending scheduled visits with the other parent

**Limiting the child’s symbolic contact with the other parent**
- removing photographs of the other parent from the child’s room
- encouraging the child to call someone else mom or dad
- refusing to mention the other parent in the presence of the child

**Limiting communication between the child and the other parent**
- blocking telephone calls, text messages and email from the other parent
- intercepting letters and packages sent by the other parent
- monitoring or recording communication between the child and the other parent
Refusing to communicate with the other parent about the child
- not sharing information and notices from the child's school, teams and health care providers
- refusing to talk to the other parent about the child
- using the child to pass messages to the other parent

Emotionally manipulating the child
- withdrawing or threatening to withdraw affection if the child expresses positive feelings toward the other parent
- making the child feel guilty about spending time with or favouring the other parent
- interrogating the child about his or her time with the other parent
- putting the child in loyalty binds
- rewarding the child for expressing criticism or rejection of the other parent
- using the child to spy on the other parent or activities in the other parent's house
- encouraging the child to keep secrets from the other parent

Options and alternatives when alienation is established
The malicious alienation of a child from a parent is a real phenomenon, to be sure. It is a tragedy when it happens, and can have life-long effects on children, which I’ll discuss in a future article, not to mention its effect on the wellbeing of the rejected parent. It is important, however, to distinguish between refusal to visit caused by: actual alienation resulting from the malevolent actions of the favoured parent; other potential explanations for a child’s reluctance to visit a rejected parent, including factors relating to the child’s age, gender and the circumstances of the parents’ relationship; and, the justified estrangement of a child resulting from the behaviour of the rejected parent.

What makes the tragedy of parental alienation so much worse is that the remedies available to the court are so clumsy and of such uncertain benefit. I’ll talk about the legal and therapeutic options available when alienation is suspected and established in the third and final part of this article.
How Debt Can Impact Your Ability to Sponsor An Immigrant To Canada

Posted By: J. Doug Hoyes

With the well-documented problems occurring now in many areas of the world, an increasing number of Canadians are considering sponsoring a relative or other person to immigrate to Canada. But is it possible to be a sponsor if you have debt? The answer is yes, but there are limitations.

First, a caveat: I am a bankruptcy trustee, not an immigration lawyer, so I will confine my comments to the area of debt. Before embarking on a legal process, such as the immigration process, you should always consult a knowledgeable legal professional.

Government Restrictions on Sponsorship

With that caveat in mind, the basic requirements to sponsor a relative can be found on the Government of Canada website. There are a number of debt-related problems that may disqualify you from being able to sponsor a relative, including:

- being behind in alimony or child support payments. Simple arrears, such as being a week behind in your payments may not be enough to disqualify you, but if you are in default, it is likely that you will not be able to be a sponsor based on the assumption that if you are unable to meet your existing Canadian family support obligations, you will likely be unable to support an eligible relative.
- you did not repay a previous immigration loan, made late payments, or missed payments.
- you have declared bankruptcy and are not yet discharged.

As this list indicates, simply having debt does not automatically disqualify you from having the opportunity to sponsor a relative. Most Canadians have debt, whether it be a mortgage or a car loan, and being behind on your debt payments may not disqualify you.

However, if you are currently bankrupt, you will not be able to sponsor a relative until you are discharged from your bankruptcy. Whether you are discharged or not from your bankruptcy is a key point, so a further explanation is in order.
Discharged vs Undischarged Bankrupt

The specific question you will be asked to answer on Form IMM 1344, last updated August 2014, is question #8: “Are you an undischarged bankrupt under the Bankruptcy and Insolvency Act?”

If you were bankrupt in the past, but are now discharged, your answer would be “no”; so you would not be disqualified.

To be “undischarged” means that you are currently in the state of bankruptcy. In Canada, if you are bankrupt for the first time, you are bankrupt for a minimum of nine months (or 21 months if you have income over the limits set by the government). A second bankruptcy will last between 24 and 36 months before you are discharged; so during this period you will probably be disqualified from the sponsorship process.

The term discharged means that your debts are cleared: in other words, you are released from those debts covered in your bankruptcy. This is likely why this question is asked on the immigration sponsorship form. The government wants to know that, if you had debt problems in the past that led to bankruptcy, your debts are now officially eliminated due to your discharge from bankruptcy.

If you went bankrupt, why would you not be discharged? It could be as simple as the pre-determined time period has not yet elapsed or it could be because you did not complete all of your required duties during your bankruptcy. If that’s the case, you must complete your duties before starting the sponsorship process.

What are the Practical Options for Someone with Debt?

If you have debt and are contemplating bankruptcy, but want to sponsor a relative, what are your options?

The first option would be to file for bankruptcy and complete the process as quickly as possible. You should consult with a licensed bankruptcy trustee to determine how long your bankruptcy process would last. If you would likely be bankrupt for nine months and you are contemplating a sponsorship application a year from now, this may be a viable option.

The second option would be to find an alternative other than bankruptcy to deal with your debts. If you have access to family money, paying off your debts before starting the application process is a prudent option.

But what if you don’t have access to family money and it’s likely that the immigration process will start before you can complete a bankruptcy?

One alternative option is a consumer proposal.
A consumer proposal is a legally binding settlement where you agree to pay your creditors a portion of the full amount of the debt. If your creditors agree, you make payments over a period of no longer than five years and your debts are discharged.

As with a bankruptcy, a consumer proposal is governed by the *Bankruptcy & Insolvency Act* and deals with all of the same debts that are dealt with in a bankruptcy.

So what’s the difference?

A consumer proposal is not bankruptcy.

Question 8 says “Are you an undischarged bankrupt?” It does not say “Are you currently in a consumer proposal?”

I am not saying that if you file a consumer proposal you can sponsor a relative. It is possible that the government will take a negative view of a consumer proposal and not allow you to be a sponsor.

However, a consumer proposal is not an automatic “no”, because it is not a question that is asked on the application to sponsor form.

Again, proper legal advice should be obtained before you embark on the sponsorship process, but if bankruptcy is looming and you are looking to sponsor someone to Canada, a consumer proposal may be a better option.
Human Rights Issues Behind the Niqab

Posted By: Linda McKay-Panos

The issue of whether the government can require a woman to remove her niqab before swearing her oath of citizenship in Canada has been the subject of a lot of media attention in the last while. While this issue directly affects a small number of people (about 100 per year), it brings to light a larger issue: What is the correct legal standard by which to determine when an individual's freedom of religion must give way to a government interest? In this case, former Prime Minister Harper expressed the government interest in the House of Commons on March 10, 2015 as: “We do not allow people to cover their faces during citizenship ceremonies. Why would Canadians, contrary to our own values, embrace a practice at that time that is not transparent, that is not open and frankly is rooted in a culture that is anti-women?”

The legal decisions to date address administrative law or policy-making authority and do not address the underlying Charter of Rights and Freedoms issues (see: Canada ((Citizenship and Immigration) v Ishaq, 2015 FCA 194, affirming (Citizenship and Immigration) Ishaq v Canada ration), 2015 FC 156) (“Ishaq”). In the Ishaq case, the Federal Court held that the policy requiring the removal of the niqab in citizenship ceremonies was inconsistent with the duty given to citizenship judges in the legislation to allow the greatest possible freedom in the religious solemnization or the solemn affirmation of the oath of citizenship. Thus, the policy was invalid. While Ms. Ishaq raised Charter issues, the Federal Court did not need to address these to determine the matter. The federal government filed notice of application for leave to appeal this case to the Supreme Court of Canada on September 21, 2015.

What could be the Charter issues and arguments in this situation? The likely arguments would be that the policy (or law, if the government amends the Oath of Citizenship Act) violates Charter sections 2(a), the guarantee of freedom of religion, and/or 15(1). Charter section 2(a), the guarantee of equality without discrimination based on religion and sex (among other grounds).

To prove a violation of freedom of religion under section 2(a), the individual must first demonstrate that he or she sincerely believes that a practice or belief has a nexus in religion, and either voluntarily or mandatorily expresses that faith. An individual need not show that his or her belief is valid or prove to the court that his or her practice is part of a religious dogma. Thus, a sincere belief in a religious practice is what the court will be looking for (Syndicat Northcrest v Amselem, [2004] 2 SCR 55). Once an individual demonstrates that his or her religious freedom is involved, the court must determine whether the
interference or burden on the religious practice is more than trivial or insubstantial. There must be objective proof of interference with the observance of a religious practice ([SL v Commission scolaire des Chênes, [2012] 1 SCR 235]).

Once the violation of freedom of religion has been established, the government can justify an infringement under Charter section 1 if it establishes that a limitation that is prescribed by law is reasonable and demonstrably justified in a free and democratic society. The factors that must be examined at this stage of the analysis were applied in Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, a freedom of religion case in which the Alberta government’s requirement that all individuals have a photograph on their driver’s licence (which was against the Colony’s religious beliefs) was upheld as necessary to minimize identity theft.

While the Charter sections 2(a), 15(1) and 1 arguments that follow are speculative, some of the points were made (but not commented on by the Court) in Ishaq. In applying the legal principles to determine whether a policy or law that requires one to remove one’s niqab violates Charter rights, a court would first determine whether the individual had a sincerely held belief. In this case, the claimant could argue that although some sects of Islam do not consider it mandatory to wear a niqab, it is enough to demonstrate that the person who wears a niqab has the sincere religious belief that she must not remove it in public. The government might argue that she had removed the niqab in the past, but the case law indicates that it is the current belief and practice that are relevant (Amselem). Further, she would have to provide objective proof that the interference with her religion was more than trivial. She could argue that the requirement to remove her niqab in public would compel her to abandon, albeit temporarily, a religious practice and put her in the position of choosing either her religious beliefs or her dream of becoming a citizen. The government may argue that the interference with her religious freedom would be minimal because the removal of the niqab would only be for the short period of time that the veil would be removed during the making of the oath. She could counter that it is the public removal—even for a short period—that would amount to a significant interference with her religious belief.

The Charter section 15(1) argument would be that the removal policy disproportionately affects Muslim women like her and perpetuates stereotyping and prejudice against them, thus amounting to discrimination on the basis of religion and sex. The response to this argument would be that there is no proof of pre-existing disadvantage, stereotype or prejudice that would be perpetuated by requiring a woman to show her face while she takes the oath. Further, the requirement that she remove the veil only briefly during the ceremony responds to the woman’s needs and circumstances while still satisfying the important objective of ensuring that the oath is given.

If violations of Charter sections 2(a) and 15(1) are proven, the government would seek to justify them using Charter section 1. First, the government would have to establish that it has a pressing and substantial objective ([R v Oakes, [1986] 1 SCR 103]. Assuming that policies are considered to be “prescribed by law”, the fact that the policy is not currently found in a law or regulation could support an argument that it does not reflect a pressing and substantial objective. However, the federal
government introduced the requirement as law by introducing amendments to the Oath of Citizenship Act on June 19, 2015. Assuming it became law (and not policy), would the objective be pressing and substantial? The government’s news release of June 16, 2015 provides the following reasons for the amendment:

*Canadians expect that new citizens should show their face when swearing or affirming the Oath in community with others, at the very moment they become part of the Canadian family. This means they are committing publicly to embracing Canada’s values and traditions, including the equality of men and women.*

Assuming this objective is pressing and substantial, the government next would have to demonstrate that there is a rational connection between ensuring the oath is taken and a visual inspection (*Oakes*). In the real situation of providing an oath, the citizenship officials are only able to confirm that the participants’ lips are moving. In any event, every new citizen has to sign a declaration that he or she took the oath, which then binds him or her to it.

Next, the government has to demonstrate that the policy/law requiring removal of the niqab minimally impairs her rights and freedoms (*Oakes*). A woman who wears the niqab could argue that since this policy would only apply to about 100 women per year, it would be possible for a female citizenship judge or official to take the woman’s oath in private. Alternatively, a woman wearing a niqab could be seated closer to the judge or official, or could wear a microphone so that the official or judge could hear her taking the oath. The government would argue that this would defeat the public act of reciting the oath openly and equally. Therefore, they would argue it is minimally impairing to require the public removal of the niqab once in a lifetime at a citizenship hearing.

Finally, the woman would argue that her interests outweigh those of the government (*Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835). Her interest in obtaining citizenship and the benefits that flow from citizenship (e.g., right to vote, mobility rights, feeling one is a true Canadian) as compared to retaining permanent residency if she cannot take the oath because she will not remove her niqab, outweigh any government interest in having all citizenship applicants taking the oath openly and equally.

It seems that the government’s notion of equality in this situation is very old-fashioned. The requirement of formal equality, or treating everyone alike, which was the rule in the first part of the 20th Century, was greatly expanded upon by the substantive equality requirements of *Charter* section 15(1). Since 1985, when this section came into force, it became necessary not only to look at the wording of the law, but also the impact or effect of the law on those to whom it applies. It is clear that the requirement that everyone, despite their religious belief or practice, appear at the oath-taking portion of citizenship hearings without facial covering would impose a burden on those who have that belief that is not imposed on others, who do not. And, the government’s justifications for the removal requirement that have been presented so far do not seem reasonable and justifiable on their face.
I would think one of the true benefits of being a Canadian is that we respect each other’s diversity and will accommodate difference, especially if there is no harm to others. This whole debate seems to be bringing out the unpleasant intolerant side of some of us, which is un-Canadian.
Introduction
The last column discussed the need for employers to practice progressive discipline. That concept means employees should be fired – that is, summarily dismissed without notice or pay – as a last resort and only where clearly justified. In this column, we look at some decisions which demonstrate how hard it can be to fire an employee for even egregious misconduct under Canadian law.

The McKinley v BC Tel Doctrine
The Supreme Court of Canada set the bar high for firing misconduct about 15 years ago in its decision in McKinley v BC Tel [2001] 2 SCR 161, 2001 SCC 38 (CanLII). This decision was profiled several years ago in this column. The Supreme Court of Canada ruled that the context of the misconduct and its impact on the employment relationship must be considered when determining just cause for dismissal. In giving a pass to dishonest employees, this case forced judges and arbitrators in summary dismissal cases today to conclude that the misconduct must show that “the employment relationship could no longer viably subsist.” The McKinley doctrine still challenges employers who believe they have serious cause to fire a worker.

Bad Behaviour Excused
In Soplet v. Bank of Nova Scotia, 2007 CanLII 47145 (CA LA), Shawn Soplet admitted buying marijuana from a co-worker on the work premises. After a suspension and subsequent investigation, he was dismissed without pay. The adjudicator referred to McKinley and analyzed the contextual proportionality of the dismissal. He noted:

- there was no damage done to the reputation of the bank;
- there was no financial or operational compromise to the bank’s functions;
- the employee could be rehabilitated (it was a one-time offence); and
- the record of performance was exemplary.

The adjudicator found no cause for summary dismissal and awarded damages.
In *Cook v Universal Coach Line* (2006), Eric Cook, a bus driver with a bus load of passengers, failed a roadside blood alcohol test. While he was being held by police for almost three weeks due to an alleged parole violation, his employer dismissed Cook without reviewing the facts with him. The adjudicator was not convinced this employer-employee relationship was broken, and noted Cook’s clean record of employment, and the absence of a progressive discipline program. He reinstated Cook from the time of his decision. In this case, illegal purchase and consumption of intoxicants while working was not sufficient cause to fire the worker.

Sexual misconduct at work often turns out to be not enough reason alone to fire someone in Canada. Mark Payne, a bank branch manager in Woodstock, Ontario, engaged in consensual sex with the assistant branch manager, both on and off the bank premises. The woman later complained that Payne was stalking her. After investigating, the employer fired Payne. The adjudicator reversed the dismissal and ordered Payne to be reinstated by BMO. While the matter was serious and could have negatively impacted the employer, the adjudicator said the actual impact was minimal and cited a lack of progressive discipline to rehabilitate Payne. The Federal Court of Appeal unanimously agreed with the arbitrator but ordered damages in lieu of reinstatement. In the end, BMO was ordered to pay Payne ten months salary and benefits and about $74,000 of his legal costs: *Payne v Bank of Montreal*, 2013 FCA 33 (CanLII) [http://canlii.ca/t/fw1vr](http://canlii.ca/t/fw1vr) (merits decision); 2014 CanLII 18861 (ON LA) [http://canlii.ca/t/g6kqq](http://canlii.ca/t/g6kqq) (costs decision).

James Burgess admitted to accessing pornographic material at work several times. The employer warned him about this behaviour. Later, when other Internet usage violations continued, Burgess was fired. The adjudicator disagreed and awarded Burgess damages for his dismissal because the employer’s warning about future discipline was ambiguous. The employer should have emphasized to Burgess that he was on his last chance. The adjudicator in *Burgess v Halifax Grain Elevator Ltd.* (2005) also viewed the subsequent (non-pornographic) Internet violations as not serious. These two cases show that misconduct of a sexual nature, even in violation of company rules, may alone not be enough to fire the worker.

What about verbal or physical altercations? Ravindra Patel told his boss “you’re a fucking idiot” and said “fuck you” five or six times during a verbal exchange on the company shop floor. The Ontario Labour Relations Board said it was not clear Patel was aware profanity was against company regulations and also found that the exchange was an isolated incident in otherwise good performance: *Patel v Welsh Industrial Manufacturing Inc.*, 2008 CanLII 14086 (ON LRB) [http://canlii.ca/t/1wdwz](http://canlii.ca/t/1wdwz). This was insufficient cause for dismissal and Patel was awarded eight weeks pay and benefits.

Mr. Phanlouvong punched and bloodied the nose of a co-worker after a heated verbal exchange. After interviewing witnesses, Phanlouvong was fired. Again, the Ontario Superior Court of Justice said the incident was an isolated case of misconduct and the employer should have considered reasonable alternative disciplinary measures. It awarded Phanlouvong over $45,000 in damages: *Phanlouvong v Northfield Metal Products*, 2014 ONSC 6585 [http://canlii.ca/t/gf9p0](http://canlii.ca/t/gf9p0).
In the previous two cases the altercations were between workers in the same company. In Ditchburn v. Landis & Gyr Powers Ltd., 1997 CanLII 1500 (ON CA) http://canlii.ca/t/6hb5, the 27-year employee attacked and drew serious blood from a customer at a strip club. Nevertheless, the Ontario Supreme Court found the employer did not adequately support its employee who had an otherwise exemplary record. The Ontario Court of Appeal agreed that beating up the customer in this case was not a firing offence. In the end, the combative employee received almost $200,000 in damages, $15,000 for mental distress he suffered for being fired and most of his costs incurred in suing his employer.

Conclusion

On the topic of “summary dismissal,” eighteen years ago the Supreme Court summarily dismissed the doctrine of “near cause” in employment law in Dowling v Halifax, [1998] 1 SCR 22, 1998 CanLII 834 http://canlii.ca/t/1fqwm, confirming an “all or nothing” approach to bad behaviour at work. Employers either have adequate cause to fire an employee or they don’t and must pay out the full notice period. The Court unanimously said “[w]e do not accept any argument relating to near cause”. The law does not exhaustively lay down what constitutes sufficient grounds to fire a worker. Employers must act quickly on the realities before them. Fired employees suffer greater stigma than notice employees and are more likely to challenge the firing. Years later, even in clear cases of serious employee misconduct, a judge can easily take a view sympathetic to the employee, who enjoys the benefit of the doubt. Therefore, firing is always a business risk. Paying generous salary and benefits in lieu of reasonable notice may be a wiser employer strategy.

We can harvest other lessons from these cases. Bad employee behaviour is likely not sufficient cause for firing where:

- it was a single, isolated incident;
- the behaviour was only bad and not egregious by prevailing social standards;
- the employer’s expectations and what constitutes dismissible behaviour were not clearly communicated;
- no specific warning was issued that future failure to meet these standards would end in dismissal;
- employee had a long record of good performance;
- the employee was not given a reasonable opportunity to rehabilitate;
- the bad behaviour was ignored in the past; and
- progressive discipline was not attempted.
Protecting Canadians from The Protecting Canadians from Online Crime Act

Posted By: Melody Izadi

As an intended ode to victims of cyber-bullying, *The Protecting Canadians from Online Crime Act* (Bill C-13) came into force on March 10, 2015. However, this legislation gives police the discretion to search Canadians’ personal information and stored data with what should be deemed as an alarming new set of powers to search. The new section of the *Criminal Code* reads:

162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

- (a) of an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) of an offence punishable on summary conviction.

The new provision is clearly intended to address a particular mode of cyber-bullying: that being the public sharing of “intimate images.” Anyone with a decent-sized heart and any speck of gumption in their soul would surely support the intention of Bill C-13. We no longer live in a world where only certain families in the neighbourhood have dial-up Internet access, and the majority of individuals don’t look through their library’s card catalogue to find a book. People Google, images are shared at lightning speed, and with one click you can publicly transmit anything you want to the rest of the world. It’s been an obvious and almost inevitable outcome of this tech-savvy, share-everything, world we now live in that images are being posted without the subject’s consent, possibly affecting their reputation, well-being, marriage, or career. But despite the well-intentioned nature of Bill C-13, this is not a time to bow our heads in support. The police have now been given titanic latitude in searching our personal property and data, and to make an arrest.

The new Section 162.1(1) includes recklessness as sufficient to prove knowledge or intent. This casts a wide net and gives the police the power to arrest and search any individual who they think may meet that criterion. For most adults, this legislation is not a threat to our personal livelihood: most adults
aren’t running home at night and posting “intimate images” of people they know for fun, without due care or regard. But young people do. Young people are constantly sharing and re-sharing images, often thoughtlessly, on all kinds of social media and public forums of an often inappropriate nature. These young persons are now subject to an almost unfettered police power to be subject to arrest, and have their phones and other devices searched meticulously. Those photos on their phones of them and their friends smoking weed last Friday night? Oh those might be in police possession. Those private messages you sent to your partner last night? The police might read them.

Even knowing this, many Canadians would be comforted by the fact that this all rests on the discretion of the police, who are thought of as heroes in shiny armour. Without question, police are invaluable in their efforts and interventions; a police force is necessary. However, police discretion ought to be questioned. They are humans, after all. Almost weekly it seems, there is a horrible example of the frailty of police discretion in the United States, with story after story of shootings that occur between white police officers and black citizens. Here at home, the Toronto Star published an expose by Jesse Mclean entitled “Hundreds of Officers in the Greater Toronto Area disciplined for ‘serious’ Misconduct in the past five years” (Sept 19, 2015). Mclean exposes many officers, including one who “drives a homeless aboriginal man several kilometers out of town and leaves him to walk back at dusk along a busy highway in near-freezing temperatures.” And as Mclean points out, “they’re all still cops.”

What then, are we to make of the new Bill C-13? The thought behind the legislation, and the devastating examples of suicides resulting from cyber-bullying should not be forgotten or minimized. However, when Canadians’ privacy interests are subject to police discretion (not to mention search warrants, production orders and arrests) is it enough to say that it was Parliament’s thought that counts? Because now, every person who recklessly disseminates an “intimate image” into cyber space is subject to a real risk of arrest and having their privacy interests violated by police. The difference in Bill C-13’s purpose and practicalities is stark when it comes to ‘Protecting Canadians.’ As the new Bill C-13 powers soon become exercised by the police, perhaps Canadians should consider the immortal words of Antoine Dodson to protect themselves from the legislation, “hide yo kids, hide yo wife.”
Media outlets lined up like kids on Christmas morning when the Transparency Act’s first public reporting came due. Newspapers across Canada analyzed the online information about the salaries, bonuses, honorariums and travel expenses received by the leaders of First Nations communities. What the Act reveals may surprise many.

The First Nations Financial Transparency Act is a recent example of the Conservative government’s relationship with Canadian Aboriginal peoples. Its legislated purpose is “to enhance the financial accountability and transparency of First Nations.” The Act requires First Nations to publish online every dollar of remuneration and reimbursement received by its leaders, including not only in their governmental roles, but also from any role they may have in any band-owned businesses.

Also significant are the powers the federal government has allotted itself should a First Nation fail or opt not to disclose this information to the government’s satisfaction. The Minister of Aboriginal Affairs and Northern Development (AANDC) may “withhold moneys payable as a grant or contribution to the First Nation” or terminate any agreement for funding.

In other words: a Minister in Ottawa, almost certainly not an Aboriginal person and most likely elected by a predominantly non-Aboriginal population in an urban riding, can end funding for education services, health care provisions, economic development or any other agreement as the Minister sees fit.

The AANDC website suggests the Act was developed at the request of First Nations members. But First Nations across Canada have criticized the Act’s overbreadth and paternalistic approach. Several have refused to comply with it and have taken the federal government to court claiming that it violates their Constitutional rights, fails to respect their position as governments and degrades their ability to be economically competitive by forcing financial disclosure from private business ventures.

The online publishing of salaries of First Nations governments has purpose if we assume that the information will expose otherwise hidden impropriety at the public expense. This is a thinly veiled articulation of an excuse non-Aboriginal Canada relies on to explain why Aboriginal communities remain mired in poverty, poor health outcomes and family breakdown; that somehow it is the fault of these
communities for misusing otherwise ample dollars rather than chronic underunderfunding or ongoing
distrust by respective governments.

One obvious problem with that assumption is that a thorough accounting of federal dollars was already
occurring. As stated by AANDC, “Prior to the passing of the FNFTA into law, First Nations were already
required to produce audited consolidated financial statements, a schedule of remuneration and
expenses and to make copies available to members as part of their funding agreement with AANDC.”

Plain English: First Nations had to provide AANDC with all of the same financial accounting information
save that about the earnings from their band-owned businesses long before the Act took effect. What
AANDC did with the reported information is less transparent.

Grants, too, were thoroughly accounted for. Indeed, every dollar that is received by First Nations under
any one of several stand alone programs comes with mind-numbing reporting requirements.

If we want to create a system to discourage local empowerment or a sense of autonomy, this is it.

But back to the Act. What did it change?

Two things: First, bands must now also post on the Internet information about any band-owner business
ventures. Second, if they fail to report their leaders’ remuneration and reimbursement, communities
can lose any or all of the funding that the federal government provides for basic community services.

That brings us to the most morally damning aspect of this Act: if First Nations do not submit to this
additional form of reporting, any aspect of funding that they otherwise receive from the federal
government to pay for services the rest of Canada takes for granted can be terminated.

No matter how corrupt a political leader might be, I cannot believe that Canadians would consider it
acceptable to withhold educational funding for that person’s eight-year-old child; or to cease funding a
politician’s teenaged neighbour who is getting counselling after a suicide attempt.

But is there evidence of widespread overdrawing from the public purse? If the government was hoping
for an “aha” moment that would quiet the criticism, the surprise is that the Act has not exposed a
watershed of waste that explains away the continuing inequities faced by Aboriginal peoples.

MacLean’s estimates that the median salary of a band Chief is $62,210. Adjusting for the fact that on-
reserve income is untaxed, it is the equivalent of about $80,000 in taxable income.

There are inevitably outliers whose salaries call out for explanation. For example, Chief Randy Porter of
the Bonaparte Indian Band in B.C. reported an income of zero. Yes, zero.
Others made six-figure incomes owing in part to the remuneration they receive through positions held in band-owned companies – not exclusively public funds. For example, as described in Macleans, Chief Arthur Noskey earned a salary of $103,000 last year as the elected leader of the Loon River Cree, a northern Alberta First Nation. Along with his political function, he takes a leading role in directing six band-owned companies, including trucking and oil-patch services. Chief Noskey made this observation about his income, “If I were in the real world, with these big CEOs, what do you think I’d be making?”

There are other leaders who may rightly see demand from their communities to explain six-figure base salaries such as the Chief of the Samson Band in Alberta earning $166,984 and or that of the Glooscap First Nation in NS at $115,500. Whether their constituents accept their explanations or, ultimately, their salaries will be up to those communities.

Which brings us to another criticism of the Act: the entire approach of telling Aboriginal governments how and where they will produce and disclose this information ignores the fact that these entities are supposed to be governments unto themselves. First Nations governments are equal partners at the table of Canadian leadership. The Transparency Act suggests that the federal government has yet to accept that concept.

Finally, if the enormous gaps in education levels, health care outcomes, poverty, standards of living, availability of potable water, and more, between Aboriginal and non-Aboriginal Canadians cannot be explained by unaccounted for siphoning off of federal dollars, what non-Aboriginal Canadians must face is the reality that our government and our present day society is failing our Aboriginal neighbours and fellow Canadian citizens. The Transparency Act is not a paper-pill that will solve the ongoing distrust between Aboriginal peoples and all levels of Canadian government by suddenly reversing generations of racist policies that stymied and subjugated aboriginal peoples.

Our collective social reaction to the Transparency Act, however, can be an opportunity for a step in a better direction towards reconciliation between Aboriginal Canadians and non-Aboriginal Canadians.
No Man’s Land: Responses to the Despair of the 1930s

Posted By: Rob Normey

Move then with new desires,
For where we used to build and love
Is no man’s land, and only ghosts can live
Between two fires
   -C Day Lewis, The Conflict

The 1930s was a pivotal decade for the whole sweep of European and, indeed, world history. The decade saw the fascist forces move from strength to strength and the failure to check them led inevitably to the cataclysm of World War II. One of my favourite histories of the period is Between Two Fires, by acclaimed historian David Clay Large. Large adopts an intriguing approach to his history of the rising tide of conflict and violence that so fractured European society and led to the consolidation of power for Hitler in Germany, Mussolini in Italy, and Horthy in Hungary. He chronicles a growing intolerance for left wing political movements, and for Jews and other minorities. Large writes individual chapters on key events in each of the major European countries. Generally, the chapters illustrate in dramatic terms just why the great poet W. H. Auden would refer to the period as the “low, dishonest decade.”

Between Two Fires is much more carefully constructed than most academic histories and is filled with wit and eloquence.

I would like to focus on just two of the book’s chapters here, as they provide a neat contrast between Britain and most of Continental Europe in that era. The chapter entitled “The Death of Red Vienna” centers on an important trial, which demonstrated to left-wingers in Austria, and particularly to the highly popular Social Democrats, just how unfair the established institutions were and how they would operate in a way to deny equal treatment and halt progressive movements in their tracks. After the collapse of the Hapsburg Empire at the end of the First World War, the small country of Austria came into being, with Vienna, the capital, dominating what had emerged as a “dwarf republic.” Whereas the Austro-Hungarian Empire had been steered by a series of somewhat conservative Hapsburg rulers, the center of power in the new democratic age had shifted to workers and those members of the middle class dedicated to eradicating the inequalities of the past. The new constitution, in affording democratic
rights and free speech, and creating a federal structure, opened up splendid opportunities for progressive political developments. The Social Democrats swept into power and throughout the 1920s implemented a series of measures to assist the working class by creating affordable housing, providing new educational opportunities for all, and extending social welfare programs to lift the Viennese out of poverty. Indeed, Vienna became something of a mecca for young and enthusiastic writers and intellectuals from Britain and elsewhere, who viewed the city-state as the true beacon for a progressive, democratic socialist future.

Unsurprisingly, those who considered they had much to lose under the new political order, the wealthy and the remaining members of the aristocratic class, were unprepared to accept such substantial changes without a struggle. As the '20s wore on, both the hard right and the left developed small armies of supporters, which became paramilitary organizations. They were outfitted with weapons and from time to time threatened violence against their opponents. In 1927 a battle took place resulting in the murder of a socialist supporter and an 8-year-old bystander. Also, a number of other Social Democrat supporters were seriously wounded. It was ascertained that the responsible individuals were members of the quasi-fascist veterans group, The Front Fighters.

The trial of three members of the Front Fighters on murder charges, to be decided by a jury, was an intense and closely watched event. The use of juries in criminal trials was a recent innovation in Austrian law and many Viennese undoubtedly placed considerable faith in the trial process. Large provides vivid details, however, of the role played by the reactionary press in shaping the opinion of conservative members of the middle class, and quite possibly the jury itself, in the process of creating sympathy for the accused. State officials, including the prosecutor, spoke repeatedly of the irresponsible conduct of the left-wingers in fomenting fear and unrest. In the end, the jury acquitted the men of all charges. Riots and continued disturbances broke out in the following months.

The trial might be seen as a symbolic turning of the tide, as the hard right appeared more confident of its abilities to roll back the initiatives of the left in subsequent years. Although the Social Democrats continued to hold power, ultimately civil war broke out between “Red” and “Black” Vienna, with the latter holding more and more of the cards. Unemployment increased in the 1930s and rather than providing adequate relief, the new government of Chancellor Englebert Dollfuss drastically shrank the social safety net. In April of 1933 Dollfuss illegally confiscated a massive sum – 22 million schillings – from the Socialist municipal government shortly after he had suspended parliamentary government altogether. Black Vienna would prove to be victorious in the Civil War that followed in 1934.

Some of those British political activists and writers who had been so impressed by the democratic socialist achievements rushed to the aid of the beleaguered Social Democrats. Hugh Gaitskell, later to become leader of the Labour Party, worked tirelessly on behalf of socialists who were facing imminent arrest and lengthy imprisonment. He had the assistance of the historical novelist Naomi Mitchison who recounts their experiences in her Vienna Diary. The Diary gives a gripping account of the tense and fearful moments that the small band of British sympathizers had in attempting to save the many young
socialists from their grim fate. By the time they left, 170 wanted Viennese had escaped through Gaitskell’s network and many others were given some financial and practical assistance.

The blow that the crushing of the Viennese Spring had on the hopes of progressives throughout Europe is captured brilliantly in Christopher Isherwood’s novel *Prater Violet*. There, characters on the set of a film being made in Berlin react with growing horror at the news of the declaration of martial law, massive arrests and the grotesquely unfair trials that followed. One of the men referred to by Isherwood is also discussed by Large in *Between Two Fires*. The leading socialist Koloman Wallisch is said to have performed brilliantly in his own defence, but the whole effort is futile. In fact, we learn that gallows were being constructed outside the court during the proceedings. His execution and the requirement that white flags be raised in the workers’ tenements serve as a requiem for what had been a hopeful social revolution.

By contrast, Large’s chapter on Britain takes us into a quite different world. The Jarrow Crusade, as it was called, was a large-scale peaceful demonstration, protesting the callous disregard of the needs of the entire community of Jarrow, in northern England. The major shipyard had been closed and uncaring businessmen liquidated the assets with no thought of the needs of the human dereliction which followed. The Conservative government of Stanley Baldwin had no plan to alleviate the immense suffering. A municipal councilor and politicians from all parties joined forces, together with community leaders, to organize a march all the way to Parliament in distant London. The feisty democratic socialist MP, “Red” Ellen Wilkinson, became the leading voice for the unemployed.

What one is struck most by in reading Large’s account is the immense dignity and pride of the many unemployed who took part in the march. They displayed patience and perseverance in making visible to the remote politicians the effect of the bankrupt policies they were pursuing. This rather remarkable exercise of free speech and free assembly unfortunately did not have any impact on government policy.

World War II then intervened. At the end of that conflict a new government, Labour, headed by Clement Attlee and including “Red” Ellen Wilkinson in cabinet, developed measures to ensure that wide-scale unemployment and demeaning laws like the “Means Test” would be relegated to the dustbin of history.

-Rob Normey