Mar/Apr 2016 Green Cities Calls to Action LARBs and CARBs

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# Municipal Law and the Environment

# 40-4: Municipal Law and the Environment


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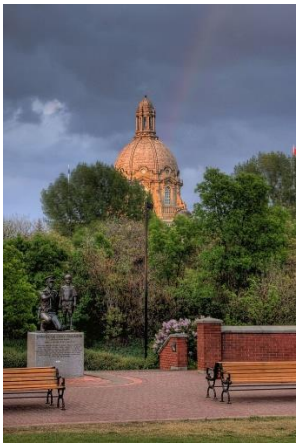
# Unleashing the Environmental Power of Municipalities: Recommendations to Strengthen Alberta's *Municipal Government Act*

Posted By: *Brenda Heenan Powell*



***Credit: WinterforceMedia***

Municipalities play a key role in the management and protection of Alberta's environment. This occurs through regulation of private land uses and through local land use planning. Municipalities can also direct local changes that reduce the trajectory of greenhouse gas (GHG) emissions and create resilient communities that can adapt to the changes caused by climate change.

However, the environmental management and protection role played by municipalities could be enhanced with legislative changes. Changes should be made to clarify municipal purposes and to create a specific bylaw power allowing municipalities to address environmental matters. As well, changes should be made to expand the currently limited range of enforcement tools and revenue powers available to municipalities. Finally, public participation opportunities in municipal decision-making can be improved with legislative changes.

## *Municipal Government Act* Review

In Alberta, the powers and activities of municipalities are governed by the *Municipal Government Act* (the "*MGA*"). Over the past couple of years, the Alberta government has been reviewing the *MGA* (as well as negotiating City Charters with the municipalities of Edmonton and Calgary). Consultations on the *MGA* commenced in January 2013 (review details can be found on the *MGA* Review website).

Following the review process, some changes to the *MGA* were made with the introduction and passage of *Bill 20: Municipal Government Amendment Act* in March 2015. The most significant of these changes are provisions enabling the creation of City Charters which may modify or make inapplicable specific provisions of the *MGA* to Charter Cities. As well, a City Charter may enable a Charter City to modify or replace provisions of the *MGA* via bylaw. In addition, there were minor changes to provisions dealing

with assessment of property definitions, general taxation provisions, local improvement taxes, and off-site levies.

A second amendment bill is expected this spring (see the government's Next Steps website). The government has indicated that its priorities for the updated *MGA* are:

- strengthened provincial-municipal relations;
- greater regional collaboration;
- more sustainable and inclusive development;
- further responsibility for land use and environmental conservation; and
- increased fairness and consistency for Alberta taxpayers.

Given that the current *MGA* does little to expressly require or to **empower** municipalities to manage and protect the local environment, it is encouraging that the government has chosen **sustainable and inclusive development** and **increased municipal responsibility for land use and environmental conservation** as two of its priority areas.

## Empowering Municipalities for Environmental Management and Protection

The Environmental Law Centre has made several recommendations to strengthen the *MGA* (see our recommendations here). The goal of our recommendations is to make environmental management and protection key priorities in the activities of municipalities. These recommendations fall into several broad categories:

### 1. Protection and management of the environment is a valid municipal purpose and, as such, should be expressly recognized in the *MGA.*

We recommend that the definitions of environment and sustainability be incorporated into the *MGA*, and that environmental protection and management be expressly included as municipal purposes. It is our view that expressly granting municipalities clear legislative guidance and authority for dealing with environmental matters will enhance the provincial approach to regional land use planning under the *Alberta Land Stewardship Act* ("*ALSA*").

### 2. The *MGA* should incorporate by-law purposes specific to protection and management of the environment.

We recommend that the bylaw powers granted in the *MGA* be expanded to include environmental protection (rather than depending on less direct, general welfare provisions). It is the ELC's view that this will provide clarity and guidance about the municipal role in environmental protection and management.

### 3. The *MGA* should expand the enforcement tools available to municipalities for the purposes of environmental protection and management.

It is our view that current enforcement tools available to municipalities are insufficient for achieving environmental protection and management. We recommend improving enforcement by establishing enforcement tools similar to those available in the *Environmental Protection and Enhancement Act* and aligning available municipal tools with the *ALSA*.

### 4. The *MGA* should expand the revenue generation options available to municipalities to enable environmental stewardship and, particularly, land conservation.

Insufficient funding impairs the ability of municipalities – both large and small – to fulfill their roles, even where municipal powers are otherwise sufficient. We recommend that the *MGA* be amended to enable directed revenue for environmental initiatives.

### 5. The *MGA* should enhance opportunities for public participation in municipal planning processes.

It is our view that current opportunities for public participation in municipal planning and decision-making are too limited. Early, meaningful engagement of the public in decision-making leads to processes better decisions and, accordingly, we recommend that the *MGA* be amended to improve public participation opportunities.

## Municipalities and Climate Change

Given their authority over local matters such as planning, transportation, and waste management, municipalities can play an essential role in reducing the trajectory of GHG emissions and creating resilient communities that can adapt to the changes caused by climate change.

In recognition of this important role, local and regional leaders from around the world gathered during the recent United Nations Framework Convention on Climate Change (UNFCCC)'s 21st Conference of the Parties (COP 21) Climate Change meetings in Paris. In the resulting report – Adapt. Curb. Engage. 21 Solutions to Protect our Shared Planet (Sommet des élus locaux pour le climat, 4 Décembre 2015) – numerous local climate change solutions were identified. These solutions can be broadly categorized into the development of resilience strategies and action plans, implementation of local low-emission solutions, and engagement in partnerships to work with the public, other governments, and industry.

Certain changes to the *MGA* would empower municipalities to take greater action on climate change using solutions such as those identified in the COP 21 Municipal Report. For example, implementation of local low-emission solutions focused on buildings could be facilitated by the following changes:

- The *MGA* should be amended to allow municipalities to impose minimum energy requirements and minimum renewable energy standards above and beyond those imposed by the building codes adopted in the *Safety Codes Act, R.S.A. 2000, S-1*. This would enable municipalities to set high standards for buildings within their borders, including retrofitting of existing, inefficient buildings.
- The *MGA* should expand the revenue generation options available to municipalities to enable the use of creative financing tools (such as loans repaid through property taxes or utility bills) to encourage adoption of more energy efficient or renewable energy technologies on a residential basis. Currently, municipalities are restricted as to who they can loan money and as to the purposes for which taxes can be levied.

Other important local low-emission solutions include those focused on transportation (such as redesign of traffic flows and reconfiguring urban development) and the use of green spaces. Solutions such as these can be facilitated by expressly incorporating environmental protection and management into the *MGA* planning provisions and by expressly allowing bylaws for environmental purposes.

# Municipalities Leading the Way on Environmentalism

Posted By: *Ben Henderson*

Canada's municipalities, already leaders in effective environmental action, stand poised to accomplish even more: to reduce the consumption of energy and water, and to emit less pollution, for example—while delivering the same quality and quantity of services to residents.

During the next decade, how we build, manage and renew our cities and communities will be critical to establishing a greener economy—an economy built on climate change mitigation and community resilience. Local governments own and operate almost 60 per cent of Canada's infrastructure: transportation networks; public buildings; and water, wastewater and waste systems. Local governments have direct or indirect influence over nearly 50 per cent of all emissions of greenhouse gas in Canada.

Infrastructure is designed and built to last for many decades. So the infrastructure decisions made today will influence resource use, pollution generation and climate vulnerability for years to come. To create a more resilient and low-carbon economy depends, in large part, on the capacity of municipalities to make sound planning and investment decisions, and to strike a proper balance between financial, social and environmental considerations.

As someone who's devoted a significant part of my career to the municipal sector—including eight years and counting as a City of Edmonton councillor—I know the challenges municipalities face all too well. Municipal budgets are tight. Technologies that reduce pollution and consumption typically save money over the long term, but sometimes cost more up front. Furthermore, many green technologies are relatively new, while municipalities tend to be risk-averse. As a result, municipalities may be tempted to follow a familiar but less-sustainable approach.

In 2000, the tide began to change with the inception of the Green Municipal Fund (GMF). Established by the Federation of Canadian Municipalities (FCM) and endowed with a total of $500 million in federal funding—and an additional $50 million for grants—GMF is a program that partners with municipalities

across the country. The program is equal parts lender, money manager, project analyst and teacher. It extends loans at competitive rates to municipalities for capital projects. The program also provides grants to help fund eligible tests, studies and plans. And most importantly, GMF analyzes the outcomes of all funded activities and shares the lessons learned to help other municipalities replicate successful projects.

The results have been nothing short of remarkable: significant reductions in the consumption of energy and water, and in air pollution and waste; volumes of research and case studies on what works, what doesn't and why; and numerous innovations studied, tested and refined, and the best ones replicated in other municipalities.

FCM is also an astute manager of public money: the initial GMF endowment of $500 million carried a value of $596 million on March 31, 2015. This performance is even more impressive during an extended era of limited returns from capital markets and given the fact that FCM has approved more than $700 million worth of GMF funding. Since GMF's inception, FCM has invested in 119 capital projects and 772 plans, studies and tests in close to 500 communities across Canada.

A few examples illustrate the effectiveness of GMF. Former industrial sites (known as brownfields) represent particular problems for municipalities because the hazardous materials that some contain often make redevelopment too risky to undertake. The site of a former gas station and garage in Edmonton sat empty for years until the City partnered with FCM and Icon Fox Developments Ltd. on a plan to remediate and revitalize the land. The plan involves the construction of two mixed-use high-rise towers in the heart of downtown near a transit station. People began to move into the first tower in August, 2016. The second tower will be ready for occupancy in 2017.

Through GMF, FCM is helping the Town of Drayton Valley to study the feasibility of building one of the world's most energy-efficient aquatic facilities. The idea is to combine and integrate multiple green technologies; eventually, the building would become a source of renewable energy. Part of what makes the project exciting is that it addresses a difficult problem many municipalities face: developing and operating recreational facilities in a sustainable, cost-effective manner.
Another FCM-supported project promises to push the envelope on waste management. For the next 25 years, Edmonton's non-recyclable and non-compostable solid waste will be used to produce biofuels under an agreement with Enerkem. Rather than going to landfill, the solid waste will be transformed into methanol and ethanol—up to 36 million litres of per year. FCM helped fund the two feasibility studies that informed the project's design. The project will enable Edmonton to preserve and sustain the environment and diversify its economy.

FCM also helps municipalities in other ways. Partners for Climate Protection (PCP), for instance, is a program that enables municipalities to reduce their emissions of greenhouse gas. Calgary's membership in PCP enabled it to reduce its 2013 emissions to a level 41 per cent below the level of its 2005 emissions. And Calgary continues to improve its performance. Last year, GMF also set a new standard for municipal collaboration with the launch of LAMP, the Leadership in Asset Management Program.

Under LAMP, municipalities work side-by-side to plan, develop and manage infrastructure in a more sustainable manner.

By continually reviewing, analyzing and updating its GMF offerings and processes, FCM fosters the success of innovative sustainability projects, and the ongoing evolution of the municipal sustainability sector. The ultimate goal is to help Canada meet its larger environmental goals by transforming what was once considered innovative into the new business as usual. Given the remarkable effectiveness of GMF's operating model, municipalities will continue to lead the way on environmental action.

# In Praise of Urban Forests

Posted By: *Michael Rosen*

***Credit: Johntwrl at English Wikipedia***

I applaud the Glenora Conservation Association and the City of Edmonton in their ongoing attempts to protect and save Edmonton's mature tree canopy. It is clear there is a desire to balance the needs of new homeowners, and protect the trees. As the president of Tree Canada, Canada's only national, not-for-profit dedicated to greening communities, I work with communities, provinces and even the federal government to help create, grow and protect urban forests. Urban forests should be a priority at every level of government. Trees are crucial to human health, and to the health of our communities and planet. They provide shade, clean the air we breathe, help minimize flooding, sequester carbon and contribute to our physical and mental well-being. Alberta's urban forests are under attack from more than just infill projects, climate change or the use of street salt in winter. Whether it is the mountain pine beetle attacks in Grande Prairie, flooding and snowstorms in Calgary; the eradication of elms in the Prairies (outside Alberta) from Dutch elm disease; or the destruction of ash trees in Eastern Canada from emerald ash borer, our urban forests are at risk. Dialogue like what is happening between Edmonton city councillors and conservation groups gives me hope that urban forests will be treated like the important resource they are. Tree Canada has been working with the Alberta government and private sector partners for many years. We are optimistic the new Alberta government will consider joining B.C., Ontario and Quebec in introducing legislation to enable municipalities to protect their trees. We look forward to seeing how we can revitalize, protect and nurture Edmonton's (and Alberta's) urban forests.

Michael Rosen, President of Tree Canada
www,treecanada.ca

***First printed in the August 31, 2015 letters to the Edmonton Journal Re: "Protect city's mature trees, activists urge," Aug. 19 and is reprinted with the author's permission.***

# Common Neighbourhood Disputes and Solutions

Posted By: *Melanie Webber*

Most Albertans live with neighbours and although we may not always think about it, they can have a huge impact on our daily lives. Living nearby so many different people can often result in disputes. Here are some common problems and what you can do to address them, without heading to court.

## Neighbours Aren't Clearing Their Snow?

Snow and ice can make a beautiful winter, but can also create dangers in residential areas. Uncleared sidewalks and pathways are not only dangerous for people walking by your home, but are also challenging for people who deliver services in your city.

If you live in Edmonton and your neighbours fail to clear their snow, the first thing you should do is contact them. You may want to offer to help them keep their sidewalk clear and consider whether your neighbour has a limited ability to move the snow. If you cannot solve the dispute with your neighbour directly, record their address and a description of the problem to report to the City.

However, there are a few rules about reporting your snow concerns to the City that you should be aware of. Your neighbours have 48 hours after it has stopped snowing to clear their sidewalks and pathways. If the snowfall has not stopped for a full 48 hours, your complaint will not be accepted. In addition, your complaints will only be accepted between November 1 and May 1 of each year. If your complaint is received, and your neighbour still fails to clear their sidewalk or pathway, they may be fined $100.

Calgary bylaws set out a similar set of rules. Your neighbours are responsible for removing snow and ice from pathways and sidewalks near their property, but you should also consider addressing any problems with your neighbour directly and offer to help them remove snow. After the snowfall has stopped, your

neighbours have 24 hours to clear their sidewalks and pathways before you can file a complaint. When a complaint is received, the City will notify your neighbour. They then have another 24 hours to clear the snow and ice. If they fail to do so, then the City may remove the snow and ice and charge the cost to your neighbour.

## Noisy Neighbours?

This common problem can arise in a number of ways – someone has a dog that never quits barking, your neighbour hosts noisy parties, or uses a lawn mower at 6 a.m. on Saturdays. Luckily, both Calgary and Edmonton have bylaws that regulate noise that disturbs your peace or affects your health and safety.

If you live in Edmonton, first try discussing your concern about noise with your neighbour. If that does not resolve the situation, you can then contact the City to address the problem. Excessive noise is prohibited between 10 p.m and 7 a.m.

If you live in Calgary, excessive noise in residential areas is prohibited between 10 p.m. and 7 a.m. on weekdays and 10 p.m. and 9 a.m. on weekends. If someone is making noise outside of those hours, they may be fined up to $200 dollars. If your neighbour is hosting a noisy party, or if you suspect that noise is resulting from criminal activity, you can contact the Calgary Police Service at 403-266-1234.

If you are being disturbed by excessive noise from vehicles or motorcycles, and live in Edmonton, you can contact the Edmonton Police Service at 780-423-4567. If you are being disturbed by a noise infraction from excessive noise from vehicles or motorcycles in a public place in Calgary, you can contact the Calgary Police Service. If you are being disturbed by vehicle noise from a private property in Calgary, you can call 311.

If you are being disturbed by a barking dog in Edmonton, you can call 311 to report the disturbance. An officer may consider the duration of the barking, the time of day and week, and any effect of the barking. An officer has authority to issue a $100 fine for the disturbance. If you live in Calgary and your neighbour has a noisy dog, you can call 311 to file a complaint. The owner will then be notified, and you will be sent a log sheet to record the barking that disturbs you. When you return the log sheet, a bylaw officer will contact your neighbour to address the issue.

## Messy Front Yards & Garbage?

No one likes looking at garbage around their property or on their neighbour’s front lawn, and cleanliness and safety are important in Calgary and Edmonton.

If you live in Edmonton and your neighbour is leaving garbage out, contact them directly, and remind them that they are responsible for ensuring that scavengers do not open their garbage and that it remains in waste bins with lids. Yards must be maintained to a reasonable standard, and your neighbours are responsible for the upkeep of their property, as per the Community Standards Bylaw.

If you live in Calgary, your neighbours are also responsible for keeping their garbage contained in the city-provided garbage containers with lids, and for maintaining their property in a tidy condition. If using garbage bags instead of bins, your neighbour is responsible for ensuring that the bags are watertight and securely tied, and that the collector's access to the bins or bags is not blocked. Tidy yards are also required by Calgary bylaws.

In each of these possible situations, you should always try to work out the problem with your neighbour first. If that fails, the next step is to file a complaint: record the address of your neighbour and a description of the problem. Then, call 311 in either city, and be prepared to give your name, address, and contact information. When you file a complaint, a bylaw or peace officer will likely be sent to your area to address the problem. The seriousness of the infraction will determine how quickly your complaint will be dealt with. Most neighbourhood disputes can be dealt with through good communication and city support.

# The Municipal Government Board

Posted By: *Peter Bowal*


*The Municipal Government Board shall provide timely, independent, quasi-judicial appeal adjudication to all parties in the areas of assessment matters, planning, subdivision appeals, inter-municipal disputes and annexation recommendations, that yields fairness and equity consistent with the authority of the Municipal Government Act.*

*Mission Statement*, Municipal Government Board

## Introduction

In Alberta, hundreds of administrative agencies, boards and commissions implement legislation and adjudicate rights and responsibilities of private parties (individuals and companies) under that legislation. One of the least known, but busiest boards in this administrative process, is the Municipal Government Board (MGB) [http://www.municipalaffairs.alberta.ca/municipal-government-board].

This article describes the MGB's varied range of work. In the interests of transparency, I will also disclose that I have been a member of the MGB for one year.

## Municipal Matters

As the name suggests, the MGB deals with issues that relate to municipalities, which are regional zones. Municipalities may be cities, rural counties or a mix of both. Under our constitutional system, municipalities come within the legal jurisdiction of the provinces in which they are located.

The provinces delegate certain powers to municipalities, such as the provision of essential services like police and fire protection, water, sewers, roads, garbage collection and some social services. Municipalities also control land use planning and development, noise, pets, business licensing, public transportation (if any), libraries and recreational facilities such as parks and sports complexes. In order to pay for these services and facilities, the municipality must levy fees and collect taxes, mostly on developed real estate. Municipal government is also called "local government" because it is the government closest to people and their daily lives.

# Legislative Framework

All administrative agencies that implement legislation and make decisions are created and empowered by that same legislation. In the case of the MGB, the legislation is the *Municipal Government Act* [RSA 2000, c M-26, http://canlii.ca/t/52gtf]. Part 12 (sections 485 to 527.1) establishes the MGB, but it is also governed by several regulations, guidelines and policies.

The MGB is a relatively new quasi-judicial board that is the amalgamation of the former Alberta Assessment Appeal Board, the Alberta Planning Board and the Local Authorities Board. Today, while the Minister of Municipal Affairs may still assign the MGB specific tasks, its main adjudication is divided between planning functions and assessment functions.

# Planning Functions

Planning refers to how communities are organized. Well-planned districts work better and are more attractive places in which to live. Subdivision is the process of breaking a larger parcel of usually undeveloped land into smaller parcels. This has the effect of increasing density on that land. Municipal subdivision decisions may be appealed to the MGB where the land being subdivided is near a body of water, a highway, landfill, a Green Area or a waste treatment or storage site.

A municipality may want to "annex" or incorporate more neighbouring land (from other municipalities) to its territory to accommodate growth and development. Appeals from annexation decisions are also heard by the MGB which will make a recommendation to the Minister.

Inter-municipal disputes may arise where one municipality considers itself to be adversely affected by the actions (such as certain land development) of another neighbouring municipality. As in the interests of all good neighbourly relations, a referee occasionally needs to be called in. The MGB is the referee between municipalities.

# Assessment Functions

Property assessment appeals comprise over 90% of the MGB work. Individual residential property tax appeals are conducted by Local Assessment Review Boards (LARBs) in each municipality. However, the MGB provides all Presiding Officers to the appeals of municipal tax assessments of commercial and multi-residential property. These are referred to as Composite Assessment Review Boards (CARBs).

The Chair of each CARB is a member of the MGB. The Chair not only presides at the hearing, but also ensures the written decision is rendered within 30 days of the end of the appeal hearing. This commercial property assessment appeal work takes place during the last half of each calendar year.

Municipal government is also called "local government" because it is the government closest to people and their daily lives.Each year there are more CARB appeals than LARB appeals. In each of the last few years in the municipality of Calgary alone, there were about 1700 LARB appeals and some 2000 CARB

appeals heard and decided. Because property tax assessment is a complicated technical subject, MGB members must all take and pass a provincial assessment principles course.

A much smaller appeal function relates to the assessment of pipelines, electrical power plants, oil and gas wells, and telecommunication systems. These installations are called linear property and any assessed person or municipality can appeal those assessments.

Not all municipalities enjoy the same tax base. There is a provincial program where the proportional tax and grant revenue is equalized by the Minister between wealthier and poorer municipalities. Municipalities can also appeal those equalized assessments to the MGB.

The MGB also makes recommendations to the Minister about disaster recovery and financial assistance programs and applications.

## Composition of the MGB

The MGB consists of a full time Chair and approximately 53 part-time board members from across the province, supported by about 20 staff in an Edmonton office. Board members are often former municipal leaders, appraisers, administrators, planners, accountants, engineers, assessors, real estate agents or developers, or lawyers. They are experienced, knowledgeable and many have professional accreditations in these subject areas.

Appointments are made by the provincial cabinet through Orders-in-Council for terms up to three years with the possibility of renewal for a total of twelve years. Prospective candidates must write reasons for a sample appeal before being selected for an interview. Again, most of the MGB workload – appeals of commercial assessments – falls into the last half of each calendar year.

# Era of Reconciliation: A Sacred Relationship

Posted By: *Troy Hunter*

The truth be told, Canada's dealing with its Indigenous populations has a dismal historical record. The Truth and Reconciliation Commission has faced this issue head on. In its report, it states:

> *Residential schooling was only a part of the colonization of Aboriginal people. The policy of colonization suppressed Aboriginal culture and languages, disrupted Aboriginal government, destroyed Aboriginal economies, and confined Aboriginal people to marginal and often unproductive land. When that policy resulted in hunger, disease, and poverty, the federal government failed to meet its obligations to Aboriginal people. That policy was dedicated to eliminating Aboriginal peoples as distinct political and cultural entities and must be described for what it was: a policy of cultural genocide.*

Justin Trudeau was true in form and spirit to attend personally at the Truth and Reconciliation Commission "handing over" ceremony. Moreover, his mandate letters to his newly appointed Ministers as well as his public commitment make clear that all 94 of the recommendations are to be implemented and that the first order of business is implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.

Honourable Prime Minister Justin Trudeau stated on APTN national television on 15 October 2015, that, "As a first order of business the Liberal Party of Canada in government will implement the *United Nations Declaration on Indigenous Rights.*" He also said in his victory speech, "You want a Prime Minister that knows that a renewed nation-to-nation relationship with Indigenous peoples that respects rights and honours treaties must be the basis for how we work to close the gap and walk forward together". This walking forward together is like the two-row wampum: two canoes going in the same direction, side by side, that is what our nation-to-nation relationship needs to be.

There are two aspects to the work of the Truth and Reconciliation Commission. First, the Truth aspect acknowledges the past: it is the facts, it is what is in the Report, it is the history and it is what it is.

Nothing can change our past. The second aspect is Reconciliation going forward. Reconciliation has often been suggested by the courts in Aboriginal title litigation. At times like these, the words of the late Chief Justice Antonio Lamer of the Supreme Court of Canada are recalled when he said in the *Delgamuukw* case:

> *… Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve … a basic purpose of s. 35(1) — "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.*

The direction from the courts is to negotiate instead of litigate. It is this second aspect in which the work must begin, it is what stands before all of us now.

There is one thing that is certain now: Canada is at a turning point. The official stance now is that we are on a nation to nation basis: i.e. Canada and First Nations. It is indicative of a partnership, it is indicative of the vision of the two-row wampum, it is indicative of the kind of vision that the Indian chiefs had in 1911 when they wrote to then Prime Minister, Sir Wilfred Laurier.

What is often referred to as the "Memorial to Sir Wilfred Laurier" is basically a petition letter signed by many of the chiefs of British Columbia, in unity, in seeking reconciliation, in seeking what was originally always said to them when the land became colonized, and that is we will share the land equally:

> *These people wish to be partners with us in our country. We must, therefore, be the same as brothers to them, and live as one family. We will share equally in everything—half and half—in land, water and timber, etc. What is ours will be theirs, and what is theirs will be ours. We will help each other to be great and good.*

While Prime Minister Laurier pledged to help the Indians, the petition letter delivered to him was never fulfilled because Sir Wilfred Laurier wasn't re-elected the following year. Instead of Canada embarking upon a path of reconciliation, it went further into a dark time for its Indigenous peoples with policies that stripped the Indian out of Indigenous children, stripped the Indian of freedoms, stripped the Indian with harsh cultural genocide.

Residential schools were the way of the 20th century for Indian children. Indians were practically confined to Indian reservations and the wealth of their forefathers, the freedom of the lands their ancestors fought for, was taken away. Promises had been made, treaties were set out, but the powers that be did not want to share the wealth with its Indigenous populations. Instead of building alliances and a true partnership with the original inhabitants, laws were put into place including the outlawing of sun dancing and the practice of holding potlatches. Indian culture was suppressed and Indian residential schools were designed to eradicate Indian spiritual and cultural practices.

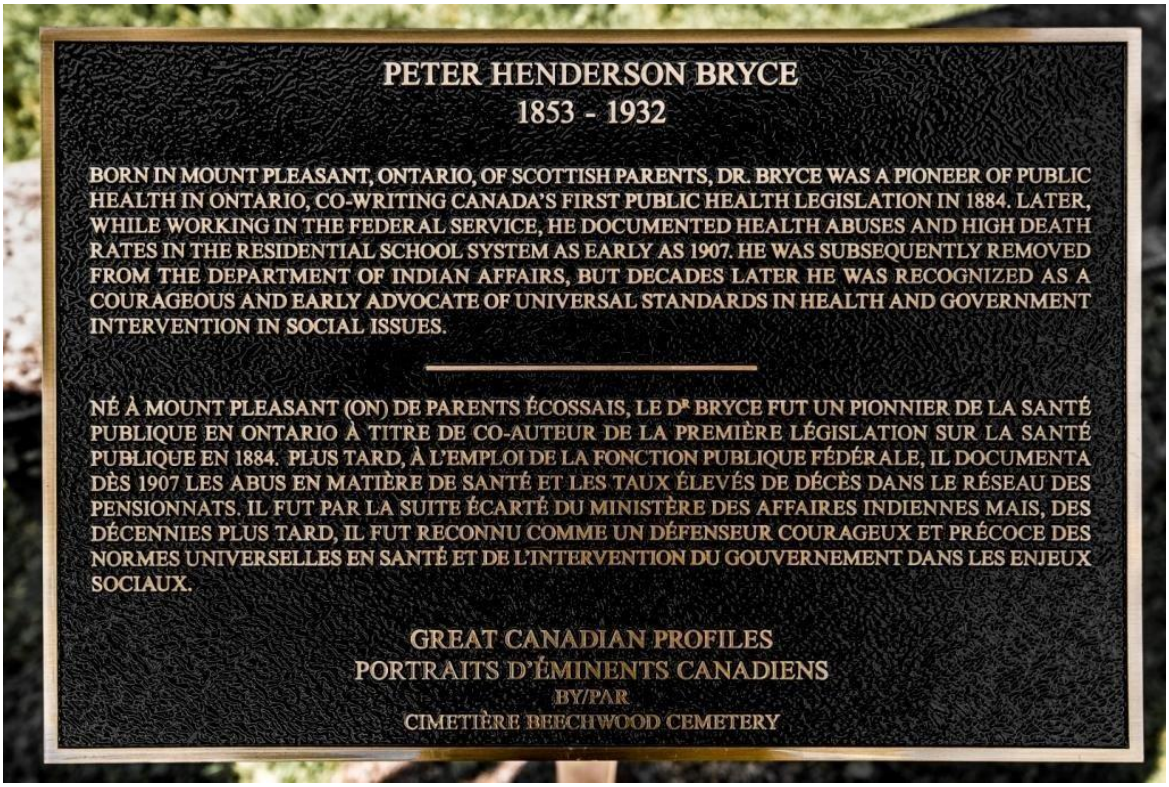
The legacy of residential schools has both its good and bad. Indian children learned to read and write in English, they became literate. In some schools, known as industrial schools, Indian children learned things such as farming and cultivation, sewing clothes, making shoes, raising livestock, etc. The negative aspects: loss of Indigenous language, culture and spiritual practices; loss of family and parenting skills; and rampant physical, sexual, verbal and emotional abuse. There are countless stories of what happened to the children, and stories of missing records of what happened. Some children never returned to their home communities. They simply vanished, like the many missing and murdered indigenous women in Canada. The legacy of the residential schools survives from generation to generation in dysfunctional families, communities and individuals.

The policy of the government and the residential schools was to put the Indian people into a second-class of citizenship. In fact, Indians were not allowed to hire lawyers to fight for their rights, they were not allowed to own or pre-empt land, they could not vote. Those are the laws and policies of the 20th century. They are directly responsible for the plight of the red man. They are also responsible for attitudes of non-Indigenous peoples who think that Indians have a free ride, they don't pay taxes, everything is given to them based on the tax dollars that they work hard to pay, that Indians are alcoholics, drug addicts, basically bums that have no place in society except at the bottom of the "totem" pole. They are the low class, the second-class, those that don't matter. Indians' lives can be taken away: the hitchhiking Indian women that are never to be seen again or the sex workers who lost their lives due to inefficient police investigations and serial murderers.

As we are now in the era of reconciliation, there must be major change. The light on the horizon is because of the newly elected Prime Minister Justin Trudeau; it is because of the work of the Truth and Reconciliation Commission; it is because there is hope. As we move into the 21st century, with a new government and a new mandate, we have now entered into the Era of Reconciliation. Reconciliation is a matter of give and take; to come to consensus about what is right and proper. It is a two-way street. Let us hope and pray that we can all get it right this time, for let's face it, after all, we are all here to stay.

# Indian Residential Schools – A Chronology

Posted By: *John Edmond*




***Beechwood Cemetery Foundation: Great Canadian Profile Plaque***

*This chronology was compiled to convey, by historic milestones, how the Indian Residential School system came to be, how it embodied attitudes of its time, how critics were dismissed, and how finally the deep harm it did to many members of generations of Indian children was exposed in the course of a reconciliation process that continues. While Canada is doing its best to compensate, in many senses, for the failings of the system, much of the damage to individuals, and to First Nations culture, can never be put right.*

**1755** – Indian Department created as branch of British military to establish and maintain relations with Indians.

**1820** – This decade sees Anglican and Methodist missionary schools established in Upper Canada and Red River settlement.

**1842** – Governor General Sir Charles Bagot appoints Commission to report on "the Affairs of the Indians in Canada."

**1844** – Bagot Commission finds reserve communities in a "half-civilized state"; recommends assimilationist policy, including establishment of boarding schools distant from child's community, to

provide training in manual labour and agriculture; portends major shift away from Royal Proclamation of 1763 policy that Indians were autonomous entities under Crown protection.

**1847** – Dr. Adolphus Egerton Ryerson, Methodist minister and educational reformer, commissioned by Assistant Superintendent General of Indian Affairs to study Native education, supports Bagot approach (as does Governor General Lord Elgin); proposes model on which Indian Residential School system was built.

**1856** – "Any hope of raising the Indians … to the … level of their white neighbours, is yet a … distant spark": Governor General Sir Edmund Head's Commission "to Investigate Indian Affairs in Canada."

**1857** – *Gradual Civilization Act* passed; males "sufficiently advanced in the elementary branches of education" could be enfranchised (they would no longer be "Indians," and could vote).

**1861** – St. Mary's Mission Indian Residential School, Mission, and Presbyterian Coqualeetza Indian Residential School, Chilliwack, first residential schools in B.C., established.

**1862** – Blue Quills Indian Residential School (Hospice of St. Joseph / Lac la Biche Boarding School) established at St. Paul, AB; first residential school on the Prairies.

**1867** – Confederation: *British North America Act* (now *Constitution Act, 1867*) establishes federal jurisdiction over Indians. Thus, while education is under provincial jurisdiction, Indian matters including education are federal.

Fort Providence and Fort Resolution Indian Residential Schools established; first residential schools north of 60$^{o}$.

**1871** – Treaty No. 1 entered into at Lower Fort Garry: "Her Majesty agrees to maintain a school on each reserve … whenever the Indians of the reserve should desire it." This promise, repeated in subsequent treaties (though hedged in Treaties No. 5 on), reflected desire of Indian leadership to ensure transition of their youth to demands of anticipated newcomer society.

**1876** – *Indian Act* passed into law by Parliament.

**1879** – Nicholas Flood Davin, journalist and defeated Tory candidate, commissioned by Prime Minister Macdonald, also Minister of the Interior, to produce proposal for Indian education; visits US industrial schools grounded in policy of "aggressive civilization"; produces *Report on Industrial Schools for Indians and Half-Breeds*. Four residential schools already operated in Ontario; "mission schools" planned for the west. This date generally taken to mark beginning of Indian Residential Schools, though the system had early predecessors in New France and New Brunswick, and several schools were already operating.

Duncan Campbell Scott, best known later as a "Confederation poet," joins Indian Affairs at age 17 as "copying clerk," at direction of Macdonald.

**1883** – First industrial school established, at Battleford, modelled on Davin Report.

**1885** – Residential schools necessary to remove children from influence of the home only way "of advancing the Indian in civilization": Lawrence Vankoughnet, Deputy Superintendent General, to Prime Minister Macdonald. Despite treaty promises, reserves lacked schools; removal, often forcible, of pupils to residential schools is option chosen by government.

**1890** – Physician Dr. G. Orton reports to Indian Affairs that tuberculosis in the schools could be reduced by half; measures rejected as "too costly."

**1892** – Regulations passed giving control over daily school administration to churches: Catholic, Anglican, Presbyterian, Methodist. (In 1925, Methodists joined most Presbyterians and others to form United Church, which continued to run schools.)

**1896** – Programme of Studies issued; stresses importance of replacing "native tongue" with English. Children forbidden to speak their native language, even to each other, and punished for doing so. This continued to be the policy for life of the system.

**1904** – Dr. Peter Bryce appointed "Medical Inspector" to the Departments of the Interior and Indian Affairs.

**1904** – Minister Sir Clifford Sifton announces closure of industrial schools – large urban institutions – in favour of boarding schools. They are closed over the next two decades.

**1907** – Dr. Bryce visits 35 schools; reports appallingly unsanitary conditions, micro-organism-bearing ventilation, high death rates; "the almost invariable cause" is tuberculosis.

"The appalling number of deaths among the younger children … brings the Department within unpleasant nearness to the charge of manslaughter": Hon. S.H. Blake, K.C., Chair of Advisory Board on Indian Education (partner in what is now national law firm Blake, Cassels & Graydon), to Minister Frank Oliver.

**1908** – Indian Affairs Accountant F.H. Paget reports school buildings in bad condition.

**1909** – Duncan Campbell Scott appointed Superintendent of Indian Education.

**1910** – The children "catch the disease … in a building … burdened with Tuberculosis Bacilli": Duck Lake Indian Agent MacArthur on the continuing prevalence of tuberculosis.

**1912** – "… in the early days of school administration … [t]he well-known predisposition of Indians to tuberculosis resulted in a very large percentage of deaths among the pupils … fifty percent of the children who passed through these schools did not live to benefit from the education which they had received therein": Scott, in an essay in the authoritative 22-volume *Canada and its Provinces*.

**1913** –Scott appointed Deputy Superintendent General of Indian Affairs (deputy minister), reporting to Minister of the Interior and Superintendent General Dr. William A. Roche.

**1919** – Position of Medical Inspector for Indian Agencies and Residential Schools abolished (in the year of the Spanish 'flu) by order in council on recommendation of Scott "for reasons of economy."

**1920** – "I want to get rid of the Indian problem": D.C. Scott to Parliamentary Committee. A Scott-instigated amendment to the *Indian Act*, with church concurrence, compelled school attendance of all children aged seven to fifteen. Though no particular kind of school was stipulated, Scott favoured residential schooling to eliminate the influences of home and reserve and hasten assimilation.

"I am afraid I cannot give a very encouraging answer to the question. We are not convinced that it is increasing, but it is not decreasing": Prime Minister Arthur Meighen, former Minister of the Interior, on being asked whether tuberculosis was increasing or decreasing amongst the Indians.

**1922** – Dr. Bryce publishes *The Story of a National Crime: Being an Appeal for Justice to the Indians of Canada, the Wards of the Nation, Our Allies in the Revolutionary War, Our Brothers-in-Arms in the Great War*. He charges that, for 1894-1908, within five years of entry 30% to 60% of students had died, an avoidable mortality rate had healthy children not been exposed to children with tuberculosis: A "trail of disease and death has gone on almost unchecked by any serious efforts on the part of the Department of Indian Affairs." His 1907 recommendations on tuberculosis control not given effect, he says, "owing to the active opposition of Mr. D.C. Scott."

**1923** – "Residential Schools" adopted as official term, replacing "boarding" (55) and "industrial" (16), housing 5,347 children.

**1932** – Scott retires as Deputy Superintendent General after more than 52 years in the department. The anthologist John Garvin writes that Scott's "policy of assimilating the Indians had been so much in keeping with the thinking of the time that he was widely praised for his capable administration." He embodied a fundamental contradiction: While a rigid and often heartless bureaucrat, "his sensibilities as a poet [were] saddened by the waning of an ancient culture" (Canadian Encyclopedia).

**1939** – 9,027 children are in 79 residential schools run by Catholic (60%), Anglican (25%), United and Presbyterian churches. "1939 [was] the approximate mid-point of the history of the system": John S. Milloy, *A National Crime*.

**1944** – Consensus develops among senior Indian Affairs officials that integration into provincial systems should replace segregated Aboriginal education.

**1951** – *Indian Act* of 1876, with many amendments, repealed; replaced with modernized I*ndian Act* (today's Act, with amendments) conceptually similar to previous Act.

**1955** – Jean Lesage, Minister of Northern Affairs and National Resources, department responsible for Inuit (then known as Eskimos), gets Cabinet approval for broad education policy in North. General policy is to substitute settlements for nomadic life. A school is built at Chesterfield Inlet, followed by Coppermine, and ten "hostels." Some Inuit had formerly been sent south to Indian Affairs schools. "Destitute" Métis were sometimes also enrolled.

**1969** – Indian Affairs takes over sole management of residential schools from churches.

**1969** – Indian Affairs Minister Jean Chretien produces assimilationist "White Paper" to abolish Indian status; strongly opposed by Indian organizations. Alberta Indian Association produces *Citizens Plus*, known as "Red Paper," in response. White Paper retracted two years later.

**1971** – Blue Quills School, St. Paul, AB, becomes first Indian-run school, following month-long contentious occupation by elders and others.

**1972** – National Indian Brotherhood (predecessor of Assembly of First Nations) produces *Indian Control of Indian Education*, advocating greater band control of education on reserves; adopted next year by government.

**1975** – Six residential schools close this year; 15 remain.

**1976** – NIB proposes amendments to *Indian Act* to provide legal basis for Indian control of education; rejected by government.

**1978** – National Film Board produces first film ever on residential schools: *Wandering Spirit Survival School*, about a non-traditional school organized by parents who had themselves survived residential schools.

**1984** – 187 bands are operating own (day) schools, half in B.C.; rest mainly on Prairies.

**1993** – Archbishop Michael Peers, Primate of Anglican Church of Canada, apologizes to survivors of Indian residential schools on behalf of the Church.

**1996** – Gordon Indian Residential School, Punnichy, Saskatchewan, closes; last of 139 Indian Residential Schools in Canada.

Royal Commission on Aboriginal Peoples recommends public investigation into violence and abuses at residential schools. Report brings these issues to national attention.

**1998** – Government responds to RCAP Report with Statement of Reconciliation, including apology to those sexually or physically abused while attending residential schools, and establishment of Aboriginal Healing Foundation to assist Aboriginal communities to build healing processes that address legacy of system, with $350 million endowment.

**2001** – Federal Office of Indian Residential Schools Resolution Canada created to manage and resolve large number of abuse claims filed by former students, resulting in 17 court judgments.

**2003** – National Resolution Framework launched, including Alternative Dispute Resolution process, an out of court process providing compensation and psychological support for former students who were physically or sexually abused or had been wrongfully confined.

**2004** – Assembly of First Nations (AFN) Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools leads to resolution discussions.

RCMP Commissioner Giuliano Zaccardelli expresses sorrow for the force's role in the residential school system.

**2005** – $1.9 billion compensation package announced to benefit former residential school students.

**2007** – Indian Residential Schools Settlement Agreement, largest class action settlement in Canadian history, negotiated and approved by parties, and Courts in nine jurisdictions, implemented. Of the 139 schools ultimately included in the settlement, 64 were Roman Catholic, 35 Anglican, 14 United Church, and the balance other or no denomination. The objective was reconciliation with the estimated 80,000 former students then still living, of over 150,000 enrolled since 1879. Elements are,

- Common Experience Payment to be paid to all eligible former students who resided at a recognized Indian Residential School;
- Independent Assessment Process for claims of sexual or serious physical abuse;
- Truth and Reconciliation Commission;
- Commemoration Activities;
- Measures to support healing such as the Indian Residential Schools Resolution Health Support Program and an endowment to the Aboriginal Healing Foundation.

Survivors report harsh and cruel punishments, suicides of others, physical, psychological and sexual abuse, poor quality and meagre rations and shabby clothing in the schools, and inability on leaving to belong in either the Aboriginal or larger world. Posttraumatic stress disorder, major depression, anxiety disorder and borderline personality disorder have been diagnosed, and many have criminal records.

**2008** – Prime Minister Harper offers formal apology in Parliament for the Indian Residential Schools, in presence of Aboriginal delegates and church leaders. Indian Residential Schools Truth and Reconciliation Commission established June 1, with five-year mandate, later extended to 2015.

**2009** – AFN Chief Phil Fontaine meets Pope Benedict XVI at Vatican. Pope Benedict expresses "sorrow" and "sympathy and prayerful solidarity," but avoids apologizing.

After a rocky start, with resignations of original Commissioners, Truth and Reconciliation Commission begins work under Justice Murray Sinclair, an Aboriginal Manitoba judge who became the province's Associate Chief Justice in 1988.

**2010** – Truth and Reconciliation Commission begins hearings in Winnipeg.

**2011** – University of Manitoba president David Barnard apologizes to Truth and Reconciliation Commission of Canada for institution's role in educating people who operated the residential school system.

**2012** – Truth and Reconciliation Commission releases Interim Report; reviews progress, explains statement gathering and document collection process. Tells of degrading treatment, unwarranted punishments, and physical and sexual abuse by "loveless institutions." Makes numerous recommendations respecting public education about residential schools and about mental health and wellness programs, especially in the North, and that Canada and churches establish a cultural revival fund. Notes mandate to establish a National Research Centre.

Interim Report can be accessed at:
http://nctr.ca/assets/reports/TRC/Interim%20report%20English%20electronic.pdf.

Over 105,000 applications for Common Experience Payments were received by Canada by 2012 deadline; over 79,000 were found eligible and paid, the average amount being $19, 412. September 19 was final deadline for Independent Assessment Process claims.

**2014** – Commission's hearings in more than 300 communities wrap up. "National Events," in Winnipeg, Inuvik, Halifax, Saskatoon, Montreal and Vancouver have been held, as required by the Settlement Agreement, the final one taking place March 27-30 in Edmonton.

**2015** – Final year for the Truth and Reconciliation Commission; related events occur:

- **August 16:** Dr. Peter Bryce (1853-1932), author of *The Story of a National Crime*, is honoured by the unveiling of a plaque in his honour at Ottawa's Beechwood Cemetery, the National Cemetery of Canada.

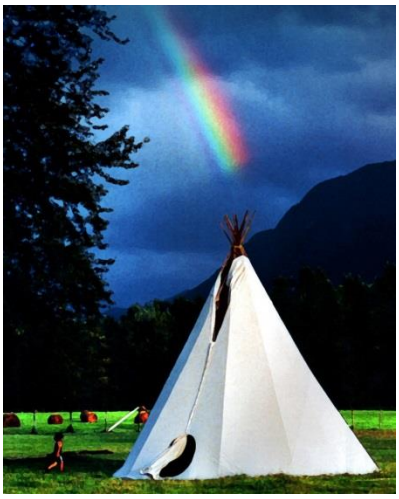
- **November 1:** The plaque at Beechwood Cemetery honouring Scott as a poet is modified to include mention of his role in residential schools.

- **December 15:** The final six-volume, 3,231-page TRC report is released. The TRC also produced a summary and five other companion volumes, 2012-15. The summary can be accessed at http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf.

- **December 18:** The Truth and Reconciliation Commission closes its doors. As required by the Settlement Agreement, the National Centre for Truth and Reconciliation opens, with a mandate to hold and make accessible all of the materials gathered by the Commission throughout its mandate. It is located at 177 Dysart Road on the University of Manitoba Fort Garry Campus in south Winnipeg: nctr.ca.

# Truth and Reconciliation is Canada's last chance to get it right

Posted By: *John Ralston Saul*



***Credit: Troy Hunter***

There are good and bad things in our society, successes and failures. But there is only one fundamental reality that remains unaddressed. That is the situation of indigenous peoples.

This is the single most important issue before us, whether we are recently arrived in Canada or have been here for centuries. This is the prime issue on which we should be judging governments and potential governments.

And we have been warned repeatedly.

There have been thousands of speeches, addresses and court cases over the last 150 years in which indigenous leaders have laid out the situation. And there is a remarkable consistency in these aboriginal arguments, as well as clarity and generosity, and what I would call patience. Patience as we have repeatedly acted badly on almost every front, attempting to destroy indigenous cultures. We have done nothing to earn the politeness and patience with which we have been treated.

The 382-page summary of the Truth and Reconciliation Commission report is perfectly clear. It is written with elegance. There is nothing mysterious or extravagant in its 94 recommendations. Its use of the term cultural genocide is clearly explained. The definition used is reasonable and the facts are undeniable.

Their recommendations are both specific and broad, precisely because the aim of the residential schools was specific and broad. After all, the system was designed to destroy indigenous civilization. So what the commissioners call for is designed to deal with that breadth. And their arguments dovetail with the

recommendations of the 1996 Royal Commission on Aboriginal Peoples, which in turn dovetail with those of the 1977 Berger Commission, Northern Frontier, Northern Homeland.

As I said, we have been warned. Repeatedly. We have chosen not to listen and not to act. Is this our last chance? Quite possibly.

Commissioners Murray Sinclair, Marie Wilson and Wilton Littlechild are trying to make it easy for us. Reconciliation, they explain, is about establishing and maintaining a mutually respectful relationship between aboriginal and non-aboriginal peoples. This requires an "awareness of the past, acknowledgment of the harm that has been inflicted, atonement for the causes and action to change behaviour." We must change behaviour, each of us. Then we must make our governments change behaviour.

Think about it. There is nothing to stop us from rectifying educational underfunding, adopting a respectful approach toward the reform of the education system, concentrating on how to remove the barriers to postsecondary education. In a global era of endangered languages, we are among the worst offenders in the world. Within what we call Canada, there are some 55 indigenous languages – not imported such as English and French, but born here. Some 45 are in danger. Yet our government spends only $9.1-million to support all 55. We spend hundreds of millions of dollars in support of French and English through a multitude of programs such as English as a second language and French immersion, which is as it should be. The problem is not what we are doing. It is what we are not doing.

We know that the criminal justice system doesn't work for indigenous people. We know the resulting statistics – the prison numbers, the disastrous effects of sentencing policies. Nothing about the current situation in prisons is an accident or inevitable. It is the direct result of government policy. And when policies fail, you change them. That we do not change them is a matter of choice. We know that we need to understand why aboriginal women are being murdered and victimized in such numbers. This is not a matter to be solved by policing. The inquiry being called for would be an attempt to get at what is wrong, yet out of sight. Then we could all set about changing the situation.

We know that the curricula in schools and universities do not reflect the reality of the country. Curricula are always intellectual constructs, often ideological interpretations. Ours, for example, largely exclude the fundamental building block of our society – that is, the indigenous reality, past and present

All of this is a matter of choice and of policy. Where are the policies? Why have these choices not been made? Because our political culture continues to marginalize indigenous issues. Why? Because it remains fixated on outdated concepts of what is at stake. We are still acting like settlers who wish the indigenous reality would evaporate. And our civil service, in particular the ministries of aboriginal affairs and justice, remain immersed in the old culture of power – a culture in which Canada can win only if indigenous people lose. They must lose power, land, treaty rights. All in the name of an elusive European concept of how a nation-state is supposed to work. This model – our governmental official model – does not reflect or suit the Canadian reality. Ask yourself this simple question: Why would we

want to erase treaty rights? We all signed these treaties. We are all treaty people. We all lose as that Canadian model is erased.

Over $100-million of your money is spent every year to fund federal lawyers to fight against indigenous people being treated with respect. At the same time, $1-billion allocated by Parliament for spending on aboriginal social programs was simply withheld over the past five years. The combination of these two sums tells you what our policy is.

Our lawyers and civil servants are still fighting to extinguish treaty rights as the price for any settlement. Yet the large 2002 Cree-Quebec Agreement – La paix des braves – was done without extinguishing rights. The Quebec government used its imagination and acted ethically. The Canadian government cannot bring itself to do either.

Our governments attempted to ignore the recommendations of the 1996 Erasmus Royal Commission. We allowed them to do this. What do any of us think is going to happen if once again we, as citizens, allow government to respond to the Truth and Reconciliation Commission by doing nothing? There is a wise comment in the commissioners' report – "At stake is Canada's place as a prosperous, just and inclusive democracy within [the] global world."

Does anyone really imagine that we will get through the celebrations of 2017 without being ridiculed at home and abroad if we have not begun urgently to listen and to act on the indigenous front? Already I see growing signs of this as I travel from country to country. No matter where I go, people question me – What's wrong with Canada? Why are you acting this way? Our reputation around the world and our respect for ourselves is at stake.

The Commission's report is very clear about how reconciliation works – respectful relationships, restoring trust, reparations, concrete actions leading to societal change. To put it bluntly, reconciliation without restitution would be meaningless. It is not so difficult to work out what restitution means. Part of it is laid out in this report. Above all, it is not about winners or losers. If indigenous peoples have more and do better, we will all do better.

In 1996, Georges Erasmus and his fellow commissioners wrote, "Canada is a test case for a grand notion – the notion that dissimilar peoples can share lands, resources, power and dreams while respecting and sustaining their differences. The story of Canada is the story of many such peoples, trying and failing and trying again, to live together in peace and harmony. But there cannot be peace or harmony unless there is justice."

Since then, indigenous peoples have more than played their part – leading the way with constructive arguments, developing an ever larger new leadership, re-establishing their cultures, winning repeatedly at the Supreme Court. The rest of us have done very little.

And the Canadian people – you and I – have not taken the stand we need to take. We have not given that fundamental instruction – the instruction of the ethical, purposeful voting citizen. Justice Sinclair and his colleagues have shown us what to do. We are the only barrier to action being taken.

***This article was first published by the* Globe and Mail *on June 6, 2015 and is reprinted with the permission of the author.***

# Call to Action: The Truth and Reconciliation Commission Report

Posted By: *John Edmond*

Credit: Troy Hunter

For over a century, generations of Aboriginal children, mostly First Nations, were taken from their families, often by force, and placed in residential schools usually far from home, where they were to be assimilated into white society. For most of that time, the schools were run by churches: Roman Catholic, Anglican, Methodist, Presbyterian and United. They were not allowed to speak their own language even to each other, and many were abused physically and often sexually at the hands of their "caregivers." The experience itself was emotional abuse. The last school closed in 1996, by which time about 150,000 children had been through the system. Many died of tuberculosis in the early 20th century; posttraumatic stress disorder, major depression, anxiety disorder, borderline personality disorder, criminal records, and suicide have been the lot of others. Some, such as Phil Fontaine, former head of the Assembly of First Nations, came through to become Aboriginal leaders.

As the Truth and Reconciliation Commission has put it,

> *For children, life in these schools was lonely and alien. Buildings were poorly located, poorly built, and poorly maintained. The staff was limited in numbers, often poorly trained, and not adequately supervised. Many schools were poorly heated and poorly ventilated, and the diet was meagre and of poor quality. Discipline was harsh, and daily life was highly regimented. Aboriginal languages and cultures were denigrated and suppressed. The educational goals of the schools were limited and confused, and usually reflected a low regard for the intellectual*

*capabilities of Aboriginal people. For the students, education and technical training too often gave way to the drudgery of doing the chores necessary to make the schools self-sustaining. Child neglect was institutionalized, and the lack of supervision created situations where students were prey to sexual and physical abusers.*

Losing their children for months at a time to a far-away institution was not what the chiefs had in mind, when, between 1871 and 1906, they signed treaties to read that schools would be maintained on reserves whenever the Indians of the reserve desired it. This was despite Prime Minister John A. Macdonald's 1883 statement in the House of Commons (speaking as Superintendent General of Indian Affairs):

*When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men.*

## *See Indian Residential Schools – A Chronology*

The history of residential schools came to public attention from the 1996 report of the Royal Commission on Aboriginal Peoples, which recommended an investigation. In 2007, a class action brought by former students resulted in the Indian Residential Schools Settlement Agreement, one element of which was that a Truth and Reconciliation Commission would be convened.

The Commission, consisting of Manitoba Associate Chief Justice Murray Sinclair, Chief Wilton Littlechild and Dr. Marie Wilson began work in 2009.

The Commission issued an interim report in 2012, which contained 94 recommendations. These have come to the fore since the 2014 election campaign in which now-Prime Minister Justin Trudeau promised full implementation of the recommendations. The government has since reiterated the promise of full implementation. This promise warrants closer examination.

The Commission released its Final Report in 2015, describing the schools assimilation policy as "cultural genocide." It comprised six main and five supplementary volumes (including the 2012 Interim Report). The Commission then closed down, its legacy to be continued by a "National Centre for Truth and Reconciliation" based at the University of Manitoba. Its recommendations are collected in a volume entitled *Calls to Action*. They are extremely wide-ranging, from calls to the Pope to apologize in Canada, to calling upon medical and nursing schools to require all students to take a course that includes the history and legacy of residential schools. Neither these, nor many other calls, are within federal power to implement.

The 94 Calls fall into 22 categories, grouped under two main headings: “Legacy” and “Reconciliation” Legacy Calls appear to arise directly from experiences related to the Commission in its hearings, and include Child Welfare, Education, Language and Culture, Health, and Justice. Reconciliation Calls are generally more detailed, implementation of which, in the Commission’s view, would lead to reconciliation of Aboriginal people with the Canadian population. They include such proposals as a “Covenant of Reconciliation,” a National Council for Reconciliation, Church apologies, and a National Day for Truth and Reconciliation as a statutory holiday.

For the purpose, however, of analysing how the government might keep its promise to implement all of these recommendations, topics are less useful than is power to implement, which is to say legal jurisdiction respecting each. This article will not examine each Call to Action, many of which are commendable and would likely lead to both an increase in reconciliation of Aboriginal peoples with the Canadian populace and also significant improvement in the lives of many First Nations people. Rather, our focus is on the ability, and indeed in some cases, the advisability, of the federal government implementing all of them.

Many of the Calls to Action are within the sole jurisdiction of the federal government to implement, by the exercise of its constitutional jurisdiction to legislate; or simply by a policy decision. Of the latter, the Commission calls on the government to investigate the issue of missing and murdered Aboriginal and girls, and also consider “links to the intergenerational legacy of residential schools.” The government is now planning a mandate to undertake this massive and nebulous task. The National Chief of the Assembly of First Nations writes that “systemic root causes … must be addressed, factors that perpetuate poverty and discrimination [are in need of] concrete recommendations.” It may be answered that many, if not all, of these factors are well-known; it is political will, not facts and recommendations, that is lacking. The political pressure for this inquiry is enormous, but it may only delay action on known remedies.

Among the many excellent recommendations, there are oddities. An example of sole federal jurisdiction is Call number 6, to repeal s. 43 of the *Criminal Code*, sometimes known as the “spanking” provision because it authorizes the use of reasonable force by parents and teachers “by way of correction.” One may ask whether the Commission oversteps its mandate by recommending a step affecting not just Canada’s Aboriginal people, but especially all Canadian parents and teachers – particularly in the face of a recent Supreme Court decision upholding the provision. Should this be implemented – even if it can be – without a larger discussion?

Perhaps the most bizarre Call within federal jurisdiction is number 94, to include in the Oath of Citizenship for new Canadians the following: “… I will faithfully observe the laws of Canada including Treaties with Indigenous Peoples, and fulfill my duties as a Canadian citizen.” A treaty, though of constitutional force, is not a “law.” Laws create obligations on citizens; treaties create only obligations between the signatories. How would one answer a sincere and diligent new Canadian who asks, “What must I do to observe these treaties?”

Nine of the 94 recommendations would require federal legislation; another 40 require federal policy decisions not involving other levels of government (these include funding decisions that would ultimately require Parliamentary legislative approval). Thirty Calls to Action would involve provincial, territorial, and in some cases Aboriginal and municipal governments, sometimes together with the federal government. One worthwhile such recommendation is Call number 1, that all levels commit to reducing the number of Aboriginal children in care: five steps are listed, including the provision of resources to keep families together in "culturally appropriate environments," subject to safety considerations.

Another 15 call on non-governmental public bodies to make changes. Groups called on are:

- post-secondary institutions;
- the health care system, medical and nursing schools;
- law societies and law schools;
- "church parties to the Settlement Agreement" (the agreement by which the Commission came into being);
- "all religious denominations and faith groups,"
- Canada Council for the Arts;
- Aboriginal Peoples Television Network;
- Canadian journalism programs and media schools;
- officials and host countries of international sporting events; and
- Canada's corporate sector.

For education programs, these Calls would serve to increase awareness of the residential schools issue in some way. Although the *United Nations Declaration of the Rights of Indigenous Peoples* is not law in Canada (see *LawNow* 35-4, Mar-Apr 2011), no doubt medical students should at least be aware of Article 24, which asserts the right of indigenous peoples "to their traditional medicines and to maintain their health practices" and that "Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health". It is difficult to see what role the federal government could play in most of these Calls.

Commendably, the Law Society of Upper Canada has recently produced specific material for First Nations, Métis and Inuit people on "Handling Everyday Legal Problems," in Ontario indigenous languages as well as English and French. The Law Society of B.C. has said, "The report is a call to action. The Law Society encourages all lawyers in British Columbia to read the report of the Truth and Reconciliation Commission and to consider how they can better serve the Indigenous people of British Columbia." No doubt other law societies are taking similar steps.

The first of the Commission's ten principles of reconciliation is, "The *United Nations Declaration on the Rights of Indigenous Peoples* is the framework for reconciliation at all levels and across all sectors of

Canadian society." Accordingly, the Calls to Action are replete with references to the *Declaration.* Number 43 is pivotal, on which all others turn. It calls on not just federal, but all levels of government "to fully adopt and implement" the *Declaration* "as the framework for reconciliation." All the others are subsidiary, because as matters stand Canada has endorsed, but not ratified the *Declaration*, so it is not binding in Canada. The Commission wants it fully adopted and implemented, which means binding. The consequences, especially in connection with resource and infrastructure development, warrant serious consideration. To begin, can the plans of the new government for major and prompt (physical) infrastructure funding live with a ratified *UNDRIP*?

Article 32 of *UNDRIP* includes the following:

> *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

In its 2005 *Mikisew Cree* decision, the Supreme Court established that First Nation interests extend well beyond reserve lands; the doctrine of consultation and necessary accommodation applies "in relation to the territories over which a First Nation traditionally hunted, fished and trapped …" But, "consultation will not always lead to accommodation, and accommodation may or may not result in an agreement," so there is no First Nations veto.

Virtually all of Canada is land on which First Nations or other Aboriginal people traditionally hunted, fished or trapped. Were *UNDRIP* to become the law of Canada, would *UNDRIP*'s "their lands or territories" mean traditional lands as defined by the Supreme Court? Probably – it would be meaningless if it merely meant lands now owned. To give the terms of the *Declaration* precise meaning in Canadian law could require years of litigation and probably more than one Supreme Court decision, while projects remain on hold. And nowhere does *UNDRIP* mention "veto." But if "free and confirmed consent" is required but not given, is the effect a veto? If the answer is yes, a highway, transmission line or pipeline of national importance could be blocked by the absence of consent of one Aboriginal group whose traditional lands it crossed – or perhaps there would at best be a significant toll to be paid.

At a recent Bar Association conference, a speaker advocating *UNDRIP* rejected the notion that the *Declaration* converted "free, prior and informed consent" into a veto. But, he went on: "Consent is the decision of the rights holder" and means the right to say "no". The Commission is more nuanced: "Free, prior and informed consent in international law is applied in proportion to the potential for harm to the rights of Indigenous peoples and to the strength of these rights." If the government proceeds to make the *Declaration* binding, it may find other of its commitments more difficult to fulfill. And ultimately, this issue will be addressed by Canadian courts.

In 2005, for a unanimous Supreme Court, Mr. Justice Binnie opened his reasons in *Mikisew Cree* thus: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of

aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." Reconciliation is, of course, one of two dominant and connected themes of the Truth and Reconciliation Commission Report – telling the *truth* about what happened being the other. The Commission defines *reconciliation* as an ongoing process of establishing and maintaining respectful relationships." It elaborates,

> *To the Commission, "reconciliation" is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. For that to happen, there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour.*

The Report, it must be said, is optimistic. It looks, laudably, to the future: "Reconciliation is not about 'closing a sad chapter of Canada's past,' but about opening new healing pathways of reconciliation that are forged in truth and justice." It offers great hope that this can occur.

In its volume 6, *Reconciliation*, the Commission sets out many excellent practical proposals for the achievement of that end, virtually all directed at non-Aboriginals: Educational institutions of all kinds, museums, archives, churches, the corporate sector; no one is left out. The TRC mandate describes reconciliation as "an ongoing individual and collective process, and will require commitment from all those affected including First Nations, Inuit and Métis former Indian Residential School (IRS) students, their families, communities [and non-Aboriginal people and entities]." Yet it is difficult to escape the conclusion that the Commission sees the entire task of achieving reconciliation to fall to non-Aboriginals, who must be educated on the history of residential schools so as to "shift understanding and alter worldviews." This is a commendable objective. But absent from the enterprise is any call on Aboriginal peoples themselves to rise beyond victimhood, terrible as many of their experiences were, in order to join in the reconciliation process. Undeniably, the fault lies with past governments and its officials, churches, and those who knew but did nothing. Nevertheless, where are the calls for commitment by former students, their families and communities, contemplated by the mandate? Where is the call, for instance, on the Assembly of First Nations to develop proposals to remedy the dysfunction in so many remote communities? For First Nations, the AFN should lead. Education is key to progress, but in many communities lacking anything but a welfare economy, the best will leave. Nothing in the Report addresses this crucial problem.

The Commission has made the *United Nations Declaration on the Rights of Indigenous Peoples* the centrepiece of its recommendations. It may be that many will never be implemented. The Report is certainly exhaustive in its reach; one wonders whether, had it been somewhat less ambitious, more focussed on a few critical goals, it would have a greater chance of success. Will, for example, Canadian museums undertake a national review to determine their level of compliance with *UNDRIP*, assuming, as called for, they received earmarked federal funding for the purpose? Will law schools move their optional Aboriginal Law courses to the mandatory group of fundamental courses along with Contract Law, Torts, and Criminal Law?

The doctrine of consultation and accommodation introduced by the Supreme Court in the *Haida* case in 2004 has lifted the economies of many First Nations. Indeed, some claim that it is responsible for the diminished interest among some B.C. First Nations in pursuing land claim negotiations – why give up traditional lands for a one-time payment, when accommodation can produce employment, ongoing payments and equity in development? The slow progress of these negotiations is criticized by the Commission, but it may have a rational economic basis. When that doctrine is already so helpful, the introduction of the "consent" principle to development, with all its attendant legal issues and probable delays, might well turn out to be fatal to the proverbial goose.

It should not need to be said that levels of funding for Aboriginal health, education, child care, and social needs generally should at least match funding levels in adjacent provinces and territories. Abstract issues of principle are less likely to affect the lives of ordinary Aboriginal people than attention to these basic needs. It is to be hoped that the magnificent effort by the Commission and its staff in producing so many recommendations, with thoughtful, thoroughly elaborated rationale will at least produce a better life for these people. If the federal government is inclined to implement recommendations of the Commission, it would do well to first ask how a given recommendation will help an Aboriginal person to live a better life.

# BenchPress – Vol 40-4

Posted By: *Teresa Mitchell*

## Gonzo Language!

The Federal Court of Appeal used some unusually strong language in a recent judgment about a claim for costs. The claim was made by the two lawyers who successfully challenged the appointment of Judge Marc Nadon to the Supreme Court of Canada. Together, the two lawyers asked for almost $70,000 in costs. The lead lawyer based his claim on an hourly rate of $800.00.The Federal Court awarded the two about $5,000 and they appealed that decision. The Federal Court of Appeal found the lawyer's claims to be excessive and misguided. The Appeal Court was particularly offended by a submission by the lawyers that because the judges are paid by the government, that they were not impartial. Justice Pelletier wrote:

> *"I do not understand how one could hope to protect the right to a fair and independent judiciary by accusing courts of colluding with the government if they don't give the applicant its solicitor-client costs….This is reminiscent of the gonzo logic of the Vietnam War in which entire villages had to be destroyed in order to save them from the enemy."*

In a separate comment, Justice Stratas wrote: "An officer of the court should never make such a submission."

> *Galati v. Harper* 2016 FCA 39 (CanLII)
> http://www.canlii.org/en/ca/fca/doc/2016/2016fca39/2016fca39.html

## Representative Juries

The Court of Queen's Bench of Alberta has ruled that the provincial *Jury Act* may exclude people convicted or charged with criminal acts from serving on juries. The Act was challenged by an Aboriginal man when his lawyer drew the judge's attention to the fact that no one in the pool of potential jurors for his client's trial appeared to be Aboriginal. The accused argued that Aboriginal persons form a disproportionate percentage of the criminally accused relative to the general population, thereby violating his *Charter* right to a representative jury. However, Justice Brian Burrows of the Alberta Court of Queen's Bench ruled that the exclusion of accused and criminally convicted persons was reasonable and acceptable because "a person who has been convicted of a crime, or is currently charged with a crime, is *prima facie* likely not to be impartial as between the Crown and the accused in a criminal proceeding." The Court found that the exclusion does not become unreasonable even when its effect is to exclude a proportionally greater number of Aboriginal persons relative to persons of any other ethnic origin.

> *R. v Newborn* 2016 ABQB 13 (CanLII)
> http://www.canlii.org/en/ab/abqb/doc/2016/2016abqb13/2016abqb13.html

# A Tough Spot

An Edmonton dry cleaner has been given a four-month conditional sentence after pleading guilty to five charges under the *Canadian Environmental Protection Act*. His dry cleaning business used a carcinogenic chemical, tetrachloroethylene, commonly known as PERC. This is the first time in Canada that someone has received a jail sentence under the Act. Provincial Court Judge Janet Dixon noted that he had been warned and educated about the dangers associated with the chemical, and had previously been fined for violations. She said: "You say you care about your employees and the environment, but actions speak louder than words. PERC is bad stuff. You need to go to jail for this."

Ali Eldin will serve his sentence in the community. He must perform 60 hours of community service and take out a full-page ad in a national newspaper explaining his conviction and sentence.

*R. v Eldin* 2016 Alberta Provincial Court (full citation not available)

# Alberta Court Grants First Exemption for Physician-Assisted Death

By Jon P. Rossall Q.C.
Chair, Health Law Practice Group, McLennan Ross LLP

On Monday, March 1st, 2016, Madam Justice S. L. Martin of the Court of Queen's Bench of Alberta granted the application of a Calgary woman to seek physician-assisted death [1]. The application arose as a result of the Supreme Court's offer of personal exemptions from a four month extension of the suspension of its declaration that provisions of the *Criminal Code of Canada* forbidding physician-assisted death were unconstitutional.

The application was brought by, and on behalf of, a retired psychologist suffering in the end stages of ALS, which is a degenerative neurological disease which causes increased weakness of the majority of the body's muscles ultimately causing paralysis. The disease is progressive, not treatable and ultimately terminal.

The Court had many questions to answer before dealing with the primary issue, that being whether the applicant was a competent adult person who consents to the termination of her life, suffering from a grievous and irremediable medical condition which causes enduring, intolerable suffering in her particular circumstances which could not be alleviated by any treatment acceptable to her. Specifically, given that the Alberta Courts (unlike Ontario and British Columbia) had not provided any specific guidelines for applications like this, preliminary issues such as appropriate notice; jurisdiction; confidentiality; and sufficiency of evidence needed to be addressed.

The Court found that although the application was not technically a constitutional one, notice to the provincial and federal attorneys general was appropriate, following guidance from the practice guidelines in Ontario. It also found that while in some circumstances notice to family members may be appropriate, in this instance that was not the case.

In terms of jurisdiction, the Court was faced with the prospect of the applicant seeking assistance in death at a private location in British Columbia. Nevertheless, the Court found that the residence of the applicant, not the intended location of death, was the governing principle and found that it had the necessary jurisdiction to grant the Order.

On the issue of confidentiality, while the Court was mindful of the important reasons underlying the principle of open court, it felt that the privacy interests of the applicant (given the sensitive nature of the proceedings and the evidence) outweighed the interests of the public, and felt that the issuance of written reasons (with identities concealed) would satisfy any public need.

Finally, on the issue of the nature of the evidence, the Court relied on the Quebec legislation dealing with assistance in dying; the Ontario and B.C. Practice Guidelines; but most importantly, the decision of the Trial Judge and the Supreme Court of Canada in the *Carter* v. *Attorney General* decision in reviewing the nature of the evidence. It determined that unlike Quebec or Ontario, no psychiatric evidence was specifically required in the absence of concerns regarding mental illness or capacity. It also determined that there were no hard and fast requirements for affidavit (i.e. sworn) evidence from physicians, although that would be preferable. She did find that it was necessary to have evidence (even in the form of statements) from the physicians assessing the patient, but not necessarily the physician(s) who would actually provide the assistance in death as she felt that a "flexible" approach to the evidence should be taken.

Finally, it determined that the assessment of competence was required to be relevant as of the time of the granting of the order, not necessarily at the time of death (although in this regard, she was comforted by the fact that the assisted death was intended to occur within a relatively short time frame).

Justice Martin was satisfied on the evidence provided that the applicant met the tests outlined by the Supreme Court in *Carter* vs. *Canada (Attorney General)* and granted the application.

The Order granted was remarkable, in that the Judge extended the protection from the Supreme Court's declaration not only to the physicians involved in the assessment and the actual act of assistance but as well to the pharmacists who provided the medication and (although not specifically required) potentially to other caregivers such as nurses who, collectively, were part of term "physician-assisted death".

For more information on issues arising from the *Carter vs. Canada (Attorney General)* decision, contact Jon Rossall or other members of the McLennan Ross Health Law Practice Group.

[1] HS (Re), 2016 ABQB 121

***LawNow is grateful for permission to reprint this case comment from Jon Rossall, of McLennan Ross LLP.***

# Shared Accommodation Problems: What Can A Tenant Do?

By Judy Feng

Here at CPLEA, we have been getting more questions lately about shared accommodation problems. There are two living arrangements that typically fall under the term shared accommodation: roommates living together in a rental property and a landlord and tenant(s) sharing living space (for example, a kitchen, bathroom or living room). We regularly receive questions about the following issues:

- I share a house with my landlord but I can't stand living with him/her anymore! How do I break my lease?
- I'm renting out a room in my home to a tenant and he/she is not paying rent! What can I do?
- My roommate is constantly throwing crazy parties at our place. Can I evict him/her?

Unfortunately, tenants living in a shared accommodation situation fall into a grey area of the law. Let me explain.

In Alberta, the *Residential Tenancies Act (RTA*) applies to most landlords and tenants in Alberta. Under the *RTA*, landlords and tenants have certain rights and responsibilities (http://www.landlordandtenant.org/responsibilities/). The *RTA* also outlines the basic rules for things like security deposits, evictions, and ending leases. Under the *RTA*, landlords and tenants can turn to the Residential Tenancy Dispute Resolution Service (RTDRS) when they have a problem (http://www.landlordandtenant.org/dispute-resolution/).

However, the *RTA* does not apply to shared accommodation situations where the landlord and tenant are living together. For example, under the *RTA,* if a landlord serves an eviction order to a tenant for non-payment of rent, the landlord must give the tenant at least 14-day written notice. On the other hand, if a tenant is living with their landlord and did not pay rent, the landlord does not have a legal obligation under the *RTA* to give 14-day notice. That said, it is good practice for the landlord to provide reasonable written notice to evict a tenant in a shared accommodation situation.

The *RTA* also does not cover issues that arise between roommates. For example, there is no legislated eviction procedure through which one roommate could evict the other. For some more examples of other problems that may arise in shared accommodation situations, you should check out our "Living with your Landlord" article (http://www.lawnow.org/living-with-your-landlord/).

There is a common impression that the *Innkeepers Act* applies to a shared accommodation situation. The *Innkeepers Act* only applies to hotels, motels, and other places that provide lodging to guests (for example, a bed and breakfast). The *Innkeepers Act* does not apply to tenants renting a room in a landlord's home – unless the landlord meets all of the rules under the *Act* (for example, posting liability signs in the office and in every bedroom).

Since landlords and tenants living in shared accommodation are not covered by the *RTA*, they do not have the option of resolving their dispute through RTDRS. So, what *can* you do as a tenant living in shared accommodation if you are having problems with your landlord or other roommates?

You can minimize disputes in the first place by having a written agreement outlining rights and responsibilities with your landlord (see our Sample Living with Your Landlord Agreement ) or with your roommate (see our Sample Roommate Agreement). For more information, go to our website: http://www.landlordandtenant.org/roommates-and-subletting/.

If a dispute arises in a shared accommodation situation, the first step should be to communicate concerns to the other side and to try to reach a resolution. It is a good idea to write down your concerns and give it to the other side in writing in case there are problems in the future. If an agreement is reached to resolve a dispute, make sure it is in writing and signed by everyone.

If you cannot resolve a dispute, then you may wish to go to mediation or Provincial Court.

Mediation is an informal, confidential, and private process that helps people work out their problems and come to a solution with the help of a neutral third party (the mediator).

Provincial Court is available for tenants to apply for a remedy of up to $50,000. You must fill out certain forms, file them, and serve them on the other side. The other side then has a chance to respond, and a trial date will be set. Sometimes the Court will schedule a mediation session with a mediator or a pre-trial conference with a judge so that you can have a chance to reach a resolution before trial.

While mediation and Provincial Court do not require a lawyer, you should consider seeking legal advice before proceeding with either option.

**For more information on dispute resolution, go to our website:**
http://www.landlordandtenant.org/dispute-resolution/

**For more information on where to get legal advice, go to our website:**
http://www.landlordandtenant.org/resources/

**For more information on Mediation or Provincial Court:**
Mediation: https://albertacourts.ca/resolution-and-court-administration-serv/mediation-programs
Provincial Court: https://albertacourts.ca/provincial-court/civil-small-claims-court

# Dealing with Pets after Separation, Part 1: Understanding the Law on Personal Property

By John-Paul Boyd

Family law is about how serious cohabiting relationships start and end, how children are cared for after separation, how the bills are paid after separation, and how the property and debts that accumulated during a relationship are split when it ends. Despite the folks who'd very much like to apply for custody of or access to their pets after separation, the law on custody, guardianship and access only applies to human children. In the eyes of the law, pets are personal property, like a coffee cup, a cow or a car. I'm not saying this is right, mind you, just that this is how it is; no matter how attached you might be to your pet, your pet is *property*. As the adjudicator said in *Gardiner-Simpson v Cross*, a 2008 case from Nova Scotia:

> "[4] Emotion notwithstanding, the law continues to regard animals as personal property. There are no special laws governing pet ownership that would compare to the way that children and their care are treated by statutes such as the [statutes on family law]. Obviously there are laws that prohibit cruelty to animals, but there are no laws that dictate that an animal should be raised by the person who loves it more or would provide a better home environment."

In this, the first half of two-part article, I'm going to talk about the laws on personal property that might apply when a couple can't agree on how they'll manage their pets after separation. In the second half of this article, I'll describe the sorts of orders you can and can't ask the court to make about pets.

Before continuing, however, I need to emphasize the importance of remembering that *pets are property,* or, to put it another way, that *pets are not people.*If you have an issue about a pet following separation, it will probably help to make a point of mentally substituting "the toaster" for "the dog" when you're thinking about the problem. Unplugging your feelings from intentionally emotional problems like these can often make it easier to work your way through them.

Here are the general rules about owning and co-owning personal property.

## Most of the time, the person who bought the pet owns the pet.

There are some exceptions to this rule, like if you found the animal wandering the streets or you bought the pet as a gift for someone else. However, in general and as with other kinds of personal property, if you bought it, you own it.

If you bought the animal, you can provide evidence of the purchase, and your ownership, through a sales receipt, or a bank statement or credit card statement, showing the details of the purchase. If you don't have paper evidence of the transaction, you may be able to demonstrate ownership by being the person:

who is listed as the owner at the vet's office;
whose name is on the city ownership licence; or,
who is identified on a kennel club registration or breeder's certificate.

## In general, a person who receives a pet as a gift owns the pet.

Making a gift of something is one of the more common ways, along with selling or trading things, that an owner of property can transfer ownership of the property to someone else. Someone who buys a pet, and then gives it to someone else, loses the right to have and enjoy the pet; the person to whom the pet is given, on the other hand, becomes the owner of the animal, and, with ownership, gains the right to have and to enjoy the pet.

If you received the pet as a gift, you may be able to prove that ownership of the pet was gifted to you by providing:

- letters, notes or cards that might have accompanied the gift;
- evidence of what the giver said to you about the gift, like "happy birthday, I bought you this ferret;"
- evidence of what the giver said to others about the gift, like "I bought Sandra a ferret for her birthday;" or,
- evidence that the giver has given similar gifts in similar circumstances, like "I give all of my children ferrets for their sixteenth birthdays."

Proving that something was a gift is about proving the *intention* of the owner to make a gift. The transfer of ownership isn't a gift without that intention!

Say your boyfriend stops caring for or feeding the dog, stops taking it for walks and stops taking it to the vet, and say you've started doing all those things. Although it's true that you're doing all the work, it doesn't mean he's necessarily given the dog to you unless he actually says, "take the dog, it's yours." However, there are some exceptions to this. Read on.

## You might be able be able claim ownership of animals that are stray or abandoned.

The basic rule is that an owner's rights in personal property are never lost unless the owner intends to get rid of the property. But what if the owner of a stray animal can't be found? What if the animal's owner has abandoned it?

I won't say much about owning stray animals, since this article is about property rights between couples who are separating. I'll just say that you may be able to keep animals that you find, as long as you don't know who the proper owner is and never find out who the proper owner is. If, over time, you become the person who normally cares for the animal you might gain a right to have the animal that is enforceable against everyone else… except the proper owner.

Now it might be possible for you to argue that the proper owner has abandoned the animal, especially if the owner has stopped caring for or feeding the animal, stopped taking it for walks and stopped taking it to the vet, and you've taken over all those chores. Arguing that your partner has abandoned a pet can be challenging, however, and it's up to you to prove that she's abandoned the animal.

Here's how an adjudicator from Nova Scotia described the law of abandonment in the 2014 case of *Chiasson v Kennedy*:

> "[16] … Abandonment occurs when there is 'a giving up, a total desertion, and absolute relinquishment' of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property … abandonment involves … an intention to relinquish title, 'that is, an indifference as to the fate of the chattel, coupled with sufficient acts of divestment'…"

And that, in a nutshell, is what you have to prove to show that your partner has abandoned her pet.

"Chattel," by the way, is another term for personal property.

## If you can't claim ownership of the pet even though you've been the only one caring for it, you may be able to claim compensation for your contributions.

If you've wound up doing a lot of the day-to-day work associated with the pet or paying for a lot of the animal's expenses, like food, vet bills and grooming costs, and you can't find a way to claim that you own the animal, you can ask for the next best thing: compensation for your contributions to the maintenance of the pet. This is called an "unjust enrichment" claim.

Although we normally see unjust enrichment claims in the context of someone's contributions to real property – houses, condominiums and cottages and so forth – I don't see any reason why the claim couldn't be made with respect to personal property. The idea behind claims like this is that you've made contributions to property owned by someone else for which you'd normally be paid in some way.

There are three things you have to prove to establish unjust enrichment:

- the owner was *enriched* because of your contributions to the animal (for example by not having to buy pet food or pay for someone to walk the pet);
- you *lost something* as a result of your contributions (like the money you spent feeding the pet or the money you could have made walking someone else's pet); and,
- there is *no legal reason* for the owner to be enriched by your contributions (like a contract which required you to care for the pet).

If you're successful, you'll then have to prove the amount by which your efforts enriched the owner. Although you won't get to keep the animal unless there's no other way for the owner to pay out what he or she owes you, at least you'll be partially repaid for the time and money you've spent on the beast.

## More than one person can own an animal.

Finally, it's important to know that more than one person can own a pet, just like more than one person can own a car or a house. This might happen if both people put money into buying a pet, if the pet is bought using money from a joint account or if the pet is bought using money borrowed from a joint credit card. It might also happen if the person buying the animal intended that both people would own it.

Ideally, you'd prove joint ownership with a sales slip that demonstrates a joint contribution to the purchase by saying something like "received for the purchase of Sam, the four-month-old purebred daschund, $100 from Sandra and $100 from Kaitlyn." This would create a presumption that both of the buyers own the pet. However, sales slips rarely say anything so useful, and most buyers never think of asking for it. Absent this sort of proof, you'll need to demonstrate that you both intended to jointly own the animal. Just like gifts, intention is everything.

Things like sales receipts that show both names ("Sam, sold to Sandra and Kaitlyn for $200"), city licences in both names, statements from joint bank accounts and credit cards showing the purchase all tend to support the argument that both of you meant to jointly own the pet, but none conclusively prove that this was your shared intention. You might be able to prove that you both had this intention through:

- letters, notes or cards that you might have exchanged around the time of the purchase;
- evidence of what your partner said to you about the purchase ("I'm so happy we bought Sam together"); and,
- evidence of what your partner said to others about the purchase ("Sandra and I bought Sam together").

However, it's not always an advantage to co-own a pet, as we'll see in the next part of this article.

## Options for the court

Okay, these are the important parts about the law on personal property that apply to pets. Assuming this information doesn't help you and your ex come to an understanding, you may find yourself having to go to a mediator, an arbitrator or a judge. In the second part of this article, I'll write about the the sorts of orders you can and can't ask the court to make about pets after separation.

# Canadian Human Rights Tribunal Sets the Stage for First Nation Discrimination Cases

By Linda McKay-Panos

In late January, 2016, the Canadian Human Rights Tribunal (Tribunal) ruled that children living on First Nations reserves have been discriminated against because of underfunding of education and child welfare. (see: *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada),* 2016 CHRT 2 (CanLII) (online https://www.canlii.org/en/ca/chrt/doc/2016/2016chrt2/2016chrt2.html). Canadians who are not First Nations may be surprised to learn about the issue of underfunding because there is much misinformation about issues of funding of First Nation peoples' families and communities.

In Canada, legislative power is divided between the federal government and the provincial/territorial governments. Under section 91(24) the *Constitution Act*, 1967, the federal government was provided with exclusive legislative authority over "Indians and Lands Reserved for Indians". The federal government enacted s 88 of the *Indian Act* RSC 1985, c I-5, which provides that all laws of general application that are in force in any province apply to Indians. This means that provincial child welfare legislation and standards apply to First Nations and peoples on reserves.

In addition to the legislative power held by the federal government, there exists a special relationship between the Crown and Aboriginal peoples. This special relationship gives rise to a fiduciary duty between the federal Crown and the Aboriginal peoples of Canada (see section 35 of the *Constitution Act*, 1982 and *R v Sparrow*, [1990] 1 SCR 1075), which could include the provision of child and family services on reserve (*Alberta v Elder Advocates of Alberta Society,* 2011 SCC 24).

At issue in this case were the activities of the Aboriginal Affairs and Northern Development Canada (AANDC) [now called Indigenous and Northern Affairs Canada] in managing its First Nations Child and Family Services Program (FNCFS). The FNCFS program was initially developed to address concerns over the lack of child and family services provided by the provinces. It is to provide culturally appropriate child and family services to First Nations children and families on reserve. The services should be reasonably comparable to the services provided to other provincial residents in similar circumstances.

The Complainants, the Caring Society and Assembly of First Nations, argued that AANDC discriminates on the ground of race and/or national or ethnic origin when providing child and family services to First

Nations on reserve and in Yukon, because they provide inequitable and insufficient funding for these services.

The Tribunal noted that in order to make out the discrimination complaint, three elements must be demonstrated:

1. First Nations have a characteristic or characteristics protected from discrimination;
2. they are denied services or are adversely impacted by the provision of services by AANDC [under s 5 of the *Canadian Human Rights Act* ]; and
3. the protected characteristic(s) are a factor in the adverse impact or denial.

Section 5 of the *CHRA* provides:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
> (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

## (1) Characteristics protected from Discrimination

The first element was easily dealt with as First Nations possess the characteristics of race and national or ethnic origin as prohibited grounds of discrimination.

## (2) "Service"

The second element was more contentious, as it required the Complainants to prove that AANDC was involved in the provision of a service under s 5 of the *CHRA* and if so, to demonstrate that First Nations were denied services, or were adversely impacted by AANDC's involvement in the provision of those services.

First, the Tribunal must determine what constitutes a "service". Second, the Tribunal must determine whether the services create a public relationship between the service provider and the service user.

The Tribunal held that funding can constitute a service within the meaning of s 5 of the *CHRA*. Further, First Nations, particularly First Nations on reserve, are a distinct public. In addition, AANDC extends the assistance or benefit of the FNCFS Program and other related provincial/territorial agreements to this public through FNCFS Agencies and the provinces or territories. The Tribunal also noted that the public relationship in the provision of child and family services between AANDC and First Nations on reserves and in Yukon is reinforced by the federal government's constitutional responsibilities and its special relationship with Aboriginal peoples.

## (3) Causal Connection Between the Protected Characteristic(s) and the Adverse Impact or Denial

In general, child welfare services are intended to protect children from neglect and abuse (sexual, physical or emotional) and to prevent these difficulties through public awareness and education on healthy families and early intervention, followed by crisis services.

The Tribunal discusses the various funding agreements for child and family services with the over 100 FNCFS Agencies across Canada. It also notes that there have been multiple reports examining the FNCFS. For example, the National Policy Review reported: …the funding formula under Directive 20-1 inhibited FNCFS Agencies' ability to meet the expectation of providing a comparable range of child and family services on reserve for a number of reasons, such as:

- The formula provides the same level of funding to agencies regardless of how broad, intense or costly, the range of service is;
- Variance in the definition of maintenance expenses from region to region, resulting in AANDC rejecting maintenance expenses that ought to have been reimbursed in accordance with provincial/territorial legislation and standards;
- Insufficient funding for staff and not enough flexibility in the funding formula for agencies to adjust to changing conditions (increases in number of children coming into care; development of new provincial/territorial programs; or, routine price adjustments for remoteness);
- There has not been an increase in cost of living since 1995-1996;
- Funding only provided to new FNCFS agencies for 3 year and 6 year evaluations; however, provincial legislation requires on-going evaluations;
- First Nations have to comply with the same administrative burden created by change in provincial legislation but have not received any increased resources to meet those responsibilities, contradicting the principle of Directive 20-1;
- Unrealistic amount of administration support to smaller agencies, often compounded by remoteness;
- The maximum annual budgetary increase of 2% did not reflect the average annual increase of 6.2% in the FNCFS Agencies;
- The average per capita per child in care expenditure was 22% lower than the average in the provinces; and
- The formula does not provide adequate resources to allow FNCFS Agencies to do legislated/targeted prevention, alternative programs and least disruptive/intrusive measures for children at risk.

In addition, a report of the Auditor General in 2008 concluded that the funding formula did not treat First Nations or provinces in a consistent or equitable manner.

The AANDC argued that the numerous studies of the FNCFS should have little weight; that differences between level of services and programs offered on and off reserve may have little to do with funding and more about choices made by FNCFS about the service and programs they provide; and that the complainants did not provide any evidence to compare different funding models. However, the Tribunal found that many of the reports were highly relevant and provided reliable evidence. There was some comparative evidence presented that demonstrated a difference between child and family services funding and service levels provided on and off First Nations reserves.

While the provincial legislation's focused on prevention and using the least disruptive measures in meeting the best interest of the child, the federal funding programs stated their goal was to provide culturally relevant child and family services on reserve. However, the federal government actually provided funding on a fixed basis without considering the specific needs of communities or individual families.

The Complainants alleged that "Jordan's Principle" was not being applied for First Nations children. The Tribunal wrote:

> *Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them [emphasis original].*

The Tribunal concluded the adverse effects generated by the FNCFS program and other provincial/territorial agreements perpetuated disadvantages historically suffered by First Nations people. The Tribunal also held that race and/or national or ethnic origin is a factor in the adverse impact on First Nations children and families. The Tribunal relied on evidence of the historical disadvantages endured by Aboriginal peoples, such as the residential schools and their long-standing impact on child welfare matters. Finally, the Tribunal referred to Canada's international commitments to children (Convention on the Rights of the Child) and Indigenous peoples (e.g., *Universal Declaration on Human Rights, and Declaration on the Rights of Indigenous Peoples*).

As for remedies, the Tribunal ordered that the AANDC remove most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies. The Program and Agreements should be reformed. The AANDC was also ordered to cease applying a narrow definition of Jordan's Principle, and to take measures to immediately implement its full meaning and scope.

Those who work closely with First Nations believe that this human rights decision will open the door to a number of claims to address the fact that (per Katherine Hensel ): "discrimination infuses the entire

relationship between the federal government and First Nations….[in the provision of] government services" (Nicole Ireland, CBC News (27 January 2016).

# Reinstatement

By Peter Bowal and Nicole Bowal

## Introduction

Many Canadians will remember the case of Lynden Dorval, the Edmonton public school teacher, who was fired by his school board for dispensing marks of zero to students who did not do their assignments. Recently the case reached the Alberta Court of Appeal on the question of whether Mr. Dorval should be reinstated to his old teaching job.

In addition to cases where wrongful dismissal has been found (especially in labour relations scenarios), reinstatement is authorized under work-related legislation, such as occupational health and safety and human rights legislation.

This article will describe that case and the circumstances where reinstatement can be an appropriate legal remedy, and where it will not be ordered.

## Facts

Mr. Dorval, a teacher with an excellent performance record over 35 years, was terminated from his job because he refused to follow his principal's order requiring him to use letter codes describing "student achievement, lack of participation, or behavior related to completion of an assigned task." Since the code was not a recognizable grade, it played no part in evaluation of the student's performance. Students who did not complete assignments might have inflated grades compared to their peers who did the assignments, which reduced the incentive to do the assignments.

Instead Mr. Dorval gave a "replaceable zero" to students who did not complete assignments. Students were still encouraged to hand in late assignments for a grade that replaced the zero. This motivated students, promoted accountability and resulted in a work-based evaluation. Mr. Dorval was not the only teacher who defied his principal, but he was the only one disciplined for doing so. On May 17, 2012 he was suspended. Four months later he was fired. Other issues were eventually put forward, such as missing a staff meeting, not grading exams on time, returning to school property without permission and displaying an insubordinate attitude. Over the course of that disciplinary action, hostility had developed between the teacher and his administrative superiors. *[Edmonton School District No 7 v Dorval, 2016 ABCA 8 (CanLII), http://canlii.ca/t/gmw5d].*

## Legal Outcomes

Mr. Dorval appealed his t*er*mination. The reviewing tribunal found he had been wrongfully dismissed and ordered the school board to pay him compensation. The Edmonton Public School Board took the case to the Alberta Court of Appeal where Mr. Dorval also asked to be reinstated to a teaching position in the school district.

The appellate court unanimously upheld the finding that Mr. Dorval had been wrongfully dismissed. It ordered compensation to be paid as if the teacher had been dismissed with reasonable notice and without cause.

But what if the worker wants his job back? One might assume that if the courts had concluded he was unfairly and illegally dismissed, it would be a fair and simple matter to allow Mr. Dorval to return to the classroom on the 0.6 FTE basis he sought. As it turns out, even when one is wrongfully dismissed, reinstatement to one's earlier job is not a right. The reviewing tribunal has discretion to determine if reinstatement is appropriate and an appeal court will assess whether that decision was reasonable.

## Principles for Reinstatement

Reinstatement is more common in the collective labour relations sector than in the non-union sector. Ordering an employer to take back a worker is a form of the extraordinary equitable remedy called "specific performance" of the employment contract. Normally, monetary compensation suffices. Reinstatement is one-sided in the sense that the employer cannot seek and obtain it from a reluctant employee. It is also difficult for a court to monitor the work relationship after reinstatement.

Compared to damages compensation, reinstatement should be used sparingly and only in clear cases. Reviewing authorities will consider the following before ordering reinstatement of an employee:

- does governing legislation, such as the *School Act*, ordain reinstatement as a presumptive remedy;
- what is the likely effect of reinstatement on the future relationship between the employee and the employer? Employers being forced to take back workers they do not want to employ, and where no mutual trust and confidence exists, is repugnant to dignity and choice. Reinstated workers may resume historical confrontations and disrupt the work environment. While reinstatement has long been presumed to be the remedy where dismissals are overturned in grievance arbitrations, the Supreme Court of Canada also stated this only applies where the employment relationship continues to be viable: *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28 (CanLII) at para 56;
- the employee should not be equivocal about returning to work or ambivalent about the reinstatement succeeding, including letting go of past acrimony; and
- reinstatement is less appropriate for short-term or seasonal employments and where compensatory damages are already ordered.

In *Milkovich v. Field Hockey Canada,* 2013 BCSC 486 (CanLII), the British Columbia Supreme Court refused to reinstate the coach of the Women's Junior National Field Hockey Team until his wrongful dismissal lawsuit was completed. The judge considered even temporary reinstatement to be an extraordinary remedy. The employer had lost confidence in his suitability for the job and reinstatement would be disruptive to the team and its new coach.

On the other hand, an Ontario judge upheld an interim reinstatement of an employee pending an arbitration outcome: *National Ballet of Canada v. Glasco,* 2000 CanLII 22385 (ON SC). Likewise, a Nova Scotia Deputy Minister of Justice was ordered not to dismiss a public employee before his wrongful dismissal action was decided on the merits. *Smith v. Nova Scotia (Attorney General),* 2004 NSCA 106 (CanLII); aff'd (2004), 244 D.L.R. (4th) 649 (N.S.C.A.); leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 498.

## Mr. Dorval Not Reinstated

The Court of Appeal agreed with the tribunal's judgment call that Mr. Dorval should not be reinstated, on the basis that the relationship between he and his employer remained irretrievably broken down, even after four years. The fact that Mr. Dorval was near the end of his active teaching career and was only seeking a 0.6 position while collecting on pension, and originally seemed less than totally confident himself that he wanted the job or could do the job, may have all been factors. One might think that the very large school board employer would have been able, more easily than other employers, to accommodate his reinstatement request by posting him at another school. In this case, it appeared to be Mr. Dorval's own lukewarm and ambivalent desire for reinstatement expressed early in the proceedings that put this extraordinary remedy out of his reach.

# Making a Mockery of the Justice System

By Melody Izadi

The new *Netflix* obsession, *Making a Murderer*, is a sensation. Blogs, news programs, articles, magazines, newspapers and water cooler conversations are all immersed in the quest to answer the eternal question: did he do it?

The evidence seems to point in both directions. The *Netflix* documentary itself shines heavy light on the absurdity and outrageousness of the prosecution against Steven Avery. It's hard to walk away from viewing the documentary and not be fairly certain that the police officers engaged in at least some miscarriages of justice, and at least had some hand in what and how evidence was found in the case. To put it in simple terms, the evidence against the officers and the portions of the trial included in the documentary clearly highlighted that the police were, at the very least, being sketchy. Suddenly finding the victim's car key in plain view after numerous searches, with none of the victim's DNA but some of the accused's DNA, is extremely suspicious, if not an obvious indication that the evidence was planted. As Steven's trial lawyers pointed out in the documentary, if the police are willing to plant the key, what else would they be capable of fabricating?

Then we have the post-documentary backlash from prosecutor Ken Kratz and others, reporting that many important and compelling pieces of evidence were omitted from the documentary. For instance, there is  the alleged fact that Avery had phoned the victim's place of business several times that day and specifically requested her attendance on his property.

Steven Avery's ex-fiancé Jodi Stachowski, who was also featured in *Making a Murderer* when the two were dating, has reported to media that Avery tied her to a bed with rope and wanted to have sex with her while she was restrained. On that basis she thinks Brandon Dassey's statement to police containing details of the victim's sexual assault was truthful. She's also gone public with a letter apparently sent to her from Avrey in an attempt to cast light on the "real" Steven Avery that isn't shown in the documentary.

All of this information, and much more, guides opinions and sparks debate and curiosity. Based on media alone, most people have decided whether or not he did it. People feel certain in their conclusions and either condemn or commend the justice system. Those who believe he's innocent sign petitions,

protest, and relentlessly support Steven's appeal on the basis that he is innocent. Those who believe he's guilty use that conclusion as a basis to determine whether or not Avery deserves what happened to him: *if he's guilty, then who cares that much if the police planted evidence: he is where he should be.*

However, what's being conflated in the minds of those who have convinced themselves they are certain of the truth, is the evidence of whether he committed the murder and the concept of reasonable doubt and the right to a fair trial. Justice does not exist when someone is convicted after not receiving a fair trial. Our justice system is not working if there exists a reasonable doubt, yet an individual is convicted. Legal rights exist to safeguard everyone from the powers, influence and resources of the state. Condoning a conviction where the evidence and prosecution falls below that threshold is to condone abuses of power and miscarriages of justice.

What's captured in *Making a Murderer* , despite the defence-friendly content, is enough to demonstrate that neither Avery nor Brandon Dassey received a fair trial. A fair trial includes the right to an impartial jury. A fair trial includes the right to the presumption of innocence, and sound rulings on the admissibility of evidence. On these principles alone, we should champion the prospect of an appeal and ensure the justice system operates as it ought to, and not as a bear trap for the rights of those caught in the hysteria of sensational cases. Real, admissible evidence ought to be presented by the prosecution, and challenged by the defence. An impartial trier then decides a verdict based on this evidence. Neither Avery nor Dassey were given all of these simple promises of our justice systems. Yet hoards of people, despite not having any actual access to the entirety of the evidence in Avery's case, have decided he's guilty of murdering Teresa Halbach and are outraged at the prospect of an appellate decision in his favour.

If there is reasonable doubt in any case, the only verdict that is just is a verdict of not guilty. Not guilty does not mean innocent. A court of appeal ought to not only declare such miscarriages of justice, but also seek to remedy them. Such a decision by an appellate court is not a declaration of innocence. It would be a declaration that our human rights are not lost, or trampled over by the state. It would be a promise by our justice system that everyone deserves a fair trial— despite whatever the Internet tells you to believe.

# The Best We Can Do? – Sybille Bedford's Classic Account of a Famous British Murder Trial

By Rob Normey

During Canada's most talked about court case of the year, the sexual assault trials of Jian Ghomeshi, defence counsel Marie Heinen in her final argument quoted the American jurist John Wigmore. He memorably stated that cross-examination in a trial is the greatest legal engine for the discovery of truth ever invented. As I write this, the decision in the case is reserved and will be rendered next month. What the Ghomeshi case has in common with the famous British murder trial, *R. v. Dr Bodkin Adams*, is a situation where a great number of horrible accusations have been made about an accused prior to trial, creating a black cloud of suspicion. Let us suspend our judgment for the time being in the Ghomeshi matter but instead travel back in time to the *Bodkin Adams* trial. It commenced at the Old Bailey in London on March 18, 1957 (three weeks later the eccentric doctor would be acquitted by a jury).

All true crime aficionados owe a debt of gratitude to the distinguished British novelist Sybille Bedford who turned her hand in two books and several essays to the reporting of major trials and to penetrating analyses of both the trials and their wider cultural and social significance. As she puts it in **The Faces of Justice,** an account of the trial process in several European countries: "The law, the working of the law, the daily application of the law to people and situations, is an essential element in a country's life." Bedford emphasizes that the law, in fact, is part of the pattern of a society like its architecture and art.

In 1957 Bedford took it upon herself to attend every day of the trial at the Old Bailey and provide for her readers an hour by hour account of this sensational trial of a doctor accused of murdering two of his patients. News stories painted a lurid account of a pathological and venal man who may well have been responsible for the deaths of more than one hundred of his elderly female patients, in circumstances where he stood to inherit large sums from them. In her introduction to the book that she crafted, **The Best We Can Do**, she explains that a prime motivation for her was her frustration and lack of satisfaction with the newspaper reporting of criminal trials. She formed the conviction that the hourly chase after sensations and the fragmentary and often illogical nature of news reports was a clear disservice to citizens. Bedford hence took her immense powers of observation and characterization and applied them to all the dramatic personae in the *Bodkins Adams* trial. Each chapter of the book represents a day in court – ending with Day 17 in what was, to that point, the longest criminal trial in British history. Bedford gives us the dramatic sweep of a major criminal trial in all its official majesty and solemnity. She

begins Day One as follows: The Judge came on swiftly. Out of the side-door, an ermined puppet progressing weightless along the bench, head held at an angle, an arm swinging, the other crooked under cloth and gloves, trailing a wake of subtlety, of secret powers, age: an Elizabethan shadow gliding across the arras. What is particularly noteworthy is that we are accorded the privilege of receiving a careful re-enactment of how this trial unfolded in real time, as if we had been invited to sit in the Central Criminal Court Number One, the most famous court in the English-speaking world. Alfred Hitchcock, an inveterate court watcher in his youth, thought the court to be of such great significance that he spent a considerable sum on a massive recreation of the court on the set of his film, **The Paradine Case**, starring Gregory Peck and Allida Valli (he was denied permission to film inside the hallowed corridors).

Bedford adopts the approach of offering a sequential reporting of each day's events in order to mirror the ideal of a jury trial. The perfect jury listens carefully to the remarks of counsel and the evidence that is presented by the Attorney General (personally in this case) and the defence. They – and uniquely, we the readers – are not to proceed in a fashion where prior newspaper and magazine accounts will have already coloured our understanding of the events. Jurors are indeed like theatre goers who attend a new play they have not read detailed accounts of in advance. The case will be presented, tested by rigorous cross examination of all evidence, pulled apart and then put back together again before a considered judgment is reached.

Dr Bodkins Adams first faced the charge of murdering his elderly patient, Mrs. Edith Morrell, who had had been partially paralyzed after suffering a stroke. The doctor administered various drugs, including an alarmingly increased prescription of morphine and heroin. In this high profile matter, Sir Reginald ("Reggie")Manningham-Buller, the Attorney General himself, lead the prosecution team. He had the unfortunate nickname, Sir Bullying Manner, for the way he aggressively and untactfully treated witnesses. The defence counsel was Sir Frederick Geoffrey Lawrence, a brilliant counsel and devastatingly effective cross-examiner. The presiding justice, Patrick Devlin, was a highly intelligent and agile star performer on the bench. He so carefully kept notes in this trial that he felt compelled to expand them into a book he would actually write about the case and publish, rather astonishingly, some years later (**Easing the Passing**, published in 1986, a few years after the doctor's death).

The first set of witnesses to take the stand as part of the Crown's case were the four nurses who took turns caring for the fatigued and paralyzed patient on a 24-hour basis. They testified that Dr Bodkin Adams would, on a fairly regular basis, inject his patients with large doses – apparently excessive doses – of drugs such as morphine and heroin in order to alleviate the pain. They indicated that they were generally shocked and suspicious of such an approach but felt in no position to challenge a trained general practitioner. It is noteworthy that the setting for the events was the seaside resort town of Eastbourne, East Sussex, a rather enclosed community where many retired and wealthy families lived on their large estates. Dr Bodkin Adams was known to expressly tell his largely female and elderly clientele that he kept his fees reasonable because they made up taxable income but he would very much appreciate being named a beneficiary in their wills, which gifts were not taxable. The doctor had come to the community as a loner and something of a misfit. In fact, we now know that he was immensely

focussed on climbing the social ladder. He ingratiated himself with his wealthy clientele presumably in order to become something of an honorary member of the upper classes. He was gifted a Rolls Royce and had three other vehicles and a chauffeur who drove him about the town and down to London, where he would accompany his charges when they needed to see specialists. The rumours circulating through the town were that once you named the doctor in your will, your days would be numbered. That being said, many patients themselves seemed to be very contented with the extra attention and apparent compassion he regularly displayed. A mysterious situation to be sure!

The evidence given by the nurses may have initially looked like a strong case in favour of a guilty verdict but as Lawrence worked through his carefully planned cross examinations of each of them, the balance dramatically shifted in favour of the defence. Perhaps the most astonishing flourish provided by this eminent counsel was the production of the notebooks of the care of Mrs. Morrell that had been maintained by the nurses. The prosecution team had no inkling whatsoever that such notebooks existed and, of course, were taken aback by the bold move of Mr. Lawrence. He proceeded to take the nurses through the notebooks and, with carefully nuanced questions, was able to establish that the notebooks should be viewed as more reliable than the somewhat fallible memories of the witnesses.
An interesting development late in the trial was his scorching partial demolition of their credibility. He was able to confront them with their lengthy discussion amongst themselves about the ongoing case , including their thoughts on the newspaper accounts, while taking the train back from Eastbourne to London at the end of the weekend. How Lawrence was able to acquire this vital information of their flouting of the court direction that they not discuss the matter at all amongst themselves until the trial was concluded is unknown. It is believed that a conscientious citizen travelled in the train compartment with them and called Lawrence's chambers on the Monday morning shortly before the trial was to resume. By that point in the trial he must have appeared to the many spectators as a true magician.

By all means read Sybille Bedford's remarkable account of a trial for the ages. Fascination with the *Bodkin Adams* trial still continues and new books have been written in recent years which reflect an awareness of additional records and recollections, together with much informed conjecture. In 1946 George Orwell had penned a humorous "lament" on the decline of the English murder in an essay (found in Penguin Books – **Decline of the English Murder and Other Essays**). Poor George did not live to read this absorbing account by another masterly writer. It proves beyond all doubt that the unique murders or apparent murders and their aftermath that take place in various English towns and villages continue to arouse interest and controversy. The drama here reached its climax in this landmark trial and its denouement.

# Whatever Happened to … Scandalous Criminal Allegations: the *Miazga* Case

By Peter Bowal and Aleksandar Gvozdenovic


## Introduction

*Miazga v. Kvello Estate* is a tragic, yet fascinating, case which reminds us of the devastating power of criminal prosecution to ruin innocent lives and the near impossibility to hold Crown prosecutors legally accountable when that happens [(2009) 3 SCR 339, 2009 SCC 51 http://canlii.ca/t/26g27].

## Facts

In 1989, Michael, Michelle and Kathleen Ross (aged 7 to 10 years) began to accuse their biological parents, foster parents and extended family members of sexual and ritual abuse. Michelle, in a videotaped interview with Saskatoon police and therapists, described horrendous rituals that they were made to witness and endure, including acts of infanticide, cannibalism, drinking human blood, being forced to eat their own excrement, and perform sex acts. Although the allegations were preposterous and lacked any credible evidence, the prosecution was unrelenting.

On July 10, 1991, 16 people were charged with almost 70 counts of sexual assault. In fact it was Michael who was abusing his sisters, coercing them into performing and participating in sexual acts. This was known to the Klassens, who urged Social Services to transfer him to a different foster home, which they eventually did. Michael had a difficult early childhood growing up with deaf, mute, alcoholic and allegedly sexually abusive parents.

Michael then accused the Klassens of sexual assault, claiming that he was concerned about the safety of his sisters. Social Services did not separate Michael from his sisters, even though the new foster parents noted and reported similar behaviour. The investigating police officer and therapist largely ignored this when it came up. They focused on gathering evidence against the adults.

The accused adults were troubled by the investigation. They believed the investigators had prompted the children to lie by providing examples of sexual and ritual abuse, by encouraging and rewarding answers that would suggest guilt, by emphasizing the sexual parts on anatomically correct dolls, and using influence and coercion.

A number of adults were found guilty at the Saskatchewan Court of Queen's Bench and Court of Appeal level. The Supreme Court of Canada overturned the convictions, and although the Court felt there was enough evidence to re-try the adults, the charges were stayed to prevent the children from facing more court proceedings. Eventually, all three children recanted their allegations.

## Malicious Prosecution Lawsuit

In 1994, twelve members of the Kvello and Klassen families launched a civil action for malicious prosecution against the investigating police officer, therapist, Crown prosecutors and their supervisors. They sought $10 million in damages. This civil action played out for 15 years until prosecutor Miazga's fate was decided by a unanimous Supreme Court of Canada.

Following the 1989 case of *Nelles v. Ontario*, the Court confirmed that four key conditions must be satisfied for a malicious prosecution claim to be successful. The plaintiff must prove the prosecution was:

1. initiated by the defendant;
2. terminated in favour of the plaintiff;
3. undertaken without reasonable and probable cause; and
4. motivated by malice or a primary purpose other than that of carrying the law into effect.

Only the last two elements were at issue in this case. According to the objective assessment made of existing circumstances, there was reasonable and probable cause to initiate a criminal proceeding. Malice lies in some 'improper purpose' by which prosecutors misuse their position for a purpose other than that which is intended for the criminal justice system. Malice was not proven in Miazga's case.

Lawsuits against police and prosecutors for malicious prosecution are rarely successful. Prosecutorial independence and discretion are essential for fair and efficient functioning of the judicial system. Prosecutors need discretion throughout legal proceedings and they should be immune from review of this discretion unless it was motivated by an improper purpose. Crown independence ensures third parties do not influence judicial affairs. Since the Attorney General is also a political member of government's cabinet, prosecutors must remain independent. Today, the test for prosecutions in Canada is whether there is "a reasonable likelihood of conviction."

Criminal prosecutions impose a significant cost on accused who are not guilty. They may be subject to public scorn, humiliation and loss of reputation, and suffer from depression, anxiety and mental anguish. They may lose their jobs and future employment opportunities. They may need medical treatment and counseling. All of these afflictions were borne by the Klassens and their children. As late as 2007, Kayla Klassen said, "My whole life I've been called Baby Eater and I am still called that name to this day. It's ruined my life." Even if reputations are eventually rebuilt, one might never fully recover.

## Where are the Parties Now?

During the lengthy legal proceedings, two plaintiffs (Dennis Kvello and Marie Klassen) passed away. Despite losing in court, the Kvellos and Klassens were paid $2.736 million from the Saskatchewan government for pain and suffering and legal costs. They have remained out of the spotlight since the trial, after years of public scrutiny. Richard Klassen co-founded with activist Sheila Steele, the 'injusticebusters.org' website, which described the trial from the perspective of the accused. Contributions to that website ended in 2006, after Ms. Steele passed away. In 2009, Mr. Klassen mused about writing a book to encourage others facing similar struggles, but he has yet to do so.

The Ross sisters, as adults, received a $560,000 settlement for the abuse at the hands of their brother. The Ross sisters were previously impoverished. One had been living homeless in downtown Vancouver. The investigating police officer is retired. Matthew Miazga continues as a Crown prosecutor in Saskatchewan.