Jan/Feb 2016 Child Welfare Prisoners and Work Peterloo Massacre

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Protecting Children

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A Brief Overview of Child Intervention Services in Alberta

Posted By: *Amanda Baretta*

The protection of children through intervention services in Alberta is governed by the *Child, Youth, and Family Enhancement* ("the Act"). Pursuant to the Act, any intervention must be done in a manner that minimally disrupts the child while preserving the family unit, in so far as possible.

The involvement of Child and Family Services ("the Director") begins with a report. In accordance with Section 4 of the Act "any person who has reasonable and probable grounds to believe that a child is in need of intervention must report." Such belief may derive from instances of:

1. child abandonment;
2. where the guardian is unable or unwilling to provide the necessities of life (including poverty related concerns, such as homelessness or inadequate meals) or medical needs;
3. where the guardian is unable or unwilling to adequately supervise the child;
4. where the guardian is unable or unwilling to protect the child from physical injury or sexual abuse; or
5. where there is substantial risk that the child will be physically injured or sexually abused by the guardian.

Although there is no action against reasonable reports, failure to report is an offence. The identity of the reporter is kept confidential.

The Director has a duty to investigate all reports made on reasonable and probable grounds. Upon investigating a report, there are three options:

1. where no concerns are noted, the file will be closed;
2. where concerns are noted, the guardian may enter into an agreement for services; and
3. where concerns are noted and an agreement is not possible, the Director may make an application and may apprehend the child.

Agreements with the Director

If, upon investigation, it is determined that the child is in need of intervention AND the child's needs can be adequately protected while in the guardian's care due to services provided, the guardian may enter into a Family Enhancement Agreement ("FEAG") for a specified period of time. Under a FEAG, the Director works with the guardian to complete certain tasks. Should the guardian require more time to complete these tasks, the FEAG can be renewed for a further specified period. Should the Director take the position, upon successful completion of the terms, that the child is no longer in need of intervention, the file would then be closed. However, should further concerns arise, the Director may take more intrusive measures, as discussed below.

Where it is determined that the child is in need of intervention AND the child's needs cannot adequately be protected while in the guardian's care, the guardian may enter into a Custody Agreement whereby the Director has custody of the child for a maximum period of six months. A Custody Agreement must outline the care plan for the child and access between the child and the guardian.

The third agreement available under the Act is a Permanent Guardianship Agreement. Where a child has been in the guardian's care for less than six months, the guardian may enter into an agreement whereby the Director becomes the sole guardian of the child.

Court Orders

If the Director determines more intrusive intervention is necessary, it may apply directly for a Supervision Order or, in more severe circumstances, the child may be apprehended.

If the court is satisfied that the child is in need of intervention AND that mandatory supervision of the child and guardian(s) is required to ensure the compliance of terms to adequately protect the child, the court may grant a Supervision Order for a maximum period of six months. In this case, the child will remain in the care of the guardian(s).

The common method of apprehension is by way of an Apprehension Order. Under Section 19 of the Act, the Director is permitted to make an application to the court, without notice to the guardian, for an Order authorizing its delegate and any peace officer to apprehend the child and, if necessary, to enter a named premise by force to do so. This occurs when the Director has reasonable and probable grounds to believe that a child's life or health would be seriously and imminently endangered in the time required to obtain an Order or is seriously and imminently endangered because:

1. the child has been abandoned or lost;
2. the child has left the custody of the child's guardian without the consent of the guardian; or
3. the child has been or there is substantial risk that the child will be physically injured or sexually abused, the Director or a peace officer may apprehend without an Order.

Following apprehension, the Director must return the child within two days OR make an application for a Supervision Order, a Temporary Guardianship Order ("TGO"), or a Permanent Guardianship Order ("PGO"). The first court date must occur no more than 10 days after apprehension and the application must be served upon the guardian(s) and any child who is 12 years of age or older at least two days prior to the first court date.

Where the Director applies for a TGO or a PGO, it must also apply for custody of the child pending final resolution ("Initial Custody"). Initial Custody must be determined with 42 days. Until Initial Custody is determined, the child is in the Interim Custody of the Director. The guardian(s) may consent to Initial Custody (agreeing that the Director shall have custody of the child pending final resolution) or the guardian(s) may oppose Initial Custody, at which point a hearing takes place and the Court determines whether the child shall remain in the custody of the Director or be returned to the guardian(s). In instances where Initial Custody is granted to the Director, the court may make an Order specifying access to the guardian(s) and directing an assessment of the child or guardian(s).

Where the court is satisfied that the child is in need of intervention AND the child's needs cannot adequately be protected while in the guardian's care, BUT it can be anticipated that the child may be returned to the guardian's care within a reasonable time, the court may grant a Temporary Guardianship Order for a specified period of time.

A child cannot remain in the care of the Director under a Custody Agreement, Interim Custody, Initial Custody, or a TGO indefinitely. The total time in care cannot exceed nine months for a child under the age of six and 12 months for a child who is six or older. If a child reaches the maximum days in care, the Director must apply for a PGO with one exception: in exceptional circumstances, the court may grant one further TGO for a period of no more than six months where it is satisfied that (1) there are good and sufficient reasons to do so and (2) it can be anticipated that the child may be returned to the guardian's care within the period of the TGO.

Finally, if the court is satisfied that the child is in need of intervention AND the child's needs cannot adequately be protected while in the guardian's care AND it cannot be anticipated that the child could or should return to the guardian's within a reasonable time, the Court may grant a Permanent Guardianship Order, whereby the Director becomes the sole guardian of the child.

A PGO can be terminated in two ways:

1. by application of the Director; or
2. upon successful application by a former guardian.

An application by a former guardian may only be made if:

1. the child has not been adopted;

2. at least 13 months have passed since the granting of the PGO or at least one year has passed since the disposal of any appeal; and
3. more than two years had passed since the disposal of any prior application to terminate the PGO.

Navigation through the process of intervention services can be complex and overwhelming. It is recommended that any guardian involved in this process obtain legal advice prior to entering into any agreements or orders with the Director.

Privacy Considerations for Families Involved with Child and Family Services

Posted By: *Riley Gallant*

Parents involved with Child and Family Services ("the Director") may not want extended family members, friends, and the general public to know. The *Child, Youth, and Family Enhancement Act ("CYFEA")* is the legislation under which intervention services are provided by the Director in Alberta. *CYFEA* contains provisions outlining how and when information that a child is involved with the Director may be made public.

Section 126.2 of *CYFEA* bans the publication of the name or photograph of a child or the child's parent ("the child's identifying information") in a manner that reveals that the child has had involvement with the Director. However, *CYFEA* also allows for the child's identifying information to be made public in certain circumstances:

1. the Director may publish or consent to the publication of the child's identifying information or any other information related to the child if the Director believes it is in the best interest of the child or necessary for the proper administration of justice;
2. a child who is 16 years of age or older is allowed to publish or consent to the publication of the child's name or photograph in a manner that reveals that he or she has had involvement with the Director; and
3. the court may grant permission to publish the child's identifying information on application by a child, a parent or guardian, or any other interested party if the court is satisfied that publication is in the child's best interest or in the public interest.

This provision of *CYFEA* applies to news media. It also applies in circumstances where family members, foster parents or other individuals involved with the child publish the child's identifying information online in a way that identifies that the child is involved with the Director. Individuals are permitted to make reference to or post photographs of a child or the child's parent online so long as those comments or photographs do not identify that the child is receiving intervention services. For example, a grandparent posting the name and photograph of a grandchild on a public Facebook page or online forum would be permitted to do so as long as the posting does not disclose that the child is involved with the Director. If the photograph is accompanied with a comment indicating that the child was apprehended and placed in foster care, the grandparent would be in contravention of *CYFEA*. *CYFEA*

states that if any person publishes the child's identifying information in a manner that reveals that the child is or has been involved with the Director without the legal authority to make that information public, that person is guilty of an offence. They may be fined and, if the fine is not paid, imprisoned for a term of not more than six months.

CYFEA states that the ban on publication does not apply in respect of a deceased child. In July 2014 changes were made to *CYFEA* with respect to the publication of information identifying a deceased child who was receiving or had received intervention services from the Director. This amendment to *CYFEA* coincided and likely resulted from newspaper reports that the Director was not being forthcoming about deaths of children in care in Alberta. This change to *CYFEA* provides more transparency to the public about children who have died in the care of the Director and allows families to speak out publicly after a death occurs if the family wishes to do so. Deaths are now automatically disclosed on the Alberta Human Services website shortly after they occur.

CYFEA allows publication of identifying information of a deceased child who had current or previous involvement with the Director. This includes services provided to a family voluntarily through a Family Enhancement Agreement where the child resided in the care of a parent or guardian at the time of death. Publication is also permitted regardless of the cause of death. Identifying information may therefore be published even if the child is no longer receiving intervention services and dies of natural causes while in the care of a parent. Section 126.3 of *CYFEA* provides that a family member of the deceased child who does not want the media to be able to publish the child's identifying information in a way that discloses that the child was receiving intervention services can apply for a publication ban. A publication ban may be ordered by the court to prohibit the publication of names and photographs, but the ban does not stop the media from publishing a story disclosing other non-identifying details surrounding the child's death, such as the age of the child, the date the death occurred, and the type of involvement the child had with the Director.

The family members permitted to make an application for a publication ban under *CYFEA* include a parent, guardian, grandparent, or sibling of the deceased child, or someone who stands in the place of a parent within the meaning of section 48 of the *Family Law Act.* The Director may also make the application and *CYFEA* allows any other person to make the application with permission from the court. To apply for the publication ban, the family member is required to file a court application. The judge may grant an order banning publication of the name and/or photograph of the deceased child, the child's parent or guardian, or any other person in a way that reveals that the child received intervention services. If an order banning publication of this information is granted, the order must be served on the parents of the deceased child, the guardians of the deceased child, all other individuals identified in the order, and the Director. To alert the media that a publication ban is in effect, the publication ban must also be served on all members of the media. This can be complicated and difficult to achieve as there are many diverse forms of media outlets in Alberta. Additionally, the publication ban specifically names the deceased child and the family members whose name and photograph may not be published so service of the order on the media may actually alert the media to the story, which is contrary to what the family is hoping to achieve.

CYFEA does not provide any timelines for applying for a publication ban. The family is entitled to apply at any time after the death of a child. The media is free to publish any identifying information until such time as a publication ban is obtained, so it is prudent for a family member desiring a publication ban to apply at the earliest opportunity. Child and Family Services caseworkers are aware of this issue. They will typically notify the family that the Director is obligated to disclose the information to the public and alert the family to the option of applying for a publication ban. This, therefore, requires that the grieving family member determine whether they wish to file a court application immediately after learning of the death of the child. The amendment to *CYFEA* allowing publication of a deceased child's identifying information may benefit the public interest and the interest of those family members who wish to speak publicly about the death of a child. However, it forces those family members who may prefer privacy to consult a lawyer and proceed to court while still processing the profoundly sad loss of a child. This demonstrates the difficult balance between transparency and privacy that must be struck when trying to address diverse and complex interests.

Signs of Safety

Posted By: *Heather D. Malaryk*

Signs of Safety are a child protection casework practice model currently being rolled out by Child & Family Services in Alberta. It was developed in the 1990s in Australia by Andrew Turnell and Steve Edwards in response to the question: “Is there a better way of doing child protection casework?” For three years, they collaborated with child protection workers to study what was working well and what was not, to come up with a strengths-based, future-focused method of assessing risk of harm to children. Signs of Safety have been shown to reduce the number of children coming into care and the number of children returning into care. In Alberta, Child & Family Services is divided into regions throughout the province and different regions and their respective offices are at different stages of implementing this framework into action here for our families.

The Signs of Safety model is a departure from traditional casework. Social workers were the experts under the old model. The social worker would take responsibility for children’s safety while caregivers often felt forced into doing things to have the children returned. This model created a significant amount of anxiety in both the social worker and the family members. Family members would be given a ‘to do’ list of tasks and files were closed when the list was completed. Signs of Safety put the family at the forefront as experts on their own needs. The responsibility for the safety of children remains with the family and they decide how the social worker’s safety concerns will be addressed. Focus is placed on what is working for the family and expanding on those areas of strength. Lastly, traditional casework can replace the voices of parents and children with social work speak. Signs of Safety encourage the use of common, plain language and concrete examples. For example, in the old model, a social worker’s concern could be: “I am concerned that mom has a mental health diagnosis that might lead to psychological harm to the child”. A Signs of Safety version of the same concern might be: “I am worried that you have some days where you feel so sad that you can’t get out of bed and that means Sally isn’t getting the helps she needs to get to school in the morning”.

One major tool of the Signs of Safety model is mapping. Mapping is a collaborative conversation between the family and the social worker which is used to build an understanding of:

- What are we worried about?
- What is working well?
- What needs to happen?

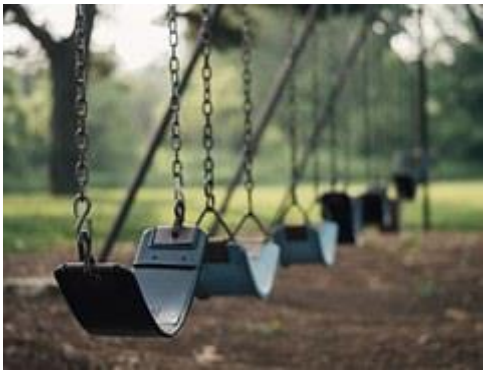
Once the mapping is complete, everyone involved in the mapping puts the risk on a scale between 0 (there is so much risk in the home that the children need to be removed immediately) and 10 (things are going so well, Child & Family Services does not need to be involved). A further discussion should follow the scaling, including what made the person choose the number they did and what would make it a point higher, or a point lower.

Finally, a safety plan is developed. This is the 'what' of creating safety for children – Child & Family Services' bottom line of what they need to see happening to feel that the child can safely return to the caregivers. To return to the earlier example, the old way might have been to ask the caregiver to attend a parenting/psychological assessment and follow through with the recommendations given. Using Signs of Safety, the goal might look something like: "Mom will be getting out of bed most mornings to help Sally get ready and to make sure she gets to school. If mom is having a bad day, she will call her cousin Nancy, or her trusted neighbor Carol for help. Carol and Nancy are aware of this and have agreed to come over to help when called". The benefit of this approach is that the caregiver is given clear direction on what kind of behavior needs to be happening to create safety for her child. It also reassures the social worker when mom has made changes to create safety, compared to the old model where mom might have completed the tasks on the list but is not showing any change in her behaviour. Under the old model, there may be a disconnect where the worker feels uneasy about returning the children, but the parent feels the children should be returned as all the boxes on the to-do list have been checked. Signs of Safety makes the safety goals specific, which brings clarity on both sides of the equation.

What does this look like in practice? Signs of Safety is a dramatic shift from the old model. It not only requires a major time commitment to train in and implement the techniques but it also requires front line workers to make a philosophical shift in their approach to casework. Despite its apparent simplicity, the model incorporates techniques used in solution-focused, planned, short-term therapy, so in its best form, Signs of Safety looks a lot like psychological counselling. The social worker elicits information, amplifies to get to the details, reflects to help the parent process their meaning, and then starts all over with the next question. This process can take hours and it's not easy. The concept is that each family is unique and there is a complex network surrounding the child that includes concerns for safety as well as roles for protection. To get an idea of that network, the social worker must have an open mind and devote the time to do a full, individualized analysis of each case. It requires a social worker to think deeply about each and every case, a luxury not always afforded to a busy worker with a large caseload. It is easy to imagine that the old social work speak might simply be replaced with new Signs of Safety speak without the required shift in thinking. It will take dedicated people at all levels of Child & Family Services devoting time and resources to families to ensure that the implementation of Signs of Safety is truly a shift in practice.

Litigating Death in Care Cases in Alberta

Posted By: *Avnish Nanda*



Legislation and Cases Commented On: F*atal Accidents Act*, RSA 2000, c F-8, Argent v Gray, 2015 ABQB 292, *FRN v Alberta*, 2014 ABQB 375, *SM v Alberta,* 2014 ABQB 376

More than 775 children with some involvement with child protective services in Alberta have died since 1999. This past year alone, approximately 31 children have died while in provincial care or while receiving protective services. The vast majority of children dying in care are of Aboriginal heritage, and all come from marginalized backgrounds. Only until recently have the deaths of all children who die in provincial care been investigated. Prior to 2014, provincial fatality inquiries were only held into select deaths, with none of the findings and recommendations binding on the province or care providers.

For the families of children who have died in care, litigating wrongful death claims against the province and care providers offers an opportunity to obtain redress. Unfortunately, very few cases have been filed, let alone litigated, due in large part, in my view, to the marginalized position of families and the opaqueness of this area of law. With respect to the latter, common law causes of action are non-existent, duties of care are not clearly defined and the jurisprudence is sparse. However, a pair of companion decisions released by Justice Robert A. Graesser in 2014, and a notable decision by the Alberta Court of Appeal on punitive damages in the wrongful death context, provides a path forward. These decisions and a more recent one, outlines a potential legal framework that could be used to inform and help formulate death in care claims against the province and care providers whose wrongful conduct led to the death. It is intended to spark a conversation on how lawyers can assist families of children who have died in care obtain financial restitution and push for reform to the child protective services system in Alberta.

The common law provides no basis for families of individuals who have died through wrongful means to recover damages for the loss resulting from the death. Statutory causes of action are instead relied upon to obtain financial restitution, which in Alberta is primarily set out under the *Fatal Accidents Act* (the *Survival of Actions Act* RSA 2000, c S-27 provides another statutory cause of action but is not relevant in this particular context. For the *Survival of Actions Act* to apply, claimants have to demonstrate that the deceased or their estate suffered actual financial loss as result of the death, which is unlikely here, as the deceased are children).

The *Fatal Accidents Act* provides the family of the deceased a statutory cause of action for non-pecuniary damages against those whose wrongful act, neglect or default caused the death of the deceased. Pursuant to section 8(2)(b), the parents of children who have died in care, and potentially the children of the children who have died in care, are entitled to damages for bereavement (defined more specifically as damages for grief and loss of the guidance, care and companionship of the deceased person). See *Non-Fatal Exclusion: The Fatal Accidents Act, Stepchildren, and Equality Rights* for an overview of the history and context of the *Fatal Accidents Act*. Any sort of negligence (including systemic negligence, which has been pled in this context), breach of fiduciary duty or other cause of action that resulted in a child in care's death could be subsumed under the *Fatal Accidents Act.* Damages may be awarded without reference to any other damage awards granted and without evidence of damage. The parent or parents of the deceased child are entitled to a statutory maximum of $82,000 in damages, to be divided equally if the action is brought for the benefit of both parents.

In *FRN v Alberta* and *SM v Alberta*, Justice Graesser considers two applications brought by the Crown to strike claims filed by families of children who have died in provincial care. In considering the applications, which are partially successful, Justice Graesser provides a template for wrongful death claims in this context. Justice Graesser thoroughly examines the pleadings for causes of action against the Crown and care providers, which in both cases are individual foster parents and not corporate care providers. While it is necessary to read both companion decisions in their entirety, for the sake of brevity, Justice Graesser examines the various causes of action brought against the defendants and narrows them to two that could be meritorious.

In addition to damages under the *Fatal Accidents Act,* families may also be entitled to damages under section 24(1) of the *Charter of Rights and Freedoms* according to Justice Graesser (*FRN v Alberta* at paras 50 -55 and 75-88, *SM v Alberta* at paras 87 – 104, 129). Damages could be awarded to the parents of children in care for the violation of their *Charter* rights as a result of the death. Justice Graesser identifies potential section 7 *Charter* rights that could be breached in such instances, including: (1) the right to nurture one's child, to care for its development and to make decisions for it in fundamental matters, but not limited to medical care and moral upbringing; and (2) the right to physical and psychological integrity (*FRN v Alberta* at para 87 and *SM v Alberta* at para 100). It is important to recognize that the enumerated section 7 rights relate to the rights of the parents and not of the children themselves, as the *Charter* cannot generally be asserted after death. Justice Graesser also sets out potential principles of fundamental justice that claimants could rely on to make out their section 7 *Charter* claims, the most relevant being:

> (1) that to have a right, you must have a remedy when your right is violated
>
> (2) if a child is being provided with care under the Act, the child should be provided with a level of care that is adequate to meet the needs of the child; and

(3) there should be no unreasonable delay in making or implementing a decision affecting a child *(SM v Alberta* at para 101).

While it is not certain whether *Charter* arguments can be successfully made in each case, Justice Graesser makes clear that the apprehension, custody and death of a child in care could lead to such section 7 violations and corresponding damage awards under section 24(1).

In the event that the children of a child who has died in care bring a claim under the *Fatal Accidents Act*, the statutory award they would be entitled to is $49,000 for each child. The award is not split between the children, as it is for parents of deceased children under the Act, but represents their individual entitlement. Moreover, as indicated in *Argent v Gray*, 2015 ABQB 292, pursuant to section 5.1(2) of the *Limitations Act*, RSA 2000, c L-12 the two-year limitation period for the children would be suspended until they reached the age of majority, recommencing afterwards. While this scenario may be rare, there is a distinct possibility that this could occur, and given the quantum of damages and limitations issues described above, filing on behalf of the children may provide a strategic advantage to the family of the deceased over filing on behalf of the parents.

Until recently, it was generally thought that claimants were limited to non-pecuniary damages under the *Fatal Accidents Act* and not entitled to punitive damages. This understanding changed with *Steinkrauss v Afridi*, 2013 ABCA 417 (clarified in *Steinkrauss v Afridi,* 2014 ABCA 14 – See Punitive Damages Now Possible in Alberta Fatal Accidents Actions for further discussion of punitive damages and the *Fatal Accidents Act*) For the first time, the court acknowledged that punitive damages could be awarded under the *Fatal Accidents Act*, and that such awards would be granted in addition to the $82,000 maximum set out for bereavement damages in the legislation. Provided that it can established that conduct related to the wrongful act, negligence or default that led to the death was so egregious that it must be punished, denounced or deterred, claimants are now entitled to punitive damages in Alberta. From my experience litigating such cases, punitive damages are a real possibility given the often tragic and preventable manner in which many children in care die.

The number of children dying in care in Alberta is alarming. While there are a multitude of factors involved, the number of deaths caused by accidental or preventable means is disturbing. For both the families, and social justice activists interested in pursuing policy reform through the law, the civil justice system can provide a method to force the province and care providers to ensure there are adequate safeguards and protections for children in their care.

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Marriage Breakdown Affects Taxes and Child Benefits

Posted By: *Christie Hoem-McNall*

Significant financial and non-financial issues arise during the breakdown of a relationship. This article addresses the various tax claims and related benefits for children that should be considered in the finalization of a separation or divorce agreement. These issues can also be relevant for parents who never lived together.

Common Law Partners

For income tax purposes, two individuals who cohabitate in a conjugal relationship are treated the same as a married couple if, either that cohabitation has continued for at least a year, or they have a child together. For purposes of the article, the term "spouse" includes common-law partners.

Separation

For income tax purposes, you are generally considered separated when you start living separate and apart from your spouse because of a breakdown in the relationship for a period of at least 90 days, assuming you have not reconciled.

Universal Child Care Benefit (UCCB) And Canada Child Tax Benefit (CCTB)

Current Rules

Under the current UCCB program, families receive $160 per month for each child under the age of 6, and $60 per month for children ages 6 to 17 regardless of the their income level. This amount is taxable to the lower income spouse. A single parent can often designate this income to be reported by a child instead, but this must be the child claimed as an eligible dependent if such a claim is made.

The CCTB provides a non-taxable monthly amount to lower income families. This benefit starts to phase out when family income reaches $44,701 (2014 income; some items, including UCCB, are excluded) at a rate of 2% of income above that level. For families with two or more children, the reduction is 4% of the excess income. The income level at which the benefit is completely phased out is dependent on the number of children in the family.

During the recent election campaign, the Liberals promised to replace the UCCB and CCTB with the new Canada Child Benefit (CTB). The CTB will start at $6,400 per year for children under the age of 6 and $5,400 per year per child 6 to 17 years old. The benefit starts to phase out when the family income exceeds $30,000, as following:

	Income	
No. of Children	**$30,000 – $65,000**	**> $65,000**
1	7.0%	3.2%
2	13.5%	5.7%
3	19.0%	8.0%
4+	23.0%	9.5%

Liberal documents estimate family income of $150,000 as the breakpoint where families will receive less under the new model, with no payments at approximately $190,000 of family income ($160,000 if the family has no children under the age of six). Since publication, the Canada Child Tax Benefit has been proposed to commence in July, 2016. The phase -out provisions were modified from the election proposals, and the chart above has been revised to reflect the rates announced in the 2016 Federal Budget.

Impact of Relationship Breakdown

Every July, CCTB eligibility is revised based on your and your spouse's income tax returns from the prior year. If you are separated for a consecutive period of 90 days, it is important to notify the CRA of this change as soon as possible on CRA Form RC66 (online at http://www.cra-arc.gc.ca/E/pbg/tf/rc66/README.html). CRA will recalculate your eligibility considering your new marital status, and only your income. Similarly, remarriage, including a new common-law relationship, should be reported so payments are adjusted.

If you are the individual who ordinarily resides with a child and are primarily responsible for their care and upbringing, you will usually be the one who is eligible for these benefits. They cannot be shared between parents.

For joint custody arrangements, the CRA conducts a detailed review to determine which parent is eligible for benefits. This review attempts to determine where the children spend most of their time and who is primarily responsible for their upbringing. This review can include letters from neighbours to verify that the children live at a particular address and how much time they spend there, letters from school outlining contact information on file, enrollment documentation in extra-circular activities, and of course, a copy of the signed court order or separation agreement outlining the custody arrangements. Parents can object to the CRA's assessment if they are dissatisfied with the results.

If one parent has custody of the children the majority of the time and is the primary caregiver, that parent is entitled to the benefits.

Where both parents satisfy the "ordinarily resided with" and "primary care" requirements, each will be entitled to half of the benefits which would be paid if they were the sole primary caregiver. This is another reason the CRA should be updated when custody changes.

Child Care Expense Deductions

Effective in 2015, the child care expense limits rose to $8,000 (from $7,000) for children under age 7, to $5,000 (from $4,000) for children aged 7 through 16, and to $11,000 (from $10,000) for children eligible for the Disability Tax Credit, regardless of age.

In general, the amount paid for childcare services rendered in the year (up to the limits listed above) may be deducted when the taxpayer lives alone (you do not have a "supporting person"), or by the taxpayer with the lower income where the taxpayer lives with a "supporting person" (usually a spouse).

Impact of Separation

These claims are available only where the costs are incurred to permit the parent to earn income, usually from employment or self-employment, or to enable the parent's education. The parent residing with the children is eligible to claim the deduction for costs they pay. In joint custody situations, where the children live with each parent at different times in the year, both parents may claim the deduction for the periods when the children resided with them, to the extent that they paid the expenses.

For a period of separation, the higher income spouse will be eligible to claim childcare expenses.

Where a parent has a new spouse, the lower income spouse will normally have to claim the deduction for the childcare expenses, even though they may not relate to that spouse's children.

Where a settlement arrangement requires that one parent pay for the childcare expenses and be reimbursed for a portion of these expenses by the other parent, the parent is considered to have paid childcare expenses only to the extent of their costs, net of the reimbursement received. The reimbursing parent is considered to have paid childcare expenses in the amount of the reimbursement. This would differ from the recipient paying childcare expenses from child or spousal support payments received.

Eligible Dependent Credit

The eligible dependent credit provides a significant non-refundable credit, potentially reducing taxes by $3,520 (2015 in Alberta) where the taxpayer meets the following requirements at any time in the year:

1. they did not have a spouse, or were not living with, supporting or being supported by that person;
2. they supported a dependent in the year; and
3. they lived with that dependent in a home they maintained.

Eligibility for this credit becomes more complicated where parents share custody. Both parents could meet the requirements and therefore could technically be eligible to claim this credit. However, only one person may claim each child in any given year. Written agreement as to who will claim each child is advisable.

If a parent is required to make child support payments in relation to a specific dependent, they are not eligible to claim that dependent. Where both parents are required to pay support in relation to the child, this restriction is overridden, and either may be entitled to a claim. The courts have generally ruled that, where the Federal Child Support Guidelines for shared custody result in support amounts that consider what each parent would pay if the other had sole custody, only the parent required to make a payment is "required to pay support". However, some judges have indicated that an agreement or order that explicitly required payments by each parent could result in both parents being required to pay support, so either parent could claim the child.

Only one eligible dependent claim can be made per household. For example, where two single parents live together, each with a child they could claim as an eligible dependent, only one of them can claim the credit.

The CRA commonly reviews these claims. Supporting the claim usually requires evidence of residence of the child, a copy of the written separation or custody agreement, evidence that the other parent is living in a separate residence, agreement between the parents on who will claim the credit, and other items.

Other Income Tax Considerations upon Separation

Parents are generally able to claim amounts they paid for other credits related to children, including children's fitness credits, children's arts credits, public transit credits, and medical expenses, within the usual requirements and limits of such claims.

There are numerous other income tax issues arise from a separation or divorce, that are unrelated to the children, so these are not discussed here.

Conclusion

Usually a breakdown in a relationship will mean a decrease in finances available to the family. Planning for the tax implications subsequent to the breakdown can greatly assist in optimizing the benefits available, and avoiding later disputes.

Prisoners and Work

Posted By: *Linda McKay-Panos*

Several years ago, the Alberta government and other provincial governments considered the introduction of Alabama-style chain gangs as a form of employment for prisoners. This action reflected a North American trend towards making the prison experience harsher, with the view that this would discourage criminal behaviour. Currently, while there would no doubt be near-universal support for the proposition that work experience is appropriate for those who are incarcerated, there is likely to be considerable disagreement over what constitutes "appropriate" work experience. It is easy sometimes to forget that prisoners are still people, but the hope that they will be able to reintegrate back into society without committing further crimes requires that correctional facilities provide them with the ability to learn better life skills. One of the main ways of accomplishing this is through employment and work programs.

The *Criminal Code of Canada* outlines the basic principles for sentencing. These provisions determine the length of time an offender will be incarcerated, which in turn determines whether the inmate will serve that time in a federal or provincial facility. Where an inmate is housed will determine what employment, education, and vocational training will be available to them. Section 743.3 of the *Criminal Code* no longer refers to hard labour being a permissible sentence. The absence of that provision implies that hard labour is no longer appropriate in Canadian correctional facilities.

There are programs for prisoners in Canadian correctional facilities, both federal and provincial. In general, each province has its own legislation and policies for many aspects of incarceration in provincial jails (e.g., *Alberta Corrections Act*, RA 2000, c C-29). Federal prisoners are regulated by the *Corrections and Conditional Release Act,* SC 1992, c 20, [*CCRA*] and its regulations. In addition, both types of institution are subject to human rights law, such as provincial and federal human rights legislation, the *Canadian Charter of Rights and Freedoms,* and international human rights instruments that Canada has ratified.

There are a number of global standards for the treatment of prisoners, and these instruments are binding on Canada. The most prominent of these are the *Charter of the United Nations (UN Charter)* and the *Universal Declaration of Human Rights* (*Universal Declaration)*, which Canada is bound by as a full member of the United Nations. Canada is also bound by the *International Covenant on Civil and Political*

Rights. It states that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment", which underscores the recognition that even prisoners must be treated with basic dignity and respect. In addition, there are persuasive international instruments that influence the decisions Canada makes about its prisoners. Two of the most important ones are the *UN Standard Minimum Rules for the Treatment of Prisoners* (*SMRs*) and the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (*Beijing Rules*). The *SMR*s set out what is generally considered good practice for the treatment of prisoners, and it re-establishes the concept that one of the most efficient ways to protect society against crime is to ensure that released prisoners are able to lead a law-abiding life. The Beijing Rules include two sections relevant to the issue of employable skills for young offenders:

- Rule 26 sets out the objectives for juvenile offender training and treatment, which includes the acquisition of education and vocational skills that meet community standards.
- Rule 27 states that the SMRs also apply to juvenile offenders both in correctional facilities and in detention centers, and they should be implemented so that they meet the unique needs of young people.

How do these domestic and international laws affect prisoners and work? To answer this, it is necessary to look at demographic information about prisoners in Canada. As of 2011, there had been a six percent decline in the rate of prisoners in federal custody over the previous ten years. Most federal prisoners serve sentences of two to three years, while the rate of those serving sentences of ten years or more has held stable at five percent. The majority of adult prisoners are held in provincial custody, the rate of which has increased over the years. Most provincial prisoners have been convicted of non-violent offences (*Keeping the Peace: Prisoner's Rights and Employment Programs* (ACLRC, 2014 online: http://www.aclrc.com/downloadable-resources/(*Keeping the Peace))*. The nature of work in Canadian correctional facilities may be especially important for those with special needs, or who are over-represented in our prison system—such as youth, women, Aboriginals, senior prisoners, those with mental health problems, and others. The issues facing each of these groups are, for the most part, quite similar. Female offenders tend to be younger and are more likely than men to be qunemployed at the time of incarceration. Aboriginal offenders, while also typically younger, have greater educational needs and are more likely to re-offend than non-Aboriginals. The average age of the incarcerated population is increasing, as are instances of mental health issues, and the vast majority of prisoners have some kind of substance abuse problem. Within both the adult and the juvenile systems, Aboriginal persons are disproportionately represented (*Keeping the Peace)*.

The *CCRA* affirms the principle that prisoners continue to have the same rights and privileges as everyone else, except those that must be removed as a result of incarceration. This includes not only the opportunity to gain employable skills, but also to engage in work of one's choice, within certain limitations. The Correctional Service of Canada (CSC) has recognized that both prisoners and corrections staff have a right to a healthy and safe work environment, and the *CCRA* mandates that all correctional decisions be made in a forthright and fair manner. Arbitrarily placing a prisoner in a boot camp or hard labour work assignment would run counter to the principle of acting fairly. Section 78 of the *CCRA* and section 104 of the *Corrections and Conditional Release Regulations* are the legislative authorities for

federal inmate program assignments and payments made to prisoners. A number of other sections of the *CCRA* support the CSC's policy objective to increase prisoners' participation in employment and education programs. The *CCRA* also provides mechanisms through which inmates can address their grievances with the system, such as the Office of the Correctional Investigator.

Both provincial and federal prisoners are employed in institutional or industrial jobs, community work projects, and occasionally for charitable assignments. Examples of institutional jobs include: food preparation, laundry, furniture making, hairdressing, road maintenance, landscaping, and animal husbandry, among others. Work assignments for female prisoners include floral arrangements, childcare for children of other prisoners, and training of assistance dogs. Goods and services originating from vocational training programs are often donated to charitable organizations. It should be noted that it costs much less to maintain offenders in appropriate community programs than it does to keep each of those offenders in correctional facilities. However, the costs associated with prison work programs are ideally balanced out by the need for community safety in the long run (*Keeping the Peace*).

Some specific examples of prisoners' work assignments follow. In Toronto, prisoners have been enlisted to white-wash graffiti from public places by the Community Response Unit and the provincial Ministry of Correctional Services (Desmond Brown "These guys won't paint themselves into a corner with this project: Inmates assigned to cover up graffiti as part of work program" National Post (10 August 2000) A17 [Brown]). Municipal police officers and provincial corrections officers supervised inmate workers, and prisoners posing a risk to society were screened out in order to address any public safety concerns The Prisoner Work Program pilot project first implemented at the Rideau Correctional Centre in 1995 has since been expanded to include at least twenty-three other provincial institutions within Ontario The community-based work encompasses highway and roadside waste removal, and cemetery and other public property maintenance, including tree pruning and grass cutting.

British-Columbia's correctional institutions utilize prisoner work programs as well. Inmates housed at the Maple Ridge, Mission, and Kamloops facilities are given the opportunity to perform duties on and off prison grounds. Inmate crews help clean up provincial parks, complete small construction jobs for non-profit organizations, and help firefighters combat forest fires (Paul Bradbury "Jail benefits community in wide variety of ways" *Kamloops Daily News* (18 April 2007) A6). In the past, inmates have performed "the back-breaking job of digging out invasive blackberry bushes" and replaced them with native cedar trees, and have helped with sandbagging efforts during floods ("Inmate crews save taxpayer dollars" *The News* (Maple Ridge, BC) (14 July 2007) p. 4).

In Manitoba, the Attorney General stated (Manitoba, Legislative Assembly, *Hansard*, 020a (19 June 1995) (Ho. Rosemary Vodrey):

> *In Adult Corrections we are developing a prison industry strategy and have been successful in increasing work programs. We have increased the number of inmate work crews and have worked with communities to identify work projects that are community based for inmates.*

In 2002, the Government of Alberta conducted a review of its corrections system, including offender rehabilitation and work programs, staff safety, offender security, and the effectiveness of existing sentencing practices . The review committee concluded that it was "essential that [Alberta's] adult offender education framework be retained" and that funding levels for the education program not fall below 2002 levels. As per the Committee's recommendation, farming operations at three Alberta prisons – which employed very few inmates – were closed. The outsourcing of correctional programs to non-governmental organizations was also suggested. The then Solicitor General for Alberta, Heather Forsyth, also tasked the review committee with studying Ontario's privately-run correctional institution, which was the only one in Canada.

Additional scrutiny of Alberta's justice system was conducted by the Crime Reduction and Safe Communities Task Force in 2007. Among its recommendations was a suggestion to increase the use of work camps, which "provide a combination of life skills, productive work and treatment," and "offer a unique and useful opportunity to make better use of the time spent [in custody] and help set offenders on a more productive path back to the community".

Individually, Alberta's correctional centers provide inmates with education and employment opportunities, (Alberta, Alberta Solicitor General and Public Security, Correctional Services, "Correctional and Remand Centers," online: Adult Centre Operations http://www.solgps.alberta.ca/programs_and_services/correctional_services/adult_centre_operations/correctional_and_remand_centres/Pages/default.aspx), which include:

- Splitting firewood which is donated to volunteer organizations for resale (Lethbridge Correctional Centre);
- Manufacturing wooden toys that are donated to non-profit agencies (Fort Saskatchewan Correctional Centre);
- Snow removal for seniors (Peace River Correctional Centre); and
- Refurbishing bicycles (Calgary Correctional Centre).

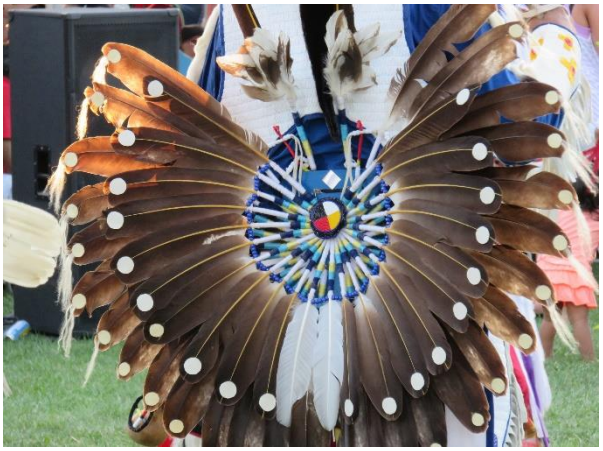
The Task Force reported that in the past, inmates have "worked on crews maintaining parks, assisting with municipal projects [and] fighting fires". It recommended that:

> *…as long as inmates are not a risk to the community or a risk to escape, involving them in productive work that benefits the community is positive not only for the community but for the individual inmates and, therefore, should be encouraged.*

Ultimately, it is important to recognize that prisoners have human rights when it comes to the area of employment. By recognizing those rights and allowing inmates to gain employable life skills, we can continue to uphold Correction Service Canada's goals of rehabilitation and reintegration into the community for as many prisoners as possible, and respect the fundamental rights and freedoms of prisoners as citizens of Canada, all the while keeping the community safe from any further harm.

Aboriginal Offenders

Posted By: *Charles Davison*



Much has been written about the alarmingly high numbers of aboriginal Canadians who spend time in our jails and penitentiaries. Hundreds of thousands of pages of texts, court decisions, reports and inquiries have been published about why so many indigenous Canadians end up in custody, and what happens to them once they are there. In this article I will try to provide an overview of at least some aspects of this situation and what has led us to where we now find ourselves, as a society and country.

Canadians like to think of themselves as a fair and open-minded people but in recent years we have been forced to face a darker part of our past. In short, as much as we would like to think otherwise, the ugly truth is that Canada has historically been a racist country. More than one non-white minority has experienced this at different times, but none has suffered the brunt of Canadian racism for as long as our aboriginal citizens. This has taken both official and unofficial forms. Over many decades both before and especially after Confederation, many laws were enacted which amounted to a regime of official racism. Various Parliamentary enactments prohibited traditional practices of aboriginal persons, denied them basic rights, forced many onto reserves, and generally, sought to wipe out all remnants of their cultures and languages in an effort to assimilate them into mainstream society. Unofficially, governments, their officers, and individual Canadians adopted and practiced racist views and actions in many ways.

Sadly, Canadian courts were no different. Judges, prosecutors, police and defence lawyers were all the products of their times. These were the institutions and officials whose role it was to enforce the racist laws enacted by elected representatives (though it must be noted that aboriginal Canadians did not help to choose these representatives, as one form of the racism to which they were subjected was the denial of the right to vote, until the 1960s). Even laws which seemed to apply to everyone equally were often applied more harshly against aboriginal persons. For many years, for example, young indigenous first-offenders were imprisoned for crimes which, had they been white and from “nice middle class homes”, would have resulted in probation, a fine or some other much more lenient sentence. And this is not a practice which ended 50 or 60 years ago. As a criminal defence lawyer I still see criminal records for aboriginal persons whose first offences were committed in the 1970s and early 1980s who were sent to

jail in situations where a white young person guilty of the same crime would have been sent home with a probation order and community service work to be performed. Sadly, as many commentators have noted over the years, “growing up Indian” meant, as a matter of course, spending time in jail.

As a result of changing attitudes, various public studies and debates, and a number of public events and controversies, an awakening to this ugly side of Canadian reality started to take place in the 1990s. In 1996 Parliament amended the *Criminal Code* to include a provision (Section 718.2(e)) specifically directing courts to exercise restraint, and to consider the particular situation of aboriginal persons as they formulated the sentence to be imposed for crimes committed by native offenders.

In 1999, the Supreme Court of Canada interpreted and explained for the first time what Parliament had intended by enacting this provision, and how lower courts should apply it. In the *Gladue* decision, the Court said sentencing judges were to consider the circumstances of aboriginal offenders carefully and individually, and with an eye on the systemic and historical factors which might have impacted their current behavior. Sentences were to be formulated with cultural characteristics in mind. This did not mean aboriginal offenders would necessarily be treated more leniently, especially where violence was involved. But, the Court did indicate that alternate forms of punishment should be considered in at least some cases involving First Nations accused.

Unfortunately, despite the Supreme Court’s decision in 1999, the situation did not change noticeably. In 2012, in a case called *Ipeelee*, the Court issued another powerful ruling directing lower courts in their use and consideration of s. 718.2 of the *Code* and observed that, instead of falling, the numbers of aboriginal Canadians in our jails and penitentiaries had actually increased since the decision in *Gladue*. Somewhat more forcefully, the Court pointed out that historical events such as the forcible confinement of aboriginal children in residential schools; the dislocation of aboriginal communities from their ancestral lands and territories; and years of racist and colonial policies and laws all influenced the lives of aboriginal persons, including those who end up before the courts for having committed criminal offences. The Judges noted the higher incidence of poverty, lack of education, substance abuse and other social challenges and problems in so many First Nation communities and drew a connection between such background factors and the moral culpability of aboriginal offenders. The lower courts were again urged to approach the sentencing of aboriginal offenders differently and to consider forms of punishment which might have a more meaningful effect, at least in situations where a threat to public protection and safety was not considered pressing.

It is probably too soon to know whether the *Ipeelee* decision has had any impact on the frequency with which we imprison aboriginal offenders, but early signs are not encouraging. Statistics from 2013 and 2014 suggest the rate of incarceration of First Nations persons has not noticeably changed. In a number of federal penitentiaries in Western Canada, aboriginal persons made up the majority of the inmate populations. Aboriginal offenders were still being imprisoned at a younger age than non-aboriginal persons. Female aboriginal offenders were even more disproportionately represented in our prison and penitentiary populations.

In at least some situations, imprisonment is the only viable option. In both the *Gladue* and *Ipeelee* decisions, the Supreme Court of Canada explicitly confirmed that as the types and results of criminal conduct increase in severity, so too will the judicial and penal response. The more serious and more violent the criminal behavior, the more likely imprisonment will be imposed, for both aboriginal and non-aboriginal offenders.

However, imprisonment alone is rarely, if ever, an effective response to criminal conduct over the long term. Except in cases where offenders must be kept in custody for the rest of their lives, incarceration must have a rehabilitative component if the individual is to be released safely back into mainstream society.

Unfortunately, once aboriginal persons are placed inside our correctional institutions, authorities seem unable to provide much by way of meaningful long-term assistance. Culturally relevant correctional programs remain an on-going challenge for the Correctional Service, perhaps in part because of the diversity of aboriginal traditions and backgrounds. In Western Canada there are now three male and one female healing lodges – correctional facilities which are meant to be operated according to First Nations values and principles. However, these facilities together can house around 200 inmates out of a total of over 3,000 aboriginal offenders in the federal correctional system. Furthermore, being located in Western Canada means it is mainly the values and cultures of aboriginal communities from this part of the country which are represented. First Nations and Inuit offenders from the north and other parts of Canada do not necessarily have the same traditions and customs, so attempts to be accommodating usually fall short in relation to those inmates.

Clearly, the correctional system is failing aboriginal offenders and the communities from which they have come and to which they are likely to return. According to the Correctional Investigator – Canada's "ombudsman" for federally sentenced prisoners – First Nations men and women are usually assessed as being higher security risks than other prisoners, serve more time on their sentences before being released, and are more likely to be returned to custody when they are granted any form of early release. Only where Correctional Services is able to take the time and spend the money on programs aimed specifically for aboriginal persons do the statistics suggest reason for optimism. In his 2013-2014 report, for example, the Correctional Investigator noted that allowing aboriginal prisoners escorted absences to permit them to attend cultural and traditional community events often led to better long-term results for those individuals when it came to successful rehabilitation and reintegration back into their communities.

So much of where we find ourselves at this time seems to relate back to the historical factors discussed in the Supreme Court decisions mentioned above, and in particular, the residential school experiences of so many aboriginal Canadians. The individuals who went through the residential school experience grew up not knowing or seeing anything by way of parental guidance and affection, and left the schools having little or no idea of how to parent and raise their own children. Many turned to alcohol in an effort to deal with their own experiences, and the anger and shame they carried often revealed itself in various forms of violence, both in the home and outside. Until these historical factors, and their

lingering results, are dealt with directly by Correctional Services at all levels, the prognosis for the future is not good.

When it issued its Report and recommendations in 2015, the Truth and Reconciliation Commission of Canada included a number of “Calls for Action”. Some of these aimed at changing how aboriginal offenders are dealt with in the courts and inside our correctional systems. The Commission called upon the Government of Canada to build more aboriginal healing lodges, and to expand the availability, use and content of aboriginal-specific programs both inside and outside our correctional institutions. Because of the high incidence of Fetal Alcohol Spectrum Disorder among First Nations populations, the Commission also called for reforms in how our courts and corrections systems address the needs of persons afflicted by that challenge. Like the Supreme Court before it, the Commission also called for greater input by aboriginal communities in determining the appropriate penalties for criminal conduct and, where possible, the establishment of aboriginal justice systems to deal with some offenders and some criminal conduct in ways which are more conducive to addressing the underlying causes of such behaviours.

In short, our courts and correctional systems – and our society in general – are still coming to terms with, and attempting to address and undo, the results of decades of institutional and personal racism aimed at the destruction of aboriginal communities, cultures and practices.

Experience clearly demonstrates that locking offenders away is not enough – and may actually be contrary – to protect and promote community safety in the longer term. Until the underlying personal challenges and difficulties which led individual offenders into conflict with the law in the first place are addressed, criminal behavior will likely continue. Until our correctional systems, at all levels, begin to address the needs of inmates in a meaningful individualized fashion, there is little reason to hope that we will see much change. For aboriginal persons and communities, the injustices and unfairness of the past will only continue.

Solitary Confinement

Posted By: *Juliana Ho*

On July 17, 2015, Globe and Mail reporter Sean Fine wrote an article about Christopher Brazeau, a 34-year-old prisoner at Edmonton Institution, who is currently serving a 12-year prison sentence. Brazeau became the focus of media attention this past summer for being at the centre of a class-action lawsuit that "alleges Canada's use of solitary confinement and lack of timely access to prescription drugs violate the rights of the mentally ill." According to Brazeau, he has been held in solitary confinement for 23 hours a day, going significant portions of time without needed prescription medications. According to the article, he has been subjected to such conditions for upwards of a year at a time.

Unfortunately, this is not the first court case brought forward against the use of solitary confinement in Canadian prisons. Some scholars such as Lisa Kerr have written extensively on the use of the Management Protocol. She discusses the Protocol in her article "The Origins of Unlawful Prison Policies" published in the *Canadian Journal of Human Rights* in 2015. The Protocol is a penal program that allows prisons to lock inmates who administrators consider threats to safety in their cells for up to 23 hours a day, for a minimum of six months at a time. Kerr notes that prior to the emergence of the Protocol, substantive restrictions that governed the use of solitary confinement as a form of punishment were set out in the *Corrections and Conditional Release Act (CCRA)* and the Correctional and Conditional Release Regulations. These instruments were very clear on the procedural protections that apply to involuntary placements into solitary confinement, such as the right to "regular, periodic reviews" designed to assess whether solitary confinement was still required to maintain prisoner safety. The instruments called for "least restrictive measures" and indicated that "necessary and proportionate" punishment should be used. This greatly enhanced fair treatment towards inmates, because it seemed that solitary confinement could only be ordered in cases where there were no reasonable alternatives.

According to Kerr, the emergence of the Protocol introduced "a new method for managing 'high risk' women" in Canada and hugely expanded previous limits on the use of solitary confinement. Rather than regular reviews that allowed inmates to move out of solitary confinement as soon as the practice was no longer needed, the Protocol imposed "three 'steps' of graduated restrictions" that an inmate had to successfully move through in order to be returned to maximum security. Decisions regarding when an inmate had successfully completed a step were "made on a purely discretionary and *ad hoc* basis," and there were no "specific or achievable criteria required for release" indicated.

Eventually, the Protocol became the basis of a claim advanced by the British Columbia Civil Liberties Association on behalf of Bobbylee Worm, which settled before moving to trial. Worm was a prisoner at the Fraser Valley Institution, ordered to serve a 6-year sentence. Despite being a first time offender, she was placed on the Protocol following several fights with other prisoners, which confined her to a cell, deprived of meaningful human contact for 23 hours a day. While the Correctional Service of Canada indicates that it may take a "minimum of 6 months" to move through the program, Worm served over three and a half years in solitary confinement, despite any indication that she continued to pose risk to other prisoners shortly after being placed on the Protocol. This extended time in segregation prevented her from accessing the "proper monitoring and ongoing treatment" required to properly manage her "serious history of trauma and abuse," which led to severe psychological repercussions that were worsened by being placed in isolation.

The program has since been terminated and at this point, it is not possible to predict the results of the Worm case should it have been raised in court. However, like Mr. Brazeau's court challenge, the Worm case has certainly brought solitary confinement forward as a critical issue for the general public to think about and has since captured the Canadian government's attention.

Just this past month, the Globe and Mail wrote that Prime Minister Justin Trudeau has directed Justice Minister Jody Wilson-Raybould to implement recommendations "that would ban long-term solitary confinement for federal inmates and steer all vulnerable prisoners from the regression form of incarceration." Of course, we have yet to see how the current government may address the issue of solitary confinement in prisons or what implementing such recommendations would look like, but it seems safe to say that changes to the excessive use of solitary confinement in federal prisons would be a welcome relief to the 1,800 Canadian inmates held in extended isolation every given day

Bench Press – Vol 40-3 Autism, Homeopathy and Custody

Posted By: *Teresa Mitchell*

Two small boys with severe and profound autism spectrum disorder were at the centre of a custody dispute between their parents. The children have seen a myriad of medical and health care professionals. The father began giving the boys a series of homeopathic treatments after consulting with homeopathic practitioners. In addition, he took the children to a podiatrist, osteopath, and wanted to pursue speech therapy and listening therapy. The mother testified that these treatments seemed to be making the boys worse, and testified that she believed he was seeking a cure for autism rather than finding a method to manage it. The judge commented: "The father's behaviour and attitude are unfortunate as it is clear that he loves the children and the children love him….Although it is understandable that the father wishes to investigate services and possible therapies for the children, such services need to be discussed and co-ordinated with the children's teacher, medical doctors and other professionals involved in the children's lives and of course discussed with the mother. The father…has not done so and has no insight that he should do so". Justice Zisman ordered sole custody for the mother, with access for the father, but under strict conditions. Among other restrictions, she ordered that he not give the children any homeopathic remedies without the mother's prior written consent, or take the children for any treatment, therapy, appointment or consultation with any person providing any type of medical, homeopathy, naturopathy, osteopathy, podiatry, occupational therapy, speech therapy or any other type of therapy with out the prior written consent of the mother.

Ciutcu v Dragan, 2015 ONCJ 659 (CanLII)
http://www.canlii.org/en/on/oncj/doc/2015/2015oncj659/2015oncj659.html

Well-drafted Waivers

Robbie Levita suffered a severe break to his leg while playing hockey in an adult recreational, non-contact league. He sued the league and the player who hit him during the game. The judge found both the defendant player and the league not liable for the plaintiff's injuries. Interestingly, he ruled that even if the league had been found negligent for not providing a safe environment for play, its waiver was a complete defence to claims against it. He found that the waiver was unambiguous about risk and specifically listed the risks and dangers it covered, such as collision with the boards, being struck by sticks or pucks, or physical contact with other participants, resulting in injuries. Justice Firestone also concluded: "The plaintiff's argument that the waiver was not explained to him is not sufficient to dispose of the waiver's effect. The plaintiff understands the legal significance of signing a waiver document. If he was unclear about the waiver's meaning or felt he did not have sufficient time to read the waiver, it was, with respect, open to him to take the necessary steps to satisfy himself that he understood the contents of the document before he signed it. Based on the factual background in this case he cannot retrospectively void the waiver's effect by arguing he voluntarily signed something he did not read."

Levita v Alan Crew et al, 2015 ONSC 5316 (CanLII)
http://www.canlii.org/en/on/onsc/doc/2015/2025onsc5316/2015

A Traffic Ticket Odyssey

After ten years, four levels of court, and numerous interveners, including the Alberta Catholic School Trustees Association and the Commissioner of Official Languages in Canada, two Alberta men have lost their battle to fight their traffic tickets because the *Alberta Traffic Safety Act* and *Regulations* were not published in both English and French. They claimed that there was a constitutional obligation on the part of Alberta to enact, print and publish its laws in official languages. This launched a sweeping review of Western Canadian history going back to 1870 when huge swaths of land owned by the Hudson's Bay Company became part of Canada. The Supreme Court of Canada rejected the men's argument in a six to three split decision. The majority ruled that the *1870 Rupert's Land and North-West Territory Order* (the *1870 Order*), which covered the territory that eventually became Alberta, did not expressly provide for legislative bilingualism, unlike the 1870 *Manitoba Act,* creating that province, which expressly did. The Court rather tartly commented: "The Canadian Parliament knew how to entrench language rights and did so in the *Constitution Act, 1867* and the *Manitoba Act, 1870* in very similar and very clear terms. The total absence of similar wording in the contemporaneous 1867 *Address* or *1870 Order* counts heavily against [the appellants]…" As a result, the Court ruled that Alberta is not constitutionally obligated to enact, print and publish its laws and regulations in both French and English.

Three Supreme Court judges dissented, including two from Quebec. They wrote: "…this historical context shows that by the time the *1870 Order* annexed the territories to Canada, the Canadian government had come to accept that legislative bilingualism was among the rights of the territories' inhabitants."

Caron v. *Alberta*, 2015 SCC 56 (CanLII)
http://www.canlii.org/en/ca/scc/doc/2015/2015scc56/2015scc56.html

Names in Japan

In December, the Supreme Court of Japan ruled that spouses must use the same surname. Five plaintiffs had challenged the law, claiming that it was unconstitutional and violated their human rights. However, the Court said: "It is only reasonable for family members to have the same name." Presiding Judge Itsuro Terada stated that changing one's name after marriage did not harm "individual dignity and equality between men and women" and noted that maiden names can still be used informally. The law in Japan does not say which surname a married couple must use, so it is possible that families could choose to use the wife's name. However, apparently 96% of Japanese families adopt the husband's surname.

Five Judges, including all three female judges on the 15-judge bench, dissented.

Renting Out Your Condominium: Six Facts You Need to Know

Posted By: *Judy Feng*

Did you know that both the *Residential Tenancies Act (RTA)* and *Condominium Property Act (CPA)* apply to condominium rentals? As a landlord and owner of a condominium unit, you must be familiar with your responsibilities under both pieces of legislation. In Alberta, the *RTA* is the law that applies to most landlord and tenant situations. It outlines specific rules that both landlords and tenants must follow. The *CPA* contains additional rules that apply to the rental of condominiums. Here are six key things you need to know before you rent out your unit.

Fact #1: You must inform your condominium corporation

If you have found a tenant and are ready to rent your unit, you must provide the following information to your condominium corporation, in writing:

- your intention to rent out your unit;
- an address where you can be personally served with documents; and
- how much rent you will be charging

Within 20 days of the tenancy starting, you must give your condominium corporation written notice of the name(s) of the tenant(s).

If you stop renting your unit, you must provide notice to your condominium corporation within 20 days of the tenancy ending.

Fact #2: The condominium corporation can ask you for a security deposit

If you are renting your unit, the condominium corporation has the right to ask you for a security deposit to cover any damage that may be caused by your tenant to the common property. The security deposit can be a maximum of one month's rent. Note: this is not the same as the security deposit you can ask for from your tenant!

Fact #3: Your tenant's security deposit cannot be used to pay the condominium corporation's security deposit

You can ask your tenant for a security deposit but you cannot use this money to pay the condominium corporation's security deposit. You must put the tenant's security deposit money into a trust account within two banking days of receiving it and keep records of the security deposit for at least three years. A security deposit cannot be more than what you are charging for one month's rent. For more information about security deposits, visit our Laws for Landlords and Tenants in Alberta website: **www.landlordandtenant.org**

Fact #4: You can only deduct money from a security deposit for damage if you have completed move-in and move-out inspection reports

Under the *RTA*, you must complete a written property inspection within one week of a tenant moving in and out of your unit. Once an inspection is completed, you must immediately give the tenant a copy of the written inspection report. As best practice, take photos at both inspections in case there is a dispute in the future. You must keep copies of the inspection reports for at least three years after a tenancy ends. If the inspection reports are not completed, you will not be entitled to take money from the security deposit to cover damage to the unit.

Fact #5: Tenants have to follow your condo bylaws

Tenants are required to follow the condominium's bylaws during their tenancy and they should have access to a copy of the bylaws. As a responsible landlord, you should familiarize yourself with the bylaws so that you can properly advise the tenant about the condominium's rules. You should also ensure that the lease agreement accurately reflects the bylaws.

Fact #6: Unpaid condo contributions can be taken from your tenant's rent

The lease should clearly state whether or not your tenant is responsible for paying the condominium contributions (also known as condo fees). You can get into serious trouble if your contributions are not paid. If you are renting out your unit and condominium contributions go unpaid, the condominium corporation can require your tenant to pay rent to the corporation instead of to you to cover the unpaid contributions.

To learn more about renting out your condominium, visit our new website www.condolawalberta.ca

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Responding to Children's Refusal to Visit After Separation – Part 3

Posted By: *John-Paul Boyd*

In the first part of this article, I wrote about the research on children who refuse to visit a parent after separation and how children's relationship with a parent can sometimes break down for reasons other than the interfering actions of the other parent. In the second part, I talked about the warning signs that suggest a child is at risk of becoming alienated from a parent, about how few claims of alienation are actually proven in court and about how the courts tend to respond to alienation claims that are proven.

In this, the final part of my article, I'll talk about the options that are available when alienation is suspected or established, and offer some suggestions for how cases involving claims of alienation and estrangement should be handled when they go to court.

Understanding why the child refuses to visit

A child may refuse to visit a parent for a variety of reasons including estrangement, alienation and reasons that are appropriate to the child's age, maturity and gender. These can include separation anxiety, fear for an emotionally vulnerable parent or a simple preference for one parent over the other, and suggest neither estrangement nor alienation. The steps that are best suited to address a particular child's refusal to visit a parent depend on why the child is refusing to visit the parent. The interventions appropriate in cases of alienation aren't necessarily going to be appropriate in cases of estrangement, and children who have distanced themselves from a parent for reasons that are age- and gender-appropriate may need no intervention at all.

Unfortunately, understanding a child's refusal to visit will usually require the assessment of a mental health professional like a psychologist. It can be very difficult, if not impossible, for the parents to figure it out themselves. No one likes to think that their parenting skills need to be improved and few people who are trying to damage the child's relationship with another parent are going to admit it.

This assessment should be performed as soon as possible, which may require applying to court for an order if the parents can't agree. Professor Nick Bala and psychologist Barbara Jo Fidler say that:

> *"The success of legal and mental health interventions depends on establishing, as early as possible, the reasons a child rejects a parent, and responding before parents and children become set in their attitudes and patterns of behaviour. … Bitter, protracted litigation may transform 'reasonable' alignment with one parent into outright rejection of the other, and some cases of severe alienation may be effectively impossible to reverse during childhood."*

This assessment should also identify the intervention most appropriate to the child and the circumstances; this intervention is something else that should be started as soon as possible.

Counselling

Psychologists Joan Kelly and Janet Johnston write that the child and each of his or her parents have different needs that might be addressed through counselling.

In cases of alienation, the favoured parent may need counselling aimed at reducing negative comments about the rejected parent, helping the parent avoid unconscious and indirect expression of negative feelings about the rejected parent, and educating the parent about the harmful effects alienation has on children. In cases of estrangement, the favoured parent may need help supporting the child's relationship with the rejected parent and responding to the child's negative statements about that parent.

Rejected parents may need counselling about their reactions to the breakdown of the parent-child relationship, managing conflict with the favoured parent, and avoiding counter-rejecting the child and withdrawing from the parent-child relationship. Counselling may also help to address any parenting or personality deficits that may have contributed to the alienation or estrangement and provide the parent with guidelines for responding to the child's negative comments.

The first objective of counselling for children will be to shore up the child's relationship with the rejected parent and ease the child's resistance to spending time with that parent. Counselling may help children address any traits, such as being anxious, fearful or passive, or having low self-esteem, that increase their vulnerability to alienation.

Therapeutic programs

A number of programs exist in Canada and the United States that are aimed at rebuilding broken parent-child relationships. These programs are run by mental health professionals who specialize in dealing with separation and divorce. They may take place in a camp or resort setting, or they may involve multiple meetings with a team of counsellors with no residential requirement.

Some of the better known programs are the Family Bridges program run by psychologist Richard Warshak, the Overcoming Barriers Family Camp run by psychologists Matthew Sullivan, Peggie Ward and Robin Deutsch, and the Family Forward program run by counsellor Alyson Jones. Unfortunately, to my knowledge none of the therapeutic programs aimed at alienated children, including these, have

been evaluated by independent experts and it is hard to say how successful they are or how long-lasting the improvements are when program succeeds.

Options for the court

Warshak writes that the basic options available to the court when a child refuses to visit a parent are:

- award or maintain custody with the favoured parent, with court-ordered psychotherapy and, in some cases, case management;
- award or maintain custody with the rejected parent, in some cases with court-ordered or parent-initiated therapy;
- take the children away from the daily care of either parent; and
- accept the child's refusal of contact with the rejected parent.

Although there are variations and nuances, those are the court's essential choices. However, when an order or agreement about parenting is in place, the court may also:

- change the parenting order or agreement on a temporary basis, to support the child's relationship with the rejected parent or give an intervention time to work;
- make the parenting order or agreement more specific, to remove any opportunity for a parent to make decisions that interfere with the child's time with the other parent;
- enforce the order or agreement through things like ordering a parent to pay the other parent's legal costs, finding a parent in contempt of court or ordering the police to enforce the order; and
- appoint a parenting coordinator to work with the family and implement the parenting order or agreement.

There isn't a lot of research on how well these orders work either. The job of the court does not include policing its orders or following up on the outcome of its decisions; our justice system leaves this to the people involved in a court proceeding.

Handling alienation claims in court

If a court proceeding is underway, or if a court proceeding is inevitable because the parents can't agree on what should be done, a few things should happen as soon as possible. First, there needs to be an assessment to figure out why a child is refusing to visit a parent. Second, if the assessment recommends an intervention, it's generally best to get that intervention started sooner rather than later. Letting things slide risks making the damage to the parent-child relationship worse and allowing the child's feelings to become entrenched and harder to change in the future.

Third, Matthew Sullivan and Joan Kelly recommend asking for close case management of the court proceeding right from the start. They say that getting the case under the control of a single judge can help to:

- preserve the relationships between lawyers and clients, clients and mental health professionals, and clients and parenting assessors;
- ensure the continuity of parenting time between the child and the rejected parent; and
- enforce orders for parenting time, counselling and assessments.

I see three other important benefits of case management:

1. controlling the favoured parent's efforts to delay and hinder the progress of the case toward resolution;
2. ensuring that applications are heard expeditiously and the case proceeds to trial with a minimum number of delays and interruptions; and
3. providing a way for the mental health professionals to report back to the court on the parents' compliance with the intervention and its progress.

In my opinion, case management meetings should be scheduled in advance, every two or three months, for example, rather than be left for the parties to schedule when the need arises. Regularly scheduled meetings gives the court the opportunity to check on the parents' compliance with parenting plans, hear from any counsellors and psychologists who may be involved in the court proceeding and make any orders necessary to get things back on course. They give parents the continuous oversight of a single judge who is familiar with their case. Parents also have the opportunity to check in with each other and the court, and to discuss problems and concerns that might otherwise be too trivial to justify a hearing.

The process of asking for case management changes depending on the court. In some jurisdictions, you can ask for case management by writing a letter to the Chief Justice. In other jurisdictions, you need to need to apply for an order for case management. Although case management can be difficult to arrange at times, when a family law proceeding involves issues of alienation, and even estrangement, case management can be critical the success of mental health interventions and the speedy resolution of the case.

Superintendent of Bankruptcy Changes Designation to Licensed Insolvency Trustee

Posted By: *J. Doug Hoyes*

Individuals able to provide debt relief services under the *Bankruptcy & Insolvency Act (BIA)* in Canada are licensed by the federal government through the Office of the Superintendent of Bankruptcy (OSB). In December of 2015, the OSB announced a significant change in the designation of these professionals from Trustee in Bankruptcy to Licensed Insolvency Trustee or LIT. This change takes place effective April 1, 2016, although firms and individuals may choose to use the new designation immediately if they notify the OSB of their intention to do so in writing.

The OSB has been reviewing trustee advertising and designation directives for some time. The primary reason was to reduce the amount of confusion for consumers as to who was licensed to provide the full range of debt restructuring services available to consumers under the *BIA*. Those services include not only personal bankruptcy, but also a debt settlement option called a consumer proposal. Currently, almost half of all insolvency filings in Canada by individuals are a consumer proposal.

The use of the title Bankruptcy Trustee made it hard for consumers to understand that only licensed Bankruptcy Trustees could file a consumer proposal. Adding to the confusion, trustees were also able to call themselves Consumer Proposal Administrators under the *BIA*. In addition, many unlicensed debt consultants advertise 'government' debt settlement programs, which are really consumer proposals, despite the fact that these debt advisors are not licensed to provide these services. These debt consultants can, in fact, only refer their prospective client to a licensed trustee (now LIT) to file a consumer proposal, but would do so only after the debt consultant charged the client an unnecessary fee, since most trustees (LITs) provide a free consultation. Once the new designation is fully implemented, it is hoped that this will provide significant clarity and security for individuals seeking debt restructuring advice.

While the new designation changes the name from Bankruptcy Trustee to Licensed Insolvency Trustee, it does not change the duties, responsibilities and code of ethics that LIT's must adhere to in order to be licensed. Licensed Insolvency Trustees are still required to help an individual who is seeking debt restructuring advice understand all of their available options, even those options not covered by the *Bankruptcy & Insolvency Act.*

It is likely that firms and individual trustees will adopt this name change over the next year. While the name change is effective April 1, 2016, trustees will have 12 months to change all forms of advertising, including their websites. It will also take the consumer some time to recognize the new designation and for that reason, firms will likely use both forms interchangeably on their websites for a period of time.

It is always important when you are looking for debt advice that you talk with a qualified, reputable professional. A full list of Licensed Insolvency Trustees in Canada can be found on the OSB's website.

Human Rights Protection Added for Transgender Identity

Posted By: *Linda McKay-Panos*

A trans-identified, transgender or transsexual person is someone who feels they were born in the wrong body (for example, someone born either with female anatomy who feels male, or with male anatomy who feels female, on a deep, psychological and emotional level) and therefore has a gender identity that is different from their birth gender. Gender identity is separate from sexual orientation, which is the descriptor of a person's overall attraction to people of the same sex, the opposite sex, or either sex. Transgender persons are particularly vulnerable to and experience discrimination and other challenges:

- at school (e.g., teasing, deciding which locker room or washroom to use);
- in medical contexts (e.g., whether hormone therapy or surgery is available and at what age);
- in identification (e.g., birth certificates, passports, etc., which may need to be amended);
- in employment (e.g., seeking appropriate accommodation, informing co-workers, etc.); and
- in other contexts.

Equality for Gays and Lesbians Everywhere (EGALE) indicates that there is discrimination against trans-identified individuals (EGALE, FAQs: Gender Identity and Canada's Human Rights System online: http://egale.ca/faq-gender-identity/#2)

In Ontario, TransPULSE has collected statistics on discrimination against trans people. These statistics show that on the basis of their gender identity, 73% of trans people have been made fun of, 39% have been turned down for a job, 26% have been assaulted, and 24% have even been harassed by police. In addition, discrimination in employment imposes a disproportionate burden on trans people in Ontario, including both high unemployment and underemployment.

Only recently has human rights legislation in several provinces and territories explicitly recognized and addressed discrimination on the basis of transgender identity. As of November 2015, eight provinces and territories explicitly protect "gender identity" or "gender expression". Alberta was the most recent province to explicitly add this ground through Bill 7, the *Alberta Human Rights Amendment Act*, 2015. The following list illustrates when each of the provinces or territories added to their legislation "gender identity" or "gender expression" as a ground of protection:

- Alberta 2015
- Saskatchewan 2014
- Manitoba 2013
- Ontario 2012
- Nova Scotia 2012
- Prince Edward Island 2013
- Newfoundland and Labrador 2013
- Northwest Territories 2002

Other provinces, territories and the federal government jurisdiction continue to rely on an expansive definition of "gender" that has developed through case law. The following examples are taken from decisions in jurisdictions that formerly or currently rely on the expanded definition of "gender" or "sex" discrimination to include discrimination on the basis of gender identity or gender expression.

In *Sheridan v Sanctuary Investments Ltd, (c.o.b. B.J.'s Lounge*), [1999] BCHRTD No. 43 (QL), discrimination was established when staff at a bar prohibited a pre-operative transgender from accessing the washroom of her target gender. Access to facilities that are exclusively male or female is a commonly litigated area in this field.

In *Vancouver Rape Relief Society v British Columbia (Human Rights Commission)*, 2000 BCSC 889 (QL), a trans individual initially won her case after being denied a volunteer position because she had not lived her whole life as a female. That decision was overturned and later affirmed by the British Columbia Court of Appeal (denied leave to appeal to the SCC) (*Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601). Although discrimination on the basis of sex had been shown, the Society was exempt under the British Columbia *Human Rights Code* because of its non-profit status. Section 41 of the B.C. *Code* offers protection for non-profits contravening the *Code*, if the primary purpose of the organization is the promotion of the interests of one of the protected groups.

In *Kavanagh v Canada (Attorney General)*, [2001] CHRD No 21, QL, the Canadian Human Rights Tribunal confirmed that sex-reassignment surgery cannot be prohibited while an individual is incarcerated, but the penal institution's duty to accommodate does not guarantee that pre-operative transsexuals are placed in the institution of their target gender.

In *Forrester v Peel (Regional Municipality) Police Services Board,* 2006 HRTO 13, (CanLII) [Ontario], when a police strip search was conducted improperly, the complainant was successful in a case of discrimination on the basis of sex.

In *Hogan v Ontario (Minister of Health and Long-Term Care*), 2006 HRTO 32 (CanLII) the Province of Ontario delisted sex-reassignment surgery and it ceased to be an insured benefit covered by the provincial health insurance plan. In this case, the successful complainants had already begun the process

towards achieving the surgery, and the Tribunal found that it would not have been unduly hard for the province to have accommodated these individuals.

While “gender” may be interpreted to include gender identity or gender expression, its explicit inclusion in human rights legislation makes it clear to people what their rights and responsibilities are. Previously, individuals would have discouraged from making complaints about gender identity discrimination if they are unclear as to whether the complaint will be received. Now, the focus will be on how service providers, employers and landlords may accommodate trans identified individuals so that they are treated with dignity and respect.

The Law of Leafleting and Picketing

Posted By: *Peter Bowal and Jordan Smith*

Introduction

Distributing leaflets to people and picketing are longstanding forms of employee expression, commonly to protest or draw attention to employment disputes. Primary picketing is attending at a place of business or employment with an object of persuasion, usually to dissuade others from entering or doing business at that place. Secondary picketing is doing the same at a different location or business – such as at a supplier, subsidiary, head office, retail outlet or customer location – in order to bring pressure on the employer.

Usually picketing involves the physical presence of employees, some of them near the entrance to the targeted premises. They communicate or display information relating to the labour dispute, all for the apparent purpose of attempting to persuade others not to support the employer.

All three involve freedom of expression as an essential component of labour relations enabling workers to enlist public support in their pursuit of better work conditions. In this article, we look at how the law regulates leafleting and primary and secondary picketing.

History of Picketing Law

Judges have determined whether picketing was lawful based on physical and perceptual criteria. The picketing had to be lawfully conducted and the objective had to be to persuade someone in a position to give support.

It follows that secondary picketing was illegal because it failed the second element. In *Hersees v. Goldstein* [1963] 2 O.R. 81 (C.A.), the labour dispute was between Deacon Brothers Sportswear and the union. Hersees was a third-party retailer that sold clothing manufactured by Deacon Brothers. The union insisted Hersees cancel its clothing orders from Deacon Brothers or it would be picketed. When Hersees refused, the union picketed it. The judge denounced this attempt to "induce breach of contract," saying:

> *"… the right, if there be such a right, of the respondents to engage in secondary picketing … must give way to appellant's right to trade; the former … is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of far greater importance … as one which in its exercise affects and is for the benefit of the community at large. If the law is to*

> *serve its purpose … the interests of the community at large must be held to transcend those of the individual or a particular group of individuals."*

As recently as 1986, the Supreme Court of Canada said in *Dolphin Delivery Ltd*. 1986 CanLII 5 (SCC):

> *"It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a legislative weapon to be employed in a labour dispute by the employees against their employer, it should not be permitted to harm others."*

The ***Kmart*** Decision

[1999] 2 SCR 1083 http://canlii.ca/t/1fqn5

This case approved secondary picketing if it constituted mere leafleting. In 1992, eleven Kmart stores operated in British Columbia. The employees at two stores were represented by a union, which was not certified at the other nine store locations. A lockout was ongoing at the two stores, the primary employer, during the busy Christmas season. Union members went to the other stores which were not part of the labour dispute, the secondary sites, and distributed leaflets.

Groups of up to twelve employees stood mostly within eight feet from the store entrances. They handed out different leaflets to prospective Kmart customers describing their employer's alleged unfair practices and urging customers to boycott these stores.

The Supreme Court of Canada concluded that B.C.'s legislation prohibiting leafleting to customers at secondary sites inexcusably violated the freedom of expression in the *Charter of Rights* and struck down these prohibitions (at p. 631):

> *"Consumer leafleting is very different from the picket line. It seeks to persuade members of the public to take a certain course of action. It does so through informed and rational discourse which is the very essence of freedom of expression. Leafleting does not trigger the "signal" effect [not to cross] inherent in picket lines and it certainly does not have the same coercive component. It does not in any significantly manner impede access to or egress from premises. Although the enterprise which is the subject of the leaflet may experience some loss of revenue, that may very well result from the public being informed and persuaded by the leaflets not to support the enterprise. Consequently, the leafleting activity if properly conducted is not illegal at common law."*

This characterization and decision could be criticized in several ways. In most labour disputes, leafleting and picketing are indivisible physical and emotional flashpoints of the parties' conflict. The fine legal distinction between leafleting and picketing, and their purposes and impacts, will be lost on the customer. The greater the impact annoyed employees can make on the employer's overall business

operations, the greater the attention and concessionary favour they can expect to receive. However, on what basis should an outside private dispute wrest control from an owner over its own property?

One might also question the Supreme Court's over-emphasis on the peacefulness of leafleting and its understatement of the degree to which leafleting impedes access to private property. The *Kmart* case represented a major reversal of the traditional law against secondary picketing, on freedom of expression grounds.

The ***Pepsi*** Decision

R.W.D.S.U., Local 558 v. Pepsi-Cola Canada [2002] 1 SCR 156 http://canlii.ca/t/51tz

Three years later, in the *Pepsi* case, the Supreme Court of Canada came full circle and permitted all forms of protest and picketing during a labour dispute. Here the union went on strike against Pepsi-Cola Canada Beverages in Saskatchewan. The union members picketed secondary retail outlets to prevent delivery of the employer's products and to dissuade store staff from accepting delivery. They picketed a hotel where replacement workers were staying and engaged in intimidating conduct at managers' homes.

The Court this time concluded that secondary picketing is generally lawful except where it involves tortious or criminal conduct. This "wrongful action approach" strikes the new balance between traditional common law rights and *Charter* values. The character and effects of the picketing are now more important than the location.

Governments can still regulate labour disputes and set appropriate limits for secondary picketing within the broad parameters of the *Charter*. For example, the Alberta *Labour Relations Code* section 84(2) and (3) empowers the Labour Relations Board to "determine whether any premises are the place of employment" as well as "declare what number of persons may [picket], determine the location and time of [picketing] and make any other declarations that the Board considers advisable."

Remedies for Illegal Picketing

Criminal behaviour on the picket line is handled by local law enforcement. Tortious acts while picketing can be brought to the Labour Relations Board, typically in the form of cease and desist applications and directives to stop the wrongful picketing behaviour.

In one Alberta example, a dispute arose between the parties and intense picketing ensued. Picketers were targeting trucks entering and leaving the plant. The Board issued a directive prohibiting:

- placing impediments on or near the roadway leading to and from the employer's premises;
- threatening, striking, hitting, vandalizing, throwing objects at or otherwise interfering with the passage of vehicles, goods and equipment and persons to and from the employer's premises; and

- engaging in any activities that cause vehicles, goods and equipment, or persons to have to stop when attempting to enter and leave the employer's premises.

Employers typically request the Board to intervene to stop picketing on private property, verbal and physical harassment of people entering or exiting the business, unduly delaying or obstructing traffic flow in or out of a site, vandalism and other crimes, and intimidating non-striking employees to respect the picket line.

Conclusion

The common law historically deemed secondary picketing illegal until the *Pepsi* case in 2002 when it was protected as a constitutional right. Criminal and tortious behaviour remain illegal picketing activities. They are dealt with by local law enforcement (criminal) or applications to provincial labour relations boards (tortious). Picketing continues to be an important legal exercise of free expression by employees.

Court of Appeal says Police Can't Climb Through Windows and Spy on You

Posted By: *Melody Izadi*

The Ontario Court of Appeal recently held in its decision in *R. v. White* [2015] O.J. No. 3563 that police officers do not have unrestricted access to enter common areas in residential buildings to gather evidence against an individual.

The police had suspected that Mr. White was dealing drugs from his condominium, and on three separate occasions Detective Hill secretly entered Mr. White's building without knowledge or prior consent from any other resident. The detective observed the comings and goings of Mr. White's apartment, observed the contents of Mr. White's condominium locker, and because of the poor quality of the walls was able to hear conversations taking place inside Mr. White's apartment. On one occasion, the detective hid in a stairwell inside the building to continue surveillance on Mr. White's apartment.

After these secret entries, a search warrant was granted and executed. The police found drugs and cash inside the apartment. Mr. White was subsequently charged with possession of marijuana and cocaine for the purpose of trafficking, possession of cocaine, and possession of property obtained by a crime. The Court of Appeal upheld the trial judge's ruling that the gathering of the evidence that formed the grounds of the search warrant violated Mr. White's Section 8 rights under the *Charter of Rights and Freedoms* ("*Charter*"), and the evidence was excluded pursuant to section 24(2) of the *Charter.*

Cue outrage and disagreement from those who view *Charter* rights as "technicalities" that clever defence lawyers argue to win cases for their clients. But pause for a moment and consider the ramifications of unfettered access to everywhere Canadian citizens live. Certainly the detectives in *R. v. White* assumed this was their right, given their testimony, so long as they didn't break anything on the way in. They were of the opinion that there was no reasonable expectation of privacy in the common areas of the condominium building, and so they could investigate as they pleased. If this were the case, privacy would be a casual right that had little weight. In fact the Court of Appeal held that:

> *"If the police are entitled to climb through windows to gain entry to multi-unit residential buildings and, once inside, enter common areas such as storage rooms, hide in stairwells, and conduct surveillance operations for as long as they want on those who live there – all without a warrant – on the basis that those who live in these buildings have no reasonable expectation of*

> *privacy in the common areas, then the concept of a reasonable expectation of privacy means little."*

Though it can be assumed that the police had every intention to stop drugs from being sold on our streets, it cannot be a goal achieved by trampling on constitutionally protected rights of Canadians without regulation. Privacy is an internationally recognized human right deserving of protection that ought not to be violated on a discretionary basis by police. The Court of Appeal in *White* succinctly and perfectly encapsulates this notion in one sentence: "Some limits on police activity are necessary if privacy is to be protected."

Even giving this ruling, many Canadians will still view these types of *Charter* violations as a "technicality," and be appalled that an alleged drug dealer is now "free." Yet what is appalling to most defence counsel, and hopefully to other Canadians, is the nature in which the detectives in *White* chose to gather evidence, and were certain in their right to do so in their testimony. If a line isn't drawn here by the Court of Appeal, then I invite you to imagine the vastness of power that we as Canadians would be handing over in exchange for human rights violations against ourselves or our fellow citizens.

Deeming *Charter* violations a "technicality" not only minimizes the importance of constitutionally protected human rights, but also adds to a problematic rhetoric that perpetuates trivializing the *Charter.* Rather, as the Court of Appeal in *White* makes clear, sometimes our *Charter* rights can only be protected at the expense of limiting police powers. A limit that is not only necessary, but essential.

In fact, the trial judge in *White* found that the police had "neither statutory authority to conduct the searches nor a constitutionally unrestricted right to trespass upon private property to conduct the searches." The Court of Appeal upheld this finding, showing strong support for the protection of Mr. White's Section 8 *Charter* right. So too should Canadians agree with the reasoning in White, and leave behind conservative notions of limitless state powers that trample on the rights of all.

The “no gifts to non-qualified donees” rule

By Peter Broder

The registered charities provisions of the *Income Tax Act* (*ITA*) feature a number of obscure terms. That makes registered charities vulnerable to inadvertent non-compliance. It means prudent organizations need to keep a keen eye on regulatory trends and emerging issues. Looming regulatory concerns with making gifts to groups that are not qualified donees are a case in point.

Eligibility for charitable status under the *ITA* is based on the common law, which uses the Preamble of the *Statute of Elizabeth* (1601) and the famous classification from *Income Tax Commissioners v. Pemsel* as its touchstones. In addition, tax authorities have modified – some might argue clarified – what is permissible for Canadian registered charities by introducing certain concepts and language not found in the common law.

Thus, in Section 149.1(6.4) of the *ITA* we have National Arts Service Organizations, which create a special category of charity with objects and activities supportive of the arts and with certain other characteristics. More broadly, in addition to registered charities, it designates a number of kinds of bodies as “qualified donees” for donation purposes and as a mechanism through which charitable and certain other public benefit work can be carried out.

Specifically, qualified donees include:

- registered charities and Canadian amateur athletic associations;
- federal and provincial governments;
- the United Nations and its agencies;

and, where registered with the Canada Revenue Agency:

- certain housing corporations;
- municipalities;
- bodies performing functions of government (such as aboriginal bands);
- foreign organizations; and
- prescribed foreign universities.

The regulatory regime varies according to what kind of organization or body they are. For donation purposes, however, they are all treated the same. As well, a specific provision of the *ITA* defines charitable purposes as including "disbursement of funds to a qualified donee". So gifting funds to such a group (so long as it is within the objects of the registered charity giving the funds) is permissible under the *ITA*. Similarly, disbursements made by a charitable organizations to qualified donees as a means of devoting their resources to charitable activities are provided for in the legislation.

All this is important because, a few years back – in conjunction with modification of disbursement quota rules – provisions were added to the registered charity revocation sections of the *ITA* . These stated that making a gift to a body other than a qualified donee is grounds for a charity losing its status.

Audits for the years in which the new measures have been in place are percolating through the system. So, this type of conduct is likely to be under increasing scrutiny in the coming years. Indeed, gifting to groups that are not qualified donees has been identified as one of the key non-compliance issues revealed by the Political Activities audits undertaken over the past three years pursuant to the direction included in the 2012 Federal Budget.

As well, the issue has the potential to arise in the context of registered charities undertaking program-related investments. So long as this type of investment is made in a registered charity or other qualified donee, there is no need for concern over whether the terms of the arrangement are at fair market value. In those circumstances, an investment at a discounted rate of return or even one where the instrument went bust and there wasn't any return could be acceptable as a gift or part gift.

However, investments made in social purpose businesses or in non-profit organizations could, if they underperform or are undertaken with terms that are below what would be considered fair market value, may be seen as effectively being a gift to an entity other than a qualified-donee. Such a transaction, therefore, could be grounds for revocation.

Lastly, the *Public Television Association of Quebec* case described in my last column may have tightened even further the direction and control obligations that registered charities need to meet if they want (or need) to work through intermediaries. In most instances, such groups would not be considered a qualified donee. (As an aside, the Public Television Station with which the Public Television Association of Quebec worked likely would have been a qualified donee when it was affiliated with the University of Vermont earlier in its history. Qualified donees include "a university outside Canada that is prescribed to be a university the student body of which ordinarily includes students from Canada". When the U.S. station became independent from the university, however, it was no longer eligible for the status.)

Ignoring the irony of that circumstance, it remains true that when registered charities fail to meet the direction and control obligations currently required by the courts (and the Canada Revenue Agency), they can be characterized as having made a gift to the intermediary that is not a qualified donee.

There is certainly merit in the government seeking to prevent resources that receive preferential tax treatment from being used for work that has not been demonstrated to further charitable or other public benefit purposes. That said, the current provisions of the *ITA* intended to check funds flowing outside the system are potentially tremendously powerful.

The practical reality is that, to be efficient and effective, it is typically necessary for charities to engage or collaborate with a diverse array of partners and associates. As well, the terms in the *ITA* and their relationship to the common law are frequently less than self-evident. In that context, you are likely to see some inadvertent leakage from the tax system. As well, the occasional player may set out to deliberately game the system. It is to be hoped that the CRA and courts recognize these possibilities in the enforcement of these far-reaching provisions. That hope aside, registered charities need to become better attuned to these requirements – obscure though they may be – so regulatory intervention will not be necessary.

The Peterloo Massacre and Shelley's Great Poem *The Mask of Anarchy*

Posted By: *Rob Normey*

I note that *The Guardian* newspaper features an interview with Mike Leigh, director of a number of superb films like *High Hopes, Vera Drake*, and *Mr Turner*, indicating that his next project will be a dramatization of the infamous 1819 Manchester massacre, a traumatic event in British history. The massacre is believed to have involved 18 deaths and injuries to as many as 700 protesters, who paid the price for exercising their democratic rights and freedom of assembly. Leigh indicated that "apart from the universal political significance of this historic event, the story has a particular personal resonance for me, as a native of Manchester and Salford."

"Peterloo" is a play on Waterloo, the triumph of the British over Napoleon's troops on the battlefield, which had occurred four years previously. Peterloo involved the assembly of a large crowd of citizens at St Peter's Field in Manchester. They had turned out to hear the radical orator Henry Hunt at a rally to demand significant reform of Parliament, so that it might better represent the population. The rally was peaceful and aimed to address the serious poverty in the region – considered to have been exacerbated by the disastrous Corn Laws – and a "democratic deficit" in a Britain that allowed fewer than two per cent of the population to vote. The crowd that gathered was reported to have conducted itself with dignity and to have turned out in its Sunday best. Hunt climbed onto a simple cart which served as his platform and gazed out at banners which proclaimed: "REFORM, EQUAL REPRESENTATION, and one, most hopefully –LOVE." Many of the banner poles were topped with the red cap of liberty, a powerful bond for reformers and engaged citizens in that era.

However, local magistrates peering out a window from a building near the field panicked at the size of the crowd, and proceeded without any notice to read the *Riot Act*, ordering the assembled listeners to disperse. It would almost certainly have been the case that only a very few would have heard the magistrates. The official "guardians of the peace" then promptly directed the local Yeomanry to arrest the speakers. The Yeomanry might be described as a kind of paramilitary force with no training in crowd control and little in the way of proper discipline. On horseback, they charged into the crowd, and pierced the air with cutlasses and clubs. It was known that they held serious grudges against some of the leading protesters (in one instance, spotting a reporter from the *Manchester Observer*, a radical newspaper, an officer cried out "there's Saxton, damn him, run him through!) Many in the crowd

believed the troops had drunk heavily in the lead-up to the assault. In the melee, 600 Hussars, who had initially been held in reserve, were ordered to attack. Thus, we have a powerful military force savagely attacking unarmed civilians, with brutal consequences. The event ushered in a series of draconian laws that further restricted the liberties of the population. The government of Lord Liverpool backed up the public officials and the actions of the troops and was adamantly unwilling to apologize for the appalling violence.

The populace did not decline into apathy, however. A large public outcry ensued, and an effort was made by various reformers to document the truth of what had occurred in the center of Manchester on that fateful day. Peterloo led directly to the formation of one of Britain's leading progressive newspapers, down to the present day, the *Manchester Guardian* (now the *Guardian*).

The Romantic poet, critic, publisher and journalist of the era, Leigh Hunt, wrote a thorough denunciation of the massacre in the *Examiner.* Hunt was a friend and critical supporter of John Keats, Lord Byron and Percy Bysshe Shelley, three of the greatest poets in the language. Hunt considered the assault on the peaceful assembly as, in essence, an attack upon Britain's unwritten constitution, supported by and encouraged by a government whose goal was to usurp the legitimate rights and powers of ordinary citizens. Shelley would have read Hunt's account from his home in political and financial exile, Italy, where he lived with the great Romantic novelist Mary Shelley.

Drawing on certain of Hunt's key allegations and themes, Shelley composed a truly impressive political poem, *The Mask of Anarchy*. Unfortunately, although it was composed the year of the catastrophe, it had to await a lengthy delay before publication, in 1832, due to its incendiary qualities. By that time Shelley had been long dead, having perished in perhaps the most famous boating tragedy in literary history. The title of the poem is likely taken from a key passage in Hunt's article, where he calls the government "the seat-selling violators of the British Constitution," who are "men in the brazen masks of power." Shelley describes the manner of composition as pouring out his words in a torrent of indignation. The title hence alludes to a key theme – power in England involved a corrupt alliance, of Church, King and Government. The poem refers directly to two key government ministers, Sidmouth and Castlereagh, who direct activities contrary to the rights of the people. The poem's verse form of tetrameter couplets and triplets was based, interestingly, on the popular ballad form of the day. Many of Shelley's poems employed high diction and a refined, philosophical approach but this "ballad-poem" is clearly directed at the gut of what he had hoped would be a wide readership. The gross injustice perpetrated by the authorities presaged dark times ahead, as the poet readily deduced.

The second stanza provided some of the flavour and incantatory quality of the poem:

> *I met Murder on the way-*
> *He had a mask like Castlereagh –*
> *Very smooth he looked, yet grim;*
> *Seven blood hounds followed him: (this line refers to the seven countries that England was quite*

prepared to allow to continue in the slave trade, as part of the agreement concluding the Napoleonic Wars).

Among the powerful forces of darkness that Shelley perceives to have struck a blow against the lives and liberty of the Manchester crowd are lawyers and magistrates. In the second half of the poem we are introduced to the female "Shape" that represents the forces of freedom and equality that the poet trusts will some day prevail (and who introduces "Hope" to the multitude).

He announces:

Thou art justice – ne'er for gold
May the righteous laws be sold,
As laws are in England – thou
Shield's alike the high and low.

The Mask of Anarchy contains not only a series of brilliant images and historical and philosophical insights, but reveals that Shelley was a close follower of the contemporary legal and political scene. He would remain an advocate for serious reform for the rest of his life. Shelley would come to serve as a prophetic voice and inspiration to those, like the Chartists, who created significant movements for peaceful reform.

Whatever Happened to … Lac Minerals v. International Corona Resources

Posted By: *Peter Bowal*

Introduction

We expect people to show good faith and fairness to each other. Corporate morality, on the other hand, is harder to put into law. Corporations, whose primary purpose is profit maximization, seek any advantage to gain on their competitors. Where does the law draw the line? In 1989, the case of Lac Minerals Ltd. (Lac) and International Corona Resources Ltd. (Corona) began to answer that in the context of the misuse of confidential information.

Facts

In 1980, David Bell was a geologist with Corona, a junior mining company incorporated and publicly listed only one year earlier. He conducted assays on land owned by Mrs. Williams in the Hemlo area of Northern Ontario. He published some of the results in news releases and newsletters. Lac, a senior mining company in Vancouver, saw the published results and arranged with Corona to view the property on May 6, 1981. Lac was shown detailed confidential documents such as geological findings and maps, assay results, area geology, drilling plans and the potential of large gold reserves over a large area. No confidentiality measures were discussed at this meeting. Lac advised Corona to pursue the Williams property.

After the meeting, Lac conducted additional research on the Williams and adjacent properties. They obtained more government maps, reports, publications and assessments for the area. Lac geologists determined that about 600 claims should be staked in the area and immediately began staking claims.

Two days after the first meeting, Corona managers met at Lac's head office in Toronto. The geology of the area was further discussed along with potential high level terms of an agreement between the two companies. Adjacent lands and strategies were also discussed. Lac followed up with a letter describing various options on how Lac could partner with Corona to exploit the resources on Corona's land. Lac was already staking rights in the area and was aware of Corona's financial limitations. It welcomed Corona in the overall exploration strategy and proposed collaborating with Corona on this project. Lac would finance it, and create a subsidiary to form a joint venture with Corona to develop the property.

While these discussions were ongoing, further assay results were published. Corona never imposed confidentiality on the information it was sharing with Lac. Likewise, Lac never said it would not purchase the property.

Corona approached Mrs. Williams to acquire the property on June 8, 1981. After a June 30 meeting, Corona left more confidential documents at Lac's office. In the end, Lac and Corona did not come to terms regarding the property because Lac was pursuing the Williams aggressively. Using confidential information it had received from Corona on the assumption that a longer term joint venture would be formed, it independently made a richer offer, which Mrs. Williams accepted on August 25, 1981. Lac did not inform Corona that it was quietly bidding on the Williams property. After the momentum had shifted to Lac, negotiations between the two companies to establish a joint venture failed.

Corona had carried out an extensive exploration program. It had shared its favourable findings with Lac who used it for its own corporate gain to Corona's detriment. When Corona discovered Lac had won the project, it filed a lawsuit, alleging breaches of contract, confidence and fiduciary duty.

In the Supreme Court of Canada

Lac had spent about $204 million to develop the mine, but by the beginning of 1986, the Williams property was estimated to be worth $700,000,000. This would rise to $2 billion by 1994.

The five-person Court was divided [*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 http://canlii.ca/t/1ft3w]. Three judges found a fiduciary relationship had not been created but all judges found a breach of confidence by Lac. Breach of confidence protects private information that is confidential in nature, disclosed in confidence and is misused to the detriment of the discloser. In this case, the additional material private information was valuable to evaluate the property. It was shared by Corona under the assumption that there would be a business arrangement or joint venture between the two companies in the future. Lac had exploited this confidential information for its own gain, at the expense of Corona.

As for the legal remedy, the judges discussed whether it should be in the form of property or damages. Three judges imposed a constructive trust on Lac for the benefit of Corona, which was essentially to give Corona the mine.

Where are the Parties Now?

This case had a huge impact on both mining companies. On the day of the judicial decision, the shares of Lac fell by 50%, and Corona stock rose by 80%.

The Williams mine in Hemlo became Canada's top gold producer. In the first quarter of 1990, the mine produced more than 151,000 ounces of gold. Three mines eventually arose from the Hemlo lands and total production was 1,058,000 ounces of gold.

Corona thrived. It joined with Teck Corp which took a 50% stake in the Williams land. In 1992, Corona was purchased by Homestake Mining Company.

Weakened financially by comparison, Lac was acquired in 1994 by Barrick Gold.

Ironically, Barrick Gold, after it took over Lac, also eventually acquired Corona by merging with Homestake in 2001 to become the largest gold mining company in the world.

Conclusion

Fiduciary duty and confidentiality must be taken seriously when negotiating business transactions.

This article is co-authored by Peter Bowal, Christopher Tang and Vincenzina Enza Rosi.