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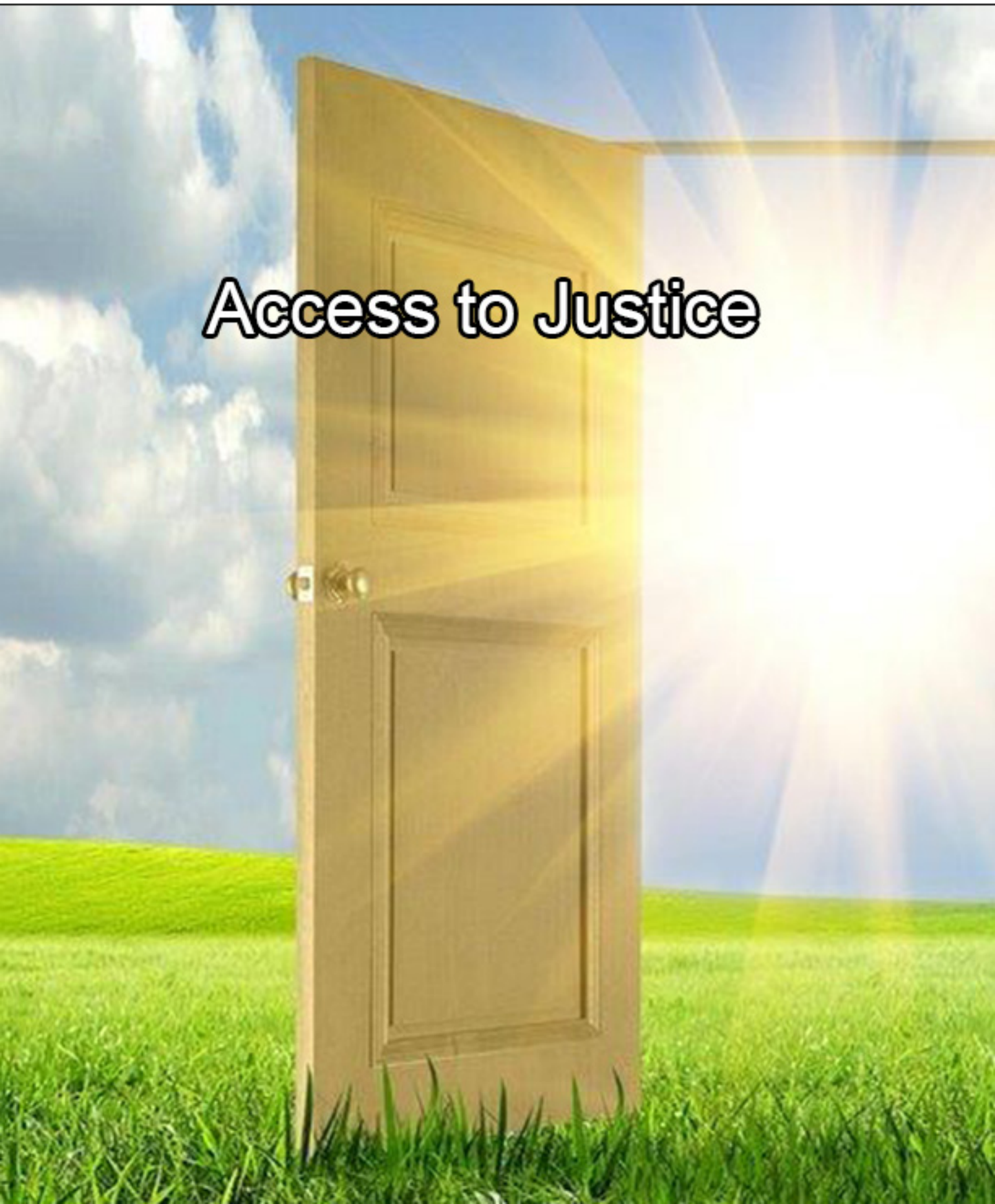

40-5: Access to Justice

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Right to Counsel Includes Access to Counsel

By Lorraine Snyder

Introduction

The right to counsel upon arrest is a constitutionally protected right under section 10(b) of the *Canadian Charter of Rights and Freedoms*. On July 18, 2014, the Supreme Court of Canada clarified the importance of this right in the case of *R v Taylor (Taylor)*. In this case, the police did not provide an opportunity for a suspected drunk driver to access counsel and, in doing so, they denied him his right to counsel. Section 10(b) states that "everyone has the right on arrest or detention…to retain and instruct counsel without delay and to be informed of that right." It ensures that a detained or arrested individual knows both the nature of the charges and his or her legal options.

In building on the section 10(b) cases before it, *Taylor* clarifies that for Canadians to trust the justice system, police must ensure that they do not simply pay lip service to section 10(b); the *right* to counsel must become *access* to counsel. In other words, an accused's right to seek the advice of a lawyer is an important *Charter* right that cannot be ignored or violated.

Facts

Early on April 13, 2008, Jamie Kenneth Taylor left a party in Cochrane, Alberta, in a vehicle containing four other passengers. Driving at high speeds, he lost control while attempting to turn right. His vehicle hit a street lamp and rolled several times, injuring three of his passengers. Police informed him of his *Charter* rights at the time of arrest. His response was that he wanted to speak to both his father and his lawyer but police did not give him access to a phone at the scene.

Paramedics found Taylor to be in good health but took him to the hospital for a thorough examination as part of their standard procedure. There, a nurse took five vials of blood from Taylor between 3:05 a.m. and 3:12 a.m. The police asked staff when Taylor would be able to leave the hospital to give a

breath sample. The staff were unable to provide a definitive answer, and so an officer issued a blood sample demand to Taylor. A doctor withdrew a second set of blood samples from Taylor at 4:53 a.m. and these samples were given to the police. On the following day the police applied for a warrant to seize the first five vials of blood in addition to the second set that they already possessed. The warrant was granted and the police took this blood from the hospital. The analysis of both sets of blood revealed that Taylor's blood alcohol level was above the legal limit at the time of the accident. The police used the samples as evidence against Taylor to charge him with impaired driving.

Procedural History

The Alberta Court of Queen's Bench heard Taylor's trial in 2011. The Crown conceded that the second set of blood samples were inadmissible because the police had failed to provide Taylor with an opportunity to consult counsel prior to demanding the second set of samples. However, the Crown insisted that the first set of vials, taken 30 minutes after Taylor's arrival at the hospital, were admissible. The trial judge agreed, stating that there was no section 10(b) breach when staff took the first set. The judge stated that when an accused "is awaiting or receiving emergency medical treatment, there is no reasonable opportunity to provide private access to the accused to a telephone to implement his right to instruct counsel." The Court admitted the first set of blood samples as evidence and convicted Taylor.

Taylor appealed the decision to the Alberta Court of Appeal. In April 2013, the Alberta Court of Appeal heard Taylor's case, where they set aside his conviction. The majority at the Court of Appeal found that the trial judge erred in concluding that there was no reasonable opportunity to provide Taylor access to counsel prior to taking the first set of samples. Phones were available at the hospital. Law enforcement admitted to forgetting to assist Taylor in fulfilling his section 10(b) rights, which rendered Taylor unable to "exercise a meaningful and informed choice as to whether he should or should not consent" to having the first samples taken.[12]

The Crown appealed the case to the Supreme Court.

Issue

The issue brought before the Supreme Court was whether Taylor's section 10(b) rights were violated during the detention process, therefore rendering the first set of blood samples inadmissible as evidence. More specifically, did the police comply with Taylor's section 10(b) right to speak with counsel "without delay?"

Decision in Brief

The Supreme Court dismissed the Crown's appeal. It unanimously agreed with the majority of the Court of Appeal's conclusion that the police deprived Taylor of his section 10(b) *Charter* right to counsel throughout the detention process, and that the first set of blood samples were inadmissible as evidence

Analysis

The Application of Section 10(b)

Madam Justice Abella delivered the Supreme Court's reasons. She cited several previous cases that have helped to clarify the essence of section 10(b), whose purpose is to allow an arrested or detained individual to be informed of his or her rights and obligations under the law and to obtain advice on how to exercise those rights. The Supreme Court in *R v Manninen* reiterated that section 10(b) is "meant to assist detainees [to] regain their liberty, and guard against the risk of involuntary self-incrimination." This ensures that someone who is detained, or "under control of the state" and in possible legal jeopardy, can make a free and knowledgeable choice to cooperate with law enforcement. In *R v Bartle* and *R v Suberu* the Supreme Court stressed that the need for this duty begins *immediately* at the time of arrest, and the police have a constitutional obligation to provide access to counsel "without delay."

The Supreme Court also found that the Crown was unable to prove beyond a reasonable doubt that the police's delay in giving Taylor access to a phone was reasonable. Once at the hospital, 20 minutes passed before staff took any blood. This was more than enough time for the police to ensure Taylor had access to a phone. At no time was Taylor under emergency care that would have rendered his consent impossible. In fact, one police officer conceded that he made a "mistake" and that he could have given Taylor access to a phone if he had remembered to do so. This indicates that no practical obstacle stood in the way of facilitating Taylor's section 10(b) rights. Madam Justice Abella maintained that someone who enters a hospital for medical treatment is not in a "*Charter*-free" zone: "Since most hospitals have phones, it is a question simply of whether the individual is in an emergency room. [It] is whether the Crown has demonstrated that…a private phone conversation is not reasonably feasible." Taylor *could* have used a phone at any time during the process. He simply was not given the opportunity.

The Grant Test: A Constitutional Safeguard

In some circumstances, the court may choose to admit evidence despite a section 10(b) breach. In other words, even if the police have breached an individual's right to counsel, the evidence that was acquired may be used by a court in determining guilt or innocence. Doing so involves determining whether to invoke *Charter* section 24(2), a provision that examines unconstitutionally obtained evidence and determines if excluding it could bring the administration of justice into disrepute. Also known as the *Grant* test, the section 24(2) analysis balances the "seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused…, and society's interest in the adjudication of the case on its merits." The Court agreed that the police's conduct was serious and that it was a significant violation of Taylor's right to counsel.

The Supreme Court noted that the public has an interest in seeing the court admit the blood samples as evidence because drunk driving is a severe crime against the state. However, the Court ruled that police placed Taylor's medical interests in direct tension with his constitutional rights. Taylor was in a legally vulnerable position when hospital staff took blood samples before he had the opportunity to consult with legal counsel. His health was not an emergency, and the police admitted that there were time and resources available to help Taylor realize his section 10(b) rights. They simply forgot to do so. The

Supreme Court stressed that it could not accept this type of behaviour from police, therefore, it excluded the evidence:

[In our] view, the seriousness of the *Charter* breach and the impact of the police conduct on Mr. Taylor's interests are such that the admission of the evidence would so impair public confidence in the administration of justice as to warrant the exclusion of the evidence.

Significance of the Ruling

R v Taylor illustrates that access to counsel is a fundamental principle of Canada's justice system. Paying lip service to *Charter* rights is simply not adequate. Here, the Supreme Court maintained that the police could not assume that barriers to access existed. They were required to prove it. They also had an obligation to ensure that they assisted the accused in fulfilling his or her *Charter* section 10(b) rights, because it is often impossible for the accused to do so alone.

Yet, the *Charter* has a built-in safeguard that allows evidence to be gathered and admitted despite a violation of an individual's *Charter* rights if doing so is in the best interests of justice. In some cases, the Supreme Court must admit evidence in order to achieve a just result. This was not the case in *Taylor*. The Supreme Court believed that maintaining Canadians' confidence in the justice system outweighed the benefit of admitting the evidence and convicting Taylor for impaired driving.

R v Taylor illustrates the importance of upholding *Charter* values in the criminal justice system and, in the words of Madam Justice Abella, hospitals are not "*Charter*-free zones." Indeed, the *Charter* applies everywhere and at all times for everyone, and the police must respect an accused's right to counsel or risk undermining the public's confidence in our justice system.

This article was prepared for the Centre For Constitutional Studies and was first published in the Centre's Newsletter on December 17, 2014. it is reprinted with the permission of the Centre.

The Right of an Imprisoned Accused to Conduct Online Research

By Sarah Burton

Case Commented On: *R v Biever*, 2015 ABQB 301

The link between access to information and access to justice is not often discussed, but it is implicit in our legal process. Document production, questioning, and Crown disclosure are all premised on the notion that one needs access to relevant information in order to present one's case. This idea should also extend to legal research. Without access to precedents, case law and procedural texts, the ability to adequately argue a case is significantly impaired.

R v Biever, 2015 ABQB 301, tackles the issue of access to legal information in a unique context – the right of an imprisoned accused to conduct online legal research. While prisons provide access to criminal law texts, the court in *Biever* considered whether those resources were adequate for an inmate to meet and defend the case against him. In ruling that the accused was entitled to more materials, the court raised questions about how prisons should be providing access to legal information. *Biever* also raises interesting questions about how we deal with self-represented parties who simply do not want a lawyer.

Facts

The accused, Mr. Biever, was charged with a number of offences related to bank robbery. He was denied bail and had been in custody since March 2013. After moving on-and-off through ten publicly and privately retained lawyers, Mr. Biever elected to represent himself.

Self-representation is complicated at the best of times, but it is particularly problematic for prison inmates. The Edmonton Remand Centre (ERC) – the facility housing Mr. Biever – does not provide Internet access to prisoners. There is no formal library, but there is a collection of criminal law texts that can be ordered through an internal request system. There is also no access to photocopying, scanning, word processing, or commissioning services.

To facilitate his research efforts, Mr. Biever purchased an annotated *Criminal Code* and relied on family and friends to bring him case law. He experienced difficulty and delay getting that case law into the ERC.

In light of these difficulties, Mr. Biever launched a pre-trial application arguing that these restrictions (and particularly, the ban on Internet research) violated his section 7 *Charter* right to make a full answer and defence to the case against him. This argument was premised on three points (as presented by an *amicus* *a latin phrase meaning "friend of the court"):

1. the election to self-represent was his right;
2. his liberty was infringed by the denial of bail; and
3. the conditions of his detention prohibited him from accessing information necessary to defend himself.

In an attempt to meet Mr. Biever's continuing complaints (and perhaps, to undermine the weight of his argument) the Crown provided the accused with research materials and assistance short of Internet access. In addition to the texts that are regularly available to inmates at the ERC, Mr. Biever was given:

- access to a laptop with the DART Westerns Decisions [DART] database uploaded on it; and
- an *amicus* defence counsel who would provide case law and guidance.

Mr. Biever appreciated these resources, but argued that they were inadequate. The DART database was limited – it provided case summaries only and was infrequently updated. As for the *amicus*, Mr. Biever was appreciative for this assistance, but expressed frustration at the restrictions placed on how frequently they could speak or meet.

In defending the application, Crown counsel focused on the safety, logistical, and financial hurdles to Mr. Biever's request. The request would cost money not only in terms of equipment, but additional staffing and monitoring costs. Internet access raised questions about witness tampering, or the ability to access and use information against other inmates or staff. Logistically, there were numerous questions about exactly where and how access would be granted. In light of these concerns and the reasonable alternatives provided, the Crown argued that Mr. Biever's requests were neither required nor workable.

Decision

Justice Graesser ruled in favour of Mr. Biever. He was satisfied that Mr. Biever would be unlikely to make a full answer and defence without having greater access to legal information. Justice Graesser explained his reasoning at paragraph 87:

> *At a minimum, Mr. Biever should have timely and reasonable access to all Canadian criminal law case authority. … Supreme Court of Canada decisions come out weekly, and Alberta Court of Appeal decisions come out daily. Their decisions are binding authority in Alberta and timely access to these decisions is essential to anyone attempting to present arguments in a criminal matter, whether it be at trial or on pre-trial applications.*

While he declined to order the exact legal sources that must be provided, Justice Graesser had some strong "suggestions" about what reasonable access would look like. He was "hard pressed to see" how reasonable access could be provided without some access to the Internet, and in particular, the CanLII website. While the ERC would be under no obligation to pay for online research services like Westlaw or Quicklaw, Justice Graesser saw no reason why inmates could not be provided access to these sites at their own expense. Similarly, while inmates could not expect free typing or printing services, access to word processing and printing at the inmate's expense appeared to be reasonable.

This decision signalled that Justice Graesser was unpersuaded by the Crown's arguments about practical constraints. In particular, concerns about the ERC's ability to provide restricted Internet access rang hollow in light of its own website which called the ERC "the largest, most technologically advanced remand facility in Canada".

Justice Graesser was equally unpersuaded that his decision would create a slippery slope. He noted that most criminally accused persons choose to be represented by counsel, either through public or private sources. These inmates would not need access to online research sites. Moreover, Justice Graesser took steps to constrain the decision to its particular facts. Mr. Biever had specifically demonstrated, through his evidence and prior appearances before the court, that he would benefit from more and better access to legal information. In his efforts and previous appearances, Mr. Biever had demonstrated his ability to make use of legal information after being given access to better resources. Many other inmates would not be able to demonstrate this benefit.

Commentary

Justice Graesser had two bodies of case law to draw from in rendering his decision. Interestingly, he opted to follow the less predictable path.

The first collection of cases was directly on point. These Ontario and British Columbia decisions held that self-represented inmates simply cannot expect Internet access to conduct research. The applications were dismissed for the following reasons:

- the right to self-represent is a right, but not one without consequences (at para 56, citing *R v Jordan*, [2002] OJ No 5250 (QL) (Ont Sup Ct J);
- practical and security constraints render requests for Internet access unworkable (at para 58, citing *R v John*, [2007] OJ No 2257 (QL));
- reasonable alternatives (such as the appointment of an *amicus*) can remedy any constitutional concerns (at para 54, citing *Jordan*)
- a court lacks jurisdiction to order a remand centre to provide these facilities (at para 74, citing *R v Wilder*, 1998 CanLII 4172 (BC SC)); and
- cases that were not complex and did not raise unsettled points of law failed to establish the need for more fulsome legal resources (at para 59, citing *R v Parchment*, 2011 BCCA 174).

The cases of Mr. Biever and the *amicus* were more general, and drew on broad principles from Canadian and U.S. case law. These decisions discussed the ability of self-represented inmates to prepare their cases, and held:

- there is an (American) constitutional right to prepare one's case, which includes an obligation on prisons to provide direct access to "truly adequate" law libraries; and
- the right to make a full answer and defence can be impeded if there is a failure to provide adequate space or facilities where preparation can be performed.

None of the cases cited by any party arose in Alberta, so Justice Graesser was free to draw from either camp. However, given that the Crown's cases provided a much closer analogy, why did he opt for the less obvious choice?

The first reason is context-specific and was made explicit in Justice Graesser's decision – Mr. Biever had demonstrated through his multiple court appearances that he actually uses and benefits from better access to legal information. He had been given limited access to CanLII on a prior application, and had demonstrated an ability to make reasonable use of any resources provided. With that backdrop, it was difficult to say that denying those resources would not impact his ability to defend himself.

In my view, however, two less explicit rationales equally guided Justice Graesser's decision.

A. Technology and Legal Research

> We live in a technology driven age, and nowhere is this more evident than in reviewing how legal research has changed over the past 20 years. Legal research is now a predominately online exercise. It is likely beyond the contemplation of every legal researcher to imagine preparing for trial without access to the Internet or a computer. Given that no one in 2015 would head to trial relying solely on research collected without at least checking online legal resources, it simply does not follow that an accused can adequately defend him or herself without it.
>
> In a related vein, the ERC's argument that Internet access is too risky or problematic does not fly in a way it might have ten years ago. As any employment lawyer (or employee) knows, online access is regularly restricted and monitored. Providing an inmate with access to CanLII does not entitle him or her to peruse Facebook. In terms of logistics, Justice Graesser noted that Internet ports were already installed in many rooms at the ERC – they just had not been connected yet. Any additional obligations in terms of monitoring or security were not unduly onerous.

B. The Use (and Limits) of an *Amicus*

> At various points in the judgment, Justice Graesser made special note of the value added by Mr. Badari, the *amicus* appointed to assist Mr. Biever. As *amicus,* Mr. Badari met with Mr. Biever, provided him with case law and research, and made arguments in support of Mr. Biever's

position to the court. As Justice Graesser rightly noted, however, there are limits to this practice. Mr. Badari was not Mr. Biever's lawyer, and should not be treated as such.

The appointment of an *amicus*, as helpful as they may be to the court, Crown, and accused, raises some uncomfortable questions insofar as this practice is used to remedy constitutional defects. For better or worse, Mr. Biever elected self-representation because he did not like, trust, or want a lawyer. In this circumstance, can we say that he was able to fairly meet and defend the case against him because, instead of providing him with access to free legal information, we appointed a lawyer to assist?

Concluding Thoughts

In my view, this case is most important for its recognition of the changing face of legal research. The move to web-based resources has forever altered the way legal research is conducted. The *Biever* decision simply recognizes that this reality has implications for the pre-existing right of criminal accused persons to represent themselves and adequately prepare for trial. This decision has the further benefit of correctly confining the role of a court-appointed *amicus.* It will be interesting to see how Alberta detention facilities respond to Justice Graesser's suggestions, and how many self-represented inmates will reap the benefit of this decision.

Access to Justice: Potential Alternatives for Indigenous Peoples

By Troy Hunter

Photo Credit: Troy Hunter

About a year ago, there had been some publicity concerning *Louie v. Loui*e BCCA, a court case where I acted as barrister and solicitor for an intervenor at the B.C. Court of Appeal. The case had involved a band member who sued his Chief and Council for a breach of fiduciary obligation. I was approached at different times by a number of other concerned people who also wanted to sue the leaders in their communities over things such as alleged mismanagement of communal funds or even bigger questions about who has authority in land claims, etc.

I remember that one of the chiefs sued in *Louie v. Louie*, commented to me about the practice of band members suing chiefs. If I recall, his comment was that it shouldn't happen. Chiefs are part of the fabric of the community; they themselves stem from the grassroots people and often have the highest hopes for their communities. I very much agree; it shouldn't have to happen. However, there are times when individuals feel that they have no choice but to turn to the court to try to get their issues resolved.

Here, at this juncture, is when Indigenous law has an opportunity to flex its muscles and become the authority but that is not always the case. Rather than seeking resolution through consent-based processes that likely involve Elders and other community people, the courts are sought for binding judicial decision-making.

It's not an easy process to go to court, especially in situations where there is an imbalance of power, for example, between a chief and grassroots band members. Oftentimes, grassroots band members lack the financial capacity to carry a case through to completion of trial because the court system has become an expensive process.

Speaking of costs, the *Tsilhqot'in* case is the landmark Aboriginal title case in Canada and the only case where the judiciary has ruled that a First Nation has Aboriginal title. It cost tens of millions of dollars. How different is this than the First Nation that borrows $25 or $30 million to negotiate a treaty? Well certainly there are big differences, but in the big picture, the end result is similar. In both processes, there are vast expenditures of resources, and ultimately, there is settlement of some kind that involves setting out treaty land or aboriginal title land. To me, they are the same thing.
One of the biggest advantages of negotiation over litigation is that the parties involved control the outcome through consent. When litigation is involved, a judge, or at times, a jury determines what the outcome is going to be and it isn't always good. Negotiation produces a better outcome because both sides might end up with having their interests met in some way, whereas in litigation there is a winner and a loser.

For Indigenous people, the question of access to justice remains outstanding. Certainly, there are times when going to court will achieve the desired outcome because of the entrenchment in both sides, which is the basic unwillingness to make any compromises. The band member that believes that the chief and/or council has been doing something untoward with communal resources, or a First Nation wants to obtain a declaration of Aboriginal title from the court. There are cost consequences and because of that, barriers to the legal system exist. Grassroots band members face barriers because they may not have any money, may be unemployed or their income may be insufficient to hire a lawyer. Likewise, First Nations lack access to the tens of millions of dollars it might require to prove an Aboriginal title case.

As a member of an Indian band myself, I know firsthand what its like to be part of an Indian Band. Within the Band system under the *Indian Act,* there are oftentimes feelings of oppression, jealousy, and lateral violence. It has been said that if you have a bucket of red crabs and a bucket of crabs of some other colour, the red crabs can never quite seem to escape from the bucket on account of jealousy and lateral violence while other crabs manage to all free themselves. When a person starts to get ahead, there are other people that will pull that person back down, just like the bucket of red crabs. This is what goes on in Indian communities. However, the *Indian Act* system requires an elected leadership and so eventually power flows to a few individuals that make decisions, control Band funds, and so on.

Someone recently sent me a letter they received from Aboriginal Affairs and Northern Development Canada. It said that if a person has a problem with anything from housing to complaints about the Band Council for unfairness, they are to bring their concerns to their Band Council for resolution. To me, it seems like seeking resolution from the very person or persons causing the problem may cause further problems, such as being blacklisted from employment, housing, renovation funds and the like. It's akin to a person in an abusive relationship; approaching the abuser sometimes isn't the cure at all. With that said, the same occurs in adverse court proceedings; hostility arises.

When problems arise at the Band level, the usual course of action is to hold a Band meeting, but each community have their own ways of dealing with disputes. This is problematic as I've heard some communities haven't had Band meetings in years. When a decision has been made by a Band Council, it

should be documented by Band Council Resolution made at a duly convened meeting. These decisions are considered to be much like a court decision in that it is made by a federal tribunal and can be challenged under a judicial review process. The judicial review process in the Federal Court requires filing within 30 days of the decision being made and that it is expensive to hire a lawyer to bring a case for judicial review.

The issue of access to justice in an Aboriginal context recently came up in a report tabled in 2015 by the Truth and Reconciliation Commission of Canada in the Calls to Action which include calling upon, "… the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples,* endorsed by Canada in November 2012 (TRC)". Recommendation number 50 states:

> *Equity for Aboriginal People in the Legal System*
>
> *In keeping with the* United Nations Declaration on the Rights of Indigenous Peoples, *we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.*

If indigenous people embrace Indigenous law and truly look to their inherent rights, perhaps they can revive the Indigenous legal traditions for a better system, one that doesn't cause friction in the community and brings about communal consensus based dispute resolution. Perhaps, if there were an Indigenous law institute, an individual band member who has no funds for litigation could still bring their chief to a forum where fairness is achieved without worrying about which side has more money. It also could be the place for early collaborative measures, which is what the Parents' Legal Centre does in downtown Vancouver when it comes to Aboriginal kids in child protection matters. What is required is full support from all levels of government, law societies, First Nations and Metis organizations, and of course, the public.

The issue of access to justice isn't going to go away very soon but in the meantime, Indigenous people have section 35 of the *Constitution Act 1982* that guarantees Aboriginal rights. It is this guarantee that should be looked to in reviving Indigenous legal traditions, because in my mind, the court cannot be the answer to all the problems that exist. I am reminded of what the late Chief Justice said at the end of the Supreme Court of Canada decision in the 1997 landmark *Delgamuukw* case when he referred the matter back to trial but also strongly suggested a negotiation process of give and take from all sides. Chief Justice Lamer stated, "after all, we are all here to stay".

That comment is often quoted in matters of indigenous peoples and reconciliation. It's an important thought because whether or not we are dealing with an indigenous community surrounded by non-

indigenous people, or if the matter is internal to an Indian Band, we should all remember the words of the late Justice Lamer: after all, we are all here to stay.

Crowdfunding: Leveling the Playing Field

By Avnish Nanda

Over the past three years, nearly 12 million Canadians will have experienced at least one legal problem. However, few Canadians have the resources to navigate the legal system to address their legal problems. Court and legal fees are major obstacles in the pursuit of justice.

The costs of bringing a lawsuit in the *public interest* can be even more daunting. Often, litigants face off against the vast resources of a government agency, multilateral organization or multinational corporation. Moreover, the nature of public interest lawsuits requires specialized investigations, research or evidence gathering techniques that cause public interest litigants to incur greater costs than would be the case in a typical lawsuit. The more novel the claim, the more expensive it will be.

Crowdfunding could be one part of the solution. Crowdfunding is the practice of funding a project or venture by raising numerous small amounts of money from a large number of people online. The practice is increasingly popular around the world and has led to the explosive growth of crowdfunding sites for various uses over the past few years. These include GoFundMe and Fundrazr, both industry-leading crowdfunding platforms in the United States and Canada, respectively, and Mighty, LexShares and Invest4Justice, crowdfunding sites that offer investors a promising return in exchange for an investment in a legal claim. Donation-based crowdfunding platforms have also emerged, including CrowdDefend in the United States, CrowdJustice in England and LawFunder in Australia, each of which facilitate the donation of funds towards public interest cases.

JusticeFundr is the first crowdfunding platform designed to help Canadians get their day in court. The platform was established to help ameliorate the financial burden facing Canadian public interest litigants. Established as a non-profit, JusticeFundr provides a fundraising hub for litigants to build a donor community to provide financial support for their legal matter by engaging Canadians from across the country. This allows individuals and organizations to launch and sustain legal challenges. Specialized crowdfunding platforms like JusticeFundr provide donors a recognizable space to fund the causes they are looking to support.

Before diving into crowdfunding, potential litigants and donors should carefully review the fee structure of each crowdfunding site to ensure that the platform and processing fees are nominal: the vast majority of funds donated should go towards the supported cause. Potential users should also make sure that some steps are taken to verify that campaigns posted on each crowdfunding site are for legitimate legal disputes. For example, before JusticeFundr approves a campaign, we require that the campaign submit proof that the action has begun, a lawyer or law firm has been retained or that other major steps have been taken to further the claim. Prospective users should also consider the legal claim itself; crowdfunding generally works best where a matter has an existing base of support to draw from or is sufficiently newsworthy to generate outside interest.

Crowdfunding is not the only, nor necessarily a major solution to the access to justice crisis confronting public interest litigants in Canada. However, it is a technique that can be used to overcome costs associated with litigation; the most significant barrier in most cases. However, public interest litigants must do their research before engaging in any sort of crowdfunding campaigning, as there are options out there and they are not equal.

Access to Legal Services in Womens' Shelters

By Alysia Wright

In December 2015, the Canadian Research Institute for Law and the Family (CRILF) published a new report, *Access to Legal Services in Women's Shelters*, authored by myself and Dr. Lorne Bertrand, examining access to legal services among clients of women's domestic violence shelters. The study sampled the views of staff and clients at three domestic violence shelters with the goals of:

- improving understanding of clients' legal service needs;
- examining the challenges clients attempting to access legal services encounter; and
- making recommendations for improvement.

Although domestic violence affects both men and women, women are disproportionally victims of domestic violence compared to men and there are no shelters for male victims of domestic violence in Alberta.

We conclude that clients' service needs are complex and often involve legal problems, yet shelters face specific organizational barriers to co-ordinating legal services. We recommend that a further Alberta-wide study be undertaken to examine the legal access patterns of women experiencing domestic violence, to assess the prevalence of the barriers identified in the study and to determine whether further barriers are present in other shelters.

Method

As we were working with social service providers serving vulnerable populations, the methodology for this project was developed in a collaborative and participatory manner. The three agency partners worked with us to develop an 18-question client survey and distribute it to their clients. In addition to

the survey, agencies made staff available to participate in agency-based focus groups. These groups were facilitated by myself and Dr. Bertrand and included a total of 15 staff members.

The client survey asked about how long the client had stayed at the shelter, which shelters they received help from, how many children they had with them during their stay, and numerous questions about their legal situation. Of 46 respondents, 36 had at least one legal issue while they stayed at the shelter, although the majority (n=24; 66.7%) had two or more legal issues. The purpose of the survey was to determine what legal issues were common among women who access shelters, what resources these clients access during their time at the shelter, and the client's self-reported experience with using these resources.

The purpose of the staff focus groups was to identify how agency staff responded to legal issues presented by the shelters' clients. To facilitate the focus groups, we developed a protocol that had areas of focus, which in turn informed the eight questions that guided the focus group. The areas of focus were based on existing literature and best practice standards in North American women's shelters. Some of the focus areas were co-ordination protocols for providing holistic services to clients, community partnerships and resources used as referrals to legal services, staff engagement and training to respond to the complex socio-legal needs of clients, and follow-up strategies in order to track client outcomes after the client has left the shelter. The eight questions were then developed in order to flesh out these areas of focus, including engagement, exploration, and exit questions.

Major Observations

The approach used in this study allowed us to explore the intersections of staff and client perceptions. Both staff and clients recognized that the legal system is difficult to navigate, while the majority of clients expressed that navigating their legal issues was more difficult than they expected. When asked how clients would deal with their unresolved legal issues, many of the respondents said that they would access Legal Aid, followed by a preference for hiring a private lawyer. Staff were particularly concerned about the likelihood of clients accessing sufficient legal assistance through free or low-cost programs; staff and clients indicated that they are not satisfied with the legal assistance options available due to stringent eligibility guidelines, long application processing timelines and possibly with lawyer-client compatibility. Staff understood that hiring a private lawyer is a personal choice and that clients have the option to self-represent, but staff expressed concern that the complex nature of the legal system, client vulnerability, and lack of knowledge of the legal system may inhibit clients' interest in or ability to self-represent.

The data show that clients often left the shelter with unresolved legal issues, possibly indicating that clients either do not expect that shelter services include legal assistance, or clients are not distinguishing their positive experience with the shelter staff from their legal issue. Clients reported feeling safe and secure in the shelters, and feeling particularly safe with staff. One staff member mentioned that clients may associate feeling emotionally safe in the shelter with feeling supported in their legal challenges; the

staff member went on to explain that this can be a false sense of security and can be problematic when the client leaves the shelter and is working through her legal problems alone.

Both staff and clients reported that it would be helpful to have legal support onsite at the shelter. Non-traditional intervention strategies may provide clients with a safe and neutral place to access services, such as an agency that provides legal, social welfare, and childcare assistance in one place. The survey findings suggest that clients have multiple legal issues at the time of intake, particularly because many of the primary issues clients deal with, such as housing, income support, separation or safety concerns, involve a legal component. The findings from the survey suggest that staff need to be aware of the socio-legal challenges clients may encounter and the significant complexity these challenges may add to the client's capacity to participate in their legal proceeding. Staff may also require more extensive legal education in order to efficiently assess their clients' needs.

The comments of staff suggested that they felt it was the responsibility of shelters to provide or co-ordinate access to legal services for their clients. Staff agreed that legal issues were the thread of commonality throughout client management and safety planning, which supports the view that interpersonal violence (IPV) survivors may require immediate attention to their legal and social welfare needs in order to obtain safety and security for themselves and their children. Appropriate legal education training and strong relationships with legal professionals would increase the capacity of staff and management to adequately serve the complex socio-legal needs of their clients. In general, staff reported feeling responsible for the safety and well-being of their clients; this behaviour can result in a form of gate-keeping between clients and resources, especially if a staff member is not confident or knowledgeable about the resources available. The process of providing numerous referrals to external services that do not result in a positive change or solution for the client is called referral fatigue. Referral fatigue can negatively impact a client's well-being and staff are reticent to repeatedly refer clients to resources that may or may not prove beneficial.

In order to address referral fatigue and implement a co-ordinated strategy to provide legal services to clients in women's shelters, staff and management have a responsibility to broker and foster relationships with legal service providers in their community. Management representatives in the focus groups reported that their agencies had difficulty brokering these relationships; it is apparent that the participating shelters are working at capacity and may not have the resources to develop these partnerships. Some staff said that they experienced referral fatigue due to perceived roadblocks to accessing external resources for their clients, which has the potential to prevent agencies from pursuing future relationships. Social service agencies and the justice system have numerous points of intersection; it is important that these systems participate in inter-agency collaboration.

While both staff and clients agreed on many points, one point of divergence was about working with police services. Of the ten clients who utilized the Calgary Police Service, the majority (n=7; 70%) said that CPS was helpful or very helpful and only 30% (n=3) said that CPS was unhelpful or very unhelpful. Staff reported that the relationship between shelter clients and police had been strained in the past; further, staff expressed concern with the level of compassion and appropriate response training police

officers had with regard to domestic violence issues. The difference in opinion could be due to different interactions between police and staff members as compared to interactions between police and clients. There could also be a perceived power dynamic between clients and law enforcement that prevents clients from speaking negatively about police officers and other law enforcement officials. Whatever the cause, it was apparent that staff were skeptical of working with law enforcement and this may contribute to increased gate-keeping behaviours that exacerbate referral fatigue and reduced inter-agency collaboration.

Resistance

This study required significant trust-and relationship-building due to its focus on vulnerable populations, and it was imperative that the project design address the resulting ethical and methodological issues prior to commencing the study. Despite the collaboration that was undertaken to prepare for this study, we experienced a number of challenges to getting the project off the ground.

The primary challenge involved recruiting agencies to participate in the project. IPV survivors are a group that researchers often want to work with. Unfortunately, research has become a process that many agencies do not have an interest in, particularly because of the frequently dehumanizing language used in social science research. Terms like *subject*, *target demographic* and *data* can cause agency misperceptions of the intentions of the researchers and consequently breed disinterest among potential partners. Trust and safety are cornerstones for work with vulnerable populations and should be applied in research practices. We were aware of this challenge and worked closely with potential agency partners to draft the survey tool.

Given the historical challenge of social service staff working over-capacity and doing a large amount of side-of-the-desk work, it is not surprising that management staff were skeptical of participating in a project that would require time or effort from already limited resources. As well, partnerships need to be brokered with the right staff in order to achieve the most positive outcomes.

Despite building rapport and trust with participating agencies, concerns were expressed about how the data would be used and reported. Data security is a priority for social service agencies working with vulnerable populations, as client safety and confidentiality is paramount to agency operations. Ethical research studies do not identify survey respondents or violate a client's right to confidentiality. However, some agencies conflate the terms *anonymity* and *confidentiality. Anonymity* means that a research project either does not collect identifying information or that any identifying information collected will not be linked to responses. *Confidentiality* refers to collecting and retaining identifying information such as name, birthdates, phone numbers or other contact information in order to link responses to a specific individual but not divulging their information to third parties.

We had a responsibility to create a collaborative research framework that incorporated the characteristics of the participating agencies and was concise, clear and relationship-based. The results from this study suggest that social service organizations would benefit from creating a partnership

strategy that supports social research and community relationship building. One agency said that while building partnerships with local legal professionals would be beneficial, there was no strategy in place to undertake the work, nor were there adequate human resources available to dedicate to the task of legal service co-ordination. Collaborative research may support the development of partnership strategies and fill the current gap between the social service sector and justice system.

The focus group discussions suggested that distrust of the justice system and its agents fosters an "us versus them" mentality between social service providers and the justice system. This gap could be mitigated by increased communication and establishing partnerships between the justice system and social services. Shelter staff are protective of their clients and resist referring clients to resources that they perceive will re-victimize their clients; this gate-keeping behaviour could negatively affect a client's ability to access resources or give credence to the perception that the justice system unnecessarily interferes with the client's situation.

Recommendations

The findings from this study suggest that clients of women's shelters in the Calgary area arrive with complex social service needs that often intersect with legal issues. It is apparent from the focus group findings and lack of internal legal supports that women's shelters are facing organizational barriers to co-ordinating sufficient legal resources for clients. These barriers may include limited funding, lack of staff capacity and legal training, and limited to non-existent legal resource partnerships. Further research needs to be conducted to determine if these barriers are present in other Alberta shelters.

We also have to consider the importance of incorporating client and staff perceptions into service delivery models. Objective data collection and analysis may aid senior management in supporting their staff and clients in a holistic manner. It would be beneficial to work with regional shelter networks to complete a representative study of how clients are accessing legal services, what supports clients are seeking, how clients perceive the legal system, and how clients' legal challenges intersect with other issues presented during their stay at the shelter.

In our view, there is significant value in studying the legal access patterns of women who experience intimate partner violence and the availability of legal assistance to vulnerable populations presenting with complex socio-legal needs. Further, there is value in working with social service agencies to identify systemic and organizational barriers that may contribute to staff referral fatigue, resistance to working with legal authorities, and reduced efficacy of service delivery to clients. Intimate partner violence is a wide-reaching issue that intersects socio-economic status across the province. Urban, rural and indigenous communities have both unique and shared needs that require significant study and planning to address. This work underpins the evidence-based approach that will inform collaborative practice between the justice system and women's shelters to address the socio-legal issues that arise from IPV crisis.

This study provides data that support an Alberta-wide research project examining access to legal services among clients of women's domestic violence shelters. There is a significant gap in the current literature about how women's shelter clients are accessing legal services, particularly in the Canadian context. Social scientists and social service agencies have an opportunity to collaborate in the collection of original data that will support funding applications, improve existing service delivery models, and supplement staff training. A project of this scale requires the establishment of partnerships and the encouragement of trust within social service agencies. Although it is the responsibility of social scientists to foster these relationships, it is the responsibility of social service agencies to provide a space for conversation with researchers. It is also important to involve other partner agencies that work with clients experiencing IPV.

Finally, community-based lawyers and law practices have an opportunity to work with their local social service agencies and build collaborative relationships. Legal service co-ordination cannot and does not happen in a vacuum; it requires significant contributions from both lawyers and social agencies, including an awareness of the scope of work both groups undertake. This may require a reassessment of resource allocation, time management, or increasing staff capacity to facilitate these partnerships. While the current study did not survey or interview lawyers, it is our intention that a province-wide study will include the voices of lawyers and judges so that we can make more comprehensive recommendations for legal service coordination in women's shelters.

Canadian Unions: From Repression and Resistance to the Right to Strike

By Paul Maas and Owen Le Blanc

A streetcar is overturned in 1919 in the Winnipeg General Strike in front of the old city hall building on Main Street. (*Manitoba Archives*)

The history of Canadian unions is a long and storied one. The Canadian labour movement of the past was a fusion of many disparate groups, often at odds with one another. For many years, the law was inhospitable to unions, with the balance tilted in favour of employers and government. Since the mid-twentieth century, trade unions have notched some legal victories, but also accepted some serious concessions. In the milestone 2015 decision of Saskatchewan Federation of Labour v Saskatchewan, the Supreme Court of Canada recognized a constitutional right to strike, reflecting over a century of worker's action. One thing is quite clear in the development of Canadian labour law: the legal protections afforded to unions ebbed and flowed with economic, social, and political changes.

Early Canadian union development was largely influenced by developments in the United States and Great Britain. A number of Canadian unions formed prior to the Industrial Revolution, typically in industries requiring skilled craftsmanship such as printing or shoemaking. British immigrants established local unions similar to the ones they left at home. The legal status of unions for most of the 1800s was unclear; even concerted efforts of legal archaeology have had difficulty pinning down how the law viewed unions. However, there was a general social tolerance for unions in Upper Canada, as there was a sense among employers that these highly skilled craftspeople were respectable and worthy of mutual dealings. Still, unionization was risky business. Conspiracy charges were laid against a strike of 'hatters' in Quebec as early as 1815, and criminal charges were pursued against bakers who attempted to bargain collectively in Ontario in 1837.

Of particular note in early Canadian labour history was the Nine Hours Movement. With twelve or more hours at work being commonplace, the movement campaigned for their namesake: a nine-hour workday. Nine Hours groups engaged in strikes in early 1872 in order to draw greater attention to the

cause, but co-ordinated action was the ultimate goal. A series of general strikes had been planned for May of 1872 in Hamilton, Ontario. However, deviating from the plans, Toronto printers walked off the job in March. George Brown, editor of the *Globe* newspaper, attempted to break the strike by having the union leaders hauled into court on conspiracy charges.

At c the judge held that despite the union's 25-year presence in the community, labour unions were nonetheless illegal at common law. Prime Minister John A. MacDonald was a political foe of Brown, and took the opportunity to pass the *Trade Unions Act,* which precluded union members from being charged with conspiracy at common law. Critically, the Act legalized unions, settling earlier uncertainty in the law. However, uncertainty remained about which activities of unions were legal, and which were not. Picketing was deemed illegal later that year.

As the Industrial Revolution marched on, increased specialization of labour diminished the importance of skilled craftspeople. This shift drove the development of international, industrial unions. Union members recognized the benefits of associating with larger, well- established organizations south of the border. In an attempt to harmonize conditions of work across North America, local Canadian unions began affiliating with American organizations, forming international labour groups. Industries which required large groups of labourers, such as mining or shipping, also unionized rapidly. Industrial unions were spurred forward by the newly constructed Canadian Pacific Railway, which facilitated increased movement of people and ideas, while simultaneously putting hefty market pressures on the working class.

One of the first international and industrial unions to operate in Canada was the Knights of Labour. Formed in Philadelphia in 1869, the Knights organized both unskilled workers and those who belonged to particular trades and crafts. Ultimately, the Knights of Labour collapsed in the United States and withered away in Canada shortly after. Not only were there divisions between craft unions and the umbrella organization, but the 1886 Chicago Haymarket riot caused public outrage against the Knights. The Haymarket rally, initially an attempt to protest police violence directed at union members, devolved into a melee of violence when a bomb was lobbed at police.
At least eight people were killed and the American public became suspicious of union activity. Membership dropped dramatically in the following years, and the American Federation of Labour developed in its stead. The Canadian Knights syndicate suffered in the wake of these events. In its weakened state, it ultimately succumbed to the pressures of economic depression.

Despite these setbacks and legal uncertainties, labour groups were determined to make legal and political gains in the 20th century. The growth of labour unions was accompanied by a strong pushback from employers and government. Strike action in the early 1900s was repressed largely through civil law causes of action. Injunctions, coupled with restrictions on picketing in the *Criminal Code,* provided employers with potent weapons to combat union activism and strikes. Police were often deployed, sometimes provoking violence among otherwise peaceful picketers. Union leaders were often arrested. Still, unions made some gains in the years preceding World War I. Industrial unionism bloomed out of

the craft unions of past, and organizations like the Alberta and British Columbia Federations of Labour cemented themselves in Canadian labour history.

Conflict between unions, government, and business came to a head in June of 1919 during the Winnipeg General Strike. Nearly 30,000 workers walked out of their jobs in solidarity with the metal worker's union. The Winnipeg General Strike was remarkable not only for its size, but also for the co-ordinated effort by all three levels of government and business to break the action and send workers back to their jobs without making any concessions. Federal troops and specially-recruited police were sent to break up demonstrations and force the strikers back to work. In order to intimidate and dissuade unionists, the federal government arrested and threatened to deport union leaders. They also engaged in extensive surveillance of labour movement activities, and attempted to bolster conservative elements in unions by offering modest reforms. By 1921, many unions had imploded and morale was shattered.

Unfortunately for Canadian unionists the social, political, and legal conditions would remain unfavourable for nearly two decades. Court decisions between the wars would frustrate union attempts to have comprehensive labour legislation enacted. As a result of the Judicial Committee of the Privy Council's decision in *Toronto Electric Commissioners v Snide*r, unions could only be regulated by the provincial governments, except for less common federal jobs. For Canadian workers, the interwar period was one of unemployment and underemployment, with little legal recourse. The most powerful deterrent to the development of legal infrastructure for unions was economic – few wanted to risk losing their jobs and crumble under the weight of abject poverty.

World War II would prove to be a period of tremendous upheaval and change for unions. Emboldened by its emergency war powers, the federal government passed laws regulating industries associated with the war effort. In effect, this covered most industries, temporarily suspending the effects of the *Snider* decision and the "watertight compartments" of federal and provincial jurisdiction. The labour laws passed by the federal government were consolidated into the *Wartime Labour Relations Regulations* in 1944, also known as PC1003. PC1003 was a monumental shift in labour politics, attempting to balance the legal rights of unions, union members, and employers.

Prior to 1944, it was necessary for workers to use collective economic action to force their employer to the bargaining table. This arrangement was not ideal for unions, given the potential for legal liability. PC1003 altered the status quo by compelling employers to recognize and bargain with trade unions. It gave legal recognition to unions for the first time, and established a system of union certification for federally-regulated industries. Once unions were certified, employers were forced by law to negotiate at the bargaining table. Essentially, a comprehensive system of collective bargaining recognizing unions and employers as equals at the negotiating table was established.

With the close of the war, wartime labour legislation was no longer permissible under the federal emergency power. Provincially-regulated industries could no longer be governed by PC1003. It was thus necessary to create a universal labour code which would apply to all industries in the post-war years. In an attempt to create this nation-wide policy, a conference of federal and provincial labour ministers met

to arrange the details of this more-or-less universal scheme. Parliament passed the 1948 *Industrial Relations and Disputes Investigations Act,* which was a consolidation of PC1003 and other legislation. Provinces followed suit, each passing their own versions of this Act in order to create a uniform legislative scheme. Unions also enjoyed increased economic safeguards through the introduction of the Rand formula. Justice Rand, for whom the formula was named, introduced the formula in the midst of a strike dispute. The formula establishes that workers will not be able to opt out of the payment of union dues if they receive the benefits of collective bargaining.

For several decades, Keynesian economic policy, mass production, and consumer society created an environment conducive to union flourishing. Given the sunny economic times, unions and employers had little to argue over. However, economic uncertainty in the 1970s and 1980s ushered in new political and legal dynamics. Privatization and deregulation, coupled with the pressures of free trade and globalization, once again tipped the scales against unions. Additionally, the newly-enacted *Charter of Rights and Freedoms* contained a right to "freedom of association," but the outer limits of this right were not well understood. Against the backdrop of economic uncertainty, the courts were forced to establish the legal contents and boundaries of this nascent right.

The *Charter of Rights* has had an extremely significant effect on labour relations, although there were initial setbacks for unions. In a series of 1987 decisions termed the "Labour Trilogy," the Supreme Court examined s. 2(d) of the *Charter of Rights* and came to the determination that "freedom of association" contained neither a right to bargain collectively nor a right to strike. Essentially, the Court established that freedom of association was an individually held and individually exercised freedom. Because collective bargaining and striking are by definition collective endeavours, they could not be performed by an individual person and thus fell outside of section 2(d) protection. Still, the Labour Trilogy was not a complete disappointment for organized labour; it established that there was a constitutional right to join and belong to a labour union.

This legal interpretation persisted until quite recently. The Court revisited its position in the 2007 *Health Services* case, taking a broader interpretation of the *Charter*. The Court reversed its previous holdings from the Labour Trilogy, finding that section 2(d) does contain a protection for collective bargaining. This decision laid the groundwork for the landmark 2015 *Saskatchewan Federation of Labour* decision. The Supreme Court finally recognized a constitutional right to strike, protected through section 2(d) of the *Charter*. The Court provided a policy rationale for the decision, noting that there is a "fundamental power imbalance" between employers and employees, "which the entire history of modern labour legislation has been scrupulously devoted to rectifying." As in the past, labour law developed in dialogue with social and political policy.

Punctuated by setbacks and victories, the history of Canadian unions before the law has steadily trended towards increasingly powerful legal protections. From their seeming illegality at common law to a constitutionally enshrined right to strike, Canadian unions have fought tooth and nail for legal protections for two centuries. History demonstrates that labour law blossomed in tandem with social

and political attitudes, and this discourse is likely to continue as unions carry the torch into an uncertain future.

Tips and Gratuities – Some Taxing Issues

By Caitlin Butler

A Simple Gift, Right?

In 2012, Statistics Canada estimated the total underground economy in Canada to be $42.4 billion. What comprises this significant amount? It has been a very popular and strong focus in recent years to attribute this activity to high net worth individuals, business owners and offshore tax evasion. However, it is not simply these individuals and businesses that are responsible. Individuals at all income levels, from every walk of life, contribute to these unreported, untaxed amounts.

For example, 12% of the total underground economy activity can be found in the accommodation and food services industry. How does this happen? A significant contributor would be unreported tips and gratuities – those gifts provided to servers for a job well done. Many people in service industries (e.g. restaurant servers, taxi drivers, and hairdressers) receive gratuities, often not reflected on a T4 (Statement of Remuneration Paid) or similar information slip, and it is widely believed that much of this income goes unreported.

In this article we will focus on both the employee and employer responsibilities with respect to tips and gratuities, as well as possible penalties that may arise from unreported amounts and means to rectify failings to report income in prior years.

For the Employee

All amounts received by virtue of an individual's employment, barring an exception, are taxable. This includes not only salaries, wages and bonuses, but any benefit received by virtue of employment. CRA discusses an array of benefits in its publication *T4130, Employer's Guide to Taxable Benefits and Allowances*. Allowances, for example, are generally taxable. One area of recent CRA activity in this

regard is automobile allowances, which are taxable unless they are both reasonable in amount and based solely on distance travelled for employment purposes.

Employment benefits received from persons other than the employer, such as tips and gratuities, fall into this wide net. In some cases, an employer will include tips paid to an employee on the individual's T4 slip, possibly withholding Canada Pension Plan (CPP) and Employment Insurance (EI) premiums, and taxes. Employees should carefully consider whether all tips received were properly reported in the T4. Amounts not included on the T4 must still be reported.

In other cases, the tips will not be reported on a T4 slip, or any other document. In this case, the individual should independently track all tips received and report them separately on their tax return, as other employment income (on line 104).

For the Employer

Though it is common practice in the service industry for individuals to receive tips, an employer's responsibilities with respect to these tips is not nearly as well understood and can be very costly.

CPP and EI

The legislation for these programs requires the employer withhold and remit CPP and EI on all amounts paid to the employees. EI is also required to be withheld on any tips the employee is required to report to the employer under provincial legislation. Only Quebec presently has such legislation. The question of when tips are "paid by the employer" is the subject of considerable uncertainty.

Under CRA's current interpretation of the law, the employer must determine whether the tips are:

- controlled – the tips are considered to have been paid by the employer; or,
- direct – the tips are considered to have be paid by the client.

Since controlled tips are controlled by the employer, they are considered to be paid by the employer. Some examples of controlled tips include: tips where the employer adds a mandatory charge to a client's bill; tips that are allocated to employees using a tip sharing formula determined by the employer; and, tips that employees turn over to the employer and are later distributed to the employees.

Direct tips, on the other hand, are not subject to CPP/EI. However, an employee can elect to make CPP contributions on these tips. Direct tips are not subject to any form of control by the employer (as mentioned in the controlled tips section). Some examples of direct tips include:

- tips where a client leaves a cash amount on the table for the server and the individual keeps the full amount;
- tips that are pooled/shared amongst employees in a method determined by the employees; and

- tips that are paid for using a credit or debit card by the customer where the employer returns the tip amount in cash to the employee.

However, a recent Tax Court of Canada decision (*Andrew Peller Limited vs. Minister of National Revenue*) suggests that CRA may be incorrect on this matter. While CRA policy states that businesses must look at who controls the tips, the Court noted that the actual test would be whether it was the employer who paid out the tips. CPP and EI, as well as T4 reporting, would be required in all situations where the employer handled the cash – this is sufficient to "pay" the gratuities. Given the prevalence of debit and credit cards, this would mean most tips are subject to CPP and EI, and employer reporting. This case has recently been appealed.

GST/HST on Tips

A tip that is freely given on a bill is not subject to GST/HST. However, if the business adds a mandatory or suggested amount to the bill as a service charge, the amount is subject to GST/HST. The same rule applies whether the tip is paid through the business to employees, or is paid to a self-employed person, such as a hairdresser or taxi driver.

Penalty Exposure

Tip Recipients

Failure to report income, even if it is not included on the T4, exposes an employee to costly penalties and interest. Where an individual fails to report an amount of income, for example for 2015, and also failed to report an amount in any of the prior three years (2012, 2013, or 2014), the penalty levied is generally 20% of the unreported income. Alternatively, CRA can assess gross negligence penalties, being 50% of the understated tax. Proposed legislation will cap any penalty at this 50% amount. CRA commonly reviews multiple years at once, so the additional tax, interest and penalties can add up very quickly.

Employers

Employers failing to properly comply with the above rules can also be subject to an expensive bill. Failure to withhold CPP/EI can result in being assessed both the employee and the employer's contributions. Penalties of up to 20% of the unremitted amounts are commonly applied. If the business is not able to pay these amounts, the directors of the corporation may be personally liable for the amounts. Inaccurate or incomplete T4 slips can also attract penalties and, again, CRA tends to assess multiple years.

Voluntary Disclosure Program (VDP)

Where a taxpayer comes forward voluntarily to correct errors and omissions in their tax filings, they can apply under the VDP. Eligibility for the program requires that the disclosure must be voluntary, including being made before the individual is aware of any action taken by CRA. For example, if the taxpayer's employer is being reviewed for unreported tips, it is likely too late for the taxpayer to initiate a voluntary

disclosure with respect to unreported gratuities. In addition, the information provided to CRA must be complete (possibly including many years). Other requirements also apply.
If the disclosure is accepted under the VDP, all penalties (and, in the extreme, criminal charges) would be waived, so the taxpayer would only pay the taxes and interest. This program is not unique to tips – any income tax and GST/HST matters can be disclosed under this program.

Where are we Now?

History has demonstrated CRA's interest in this type of unreported income and underground activity.

For example, a review of 145 serving staff in St. Catherines, Ontario resulted in $1.7 million in unreported tips and gratuities, an average of nearly $12,000 per serving staff. A Canadian Press article in 2012 quoted CRA as indicating that "once the project has been thoroughly evaluated, the results and findings will enable the CRA to determine whether to expand it at a national level".

On the employer side, the recent case discussed above (*Andrew Peller Limited vs. M.N.R.)* involved approximately $1 million in tips, in a restaurant with approximately $6.5 million in sales. In other words, this area is definitely on CRA's radar. Some restaurateurs also report having received calls from CRA enquiring about the manner in which they handle gratuities.

With the federal government's announcement in the 2016 Budget to spend an additional $444.4 million over five years to combat tax evasion and avoidance, both businesses and employees in the hospitality industries, and others where CRA perceives high underground activities should expect more scrutiny in the years to come.

Job Candidates Deserve Fair Treatment of Their Applications

By Peter Bowal

I have applied for many jobs in both the private and public sectors in Canada. Some were full-time, most were part-time. Several employers follow a long, drawn-out application process involving several phases: asking for numerous personal and work experience referees; written examinations; telephone calls; and occasionally requiring flights out of province or drives to other cities for interviews (sometimes at my own expense). Often about eight months later, all contact with the prospective employer stopped. No one returned my calls and I am still waiting nine years later to hear whether I got the job.

For several other part-time, unpaid positions with public agencies, I spent two to three days away from my regular job travelling to Ottawa for interviews. I had to produce four original reference letters from supervisors and colleagues who were asked to comment on a list of things. I brushed up my French, read all I could find on my agency and put my best foot forward. I did not hear from the Government of Canada for almost one more year, which was several months after I read on the website the name of the successful candidate. She was, by the way, the person who was serving in the role on an interim basis. This was the same outcome several other times I applied for jobs. I did not have the impression my application was considered seriously. Rather, I was mere fodder fed into a formal process that always had a pre-ordained conclusion.

Employment agencies can be guilty of the same disregard of applicants. Recently, I was in a law recruitment office applying for a part-time volunteer position (lawyers even compete to volunteer). While I was waiting in the reception area, I noticed several paid job postings that tweaked my interest. When the search consultant (who also headed the firm) completed her interview with me about the volunteer position, I asked about a few of the other listed positions. She seemed dismissive. When I pressed her, she admitted without a whiff of impropriety, that the positions had been filled, in some cases years earlier. Her objective was to attract as many interested candidates to her firm, even with the bait of attractive job openings that were no longer active. There is no economic or legal incentive to communicate with applicants and to remove stale postings, even though today, valuable ongoing communication with applicants and maintaining up to date job listings has never been easier to achieve.

On another site, I discovered that more than half of the advertised jobs were not open. The employer or agency left the listings up to continue to attract job seekers to their sites in the same way a realtor would leave the 'For Sale' sign standing months after the new buyers have moved in.

I have applied for many jobs listed online with employers and search firms. One job apparently required that applicants live in another city, although this was not stated in the job description. Other jobs had hidden requirements and other employers changed the job requirements after I applied.

Once, I made it to the final round for a part- time appointment to another public agency. I had already gone through months of formal process. I had to sit and pass a challenging written exam at a specific time and place set by the employer. The interview was held out of town at my expense and I juggled to get the time off. The interview was a few silly role play exercises which struck me as odd for a quasi-judicial decision-maker position. Several months later I received the standard rejection letter. This time I followed up and was told I did not get the position because I did not say one specific magic word ("administrative") during the interview. It was irrelevant that no one prompted me for that word, and that I had used that word all over my cover letter and written exam.

As the economy becomes more challenging for job seekers, uncaring or unaware employers can add to the job searchers' expectations and wastage of time and resources. What can job applicants do about unresponsive and unfair job recruiting organizations which engage applicants in significant time and efforts to apply for their jobs?

The Problem

Many job hunters are disappointed not only to miss out getting hired for jobs they earnestly seek, but also for the often shoddy treatment at the hands of recruiting employers that seems to have become acceptable. Thirty years ago, most people applied for jobs in person or by mail. Their applications were acknowledged and they were told if they did not get the job. Ironically today, when communications can be more easily facilitated, job seekers seem to be generally less informed about the progress of their applications.

Applying for a job, even online, can take a significant expenditure of time and effort on the part of the applicant. You may have to obtain the permission (or original letters) of several references and customize and focus your resume and cover letter to the specific position. You run the risk that your current employer will learn that you are looking for another employer. There may be aptitude, qualification or judgment exams or other pre-qualification testing. If you make the first cut, you may have to take time off for interviews and sometimes travel to them at your own expense. You have to psychologically prepare yourself for the candidate process and the possibility that you get the job.

The job applicant invests significantly in the search process and always is in a weaker position relative to the prospective employer, who controls the process from start to end. Employers may already have an

individual in mind for the job before it is posted. They may want to test the waters of the market to see how many people would be willing to work for them, what their qualifications and experience levels look like and the compensation packages they would accept. Employers can use the hiring process to probe prospective employees for business ideas and competitive intelligence, or develop rosters of candidates for other (and future) opportunities. An employer's recruitment process can be a sham and most of the time prospective employees would never know.

The law has long recognized that employees have vulnerabilities and corresponding rights during employment and at termination. The law has been less attentive about protecting job applicants during the recruitment process. Most employees who fail to get the job never know the reasons why or what happened in the process. They cannot prove any legal wrongdoing and are not aware of any legal remedy. Most likely, while disappointed, they just want to move on with their lives.

Given my own numerous opportunities to observe how even reputable employers may callously disregard the interests of prospective employees, I believe employers do have a legal duty of good faith and fairness to all job applicants. My theory of a remedy arises from the commercial world of tendering, to which I will now turn.

Theory of a Legal Solution

When a company puts a project, such as the construction of a building, out for tenders and calls for bids to be sent in, a system of fair process for all participants in the tender is required. Individual, private, sealed bids in response to public tender terms are a mainstay of a competitive and efficient commercial marketplace for pricing and allocation of projects. Bidding companies will spend considerable time and money – in some cases a million dollars or more – to develop their bids and adjust their resources and capacities in contemplation of possible success.

In 1981, the Supreme Court of Canada described the law of tendering in contracts in the *Ron Engineering* decision [http://canlii.ca/t/1lpk8]. Submitting a bid in response to a call for tenders creates a contract with its own rights and obligations apart from the ultimate project contract. This first legal relationship of fair process is called Contract A, which arises when someone submits a valid bid in response to a tender. It is based upon good faith, equal treatment of all bidders, and legal enforceability of actions by both sides. Owners calling for tenders owe all bidders a duty of fairness. Contract A emerges as soon as one makes a proper bid. Owners cannot favour or disfavour any bidder. Contract B is the actual project contract awarded to the winning bidder.

Contract A is breached if the tendering organization calling for bids changes the rules of the competition in a way that unfairly benefits a bidder, enters into closed negotiations with a bidder, does not make a contract with any bidder, accepts a bidder who is not the most qualified, etc. A breach and liability on Contract A can be avoided if the tendering organization makes it clear at the time the tender is published that there are special exceptions to fairness and the rules. This is called a "privilege clause" but it must be upfront in the tender documents so that everyone contemplating putting in a bid knows

the process may not be fair or follow the rules. Even then, the courts have said privilege clauses cannot be so broad as to make the whole bidding process meaningless.

Conclusion

One would think employers would want to treat all job applicants like customers – an opportunity to make a positive impression to promote the company and win them over. However, that is not the case and many employers from all sizes and sectors take job applicants for granted and that will need to be tested. It is an extension of the equitable business principles of good faith and fair dealing toward vulnerable individuals. It is a simple principle of commercial morality. The law protects the self-esteem interests of human beings in jobs – this is a small expansion of that thinking.

My theory is that job competitions ought to be treated in law in the same way as commercial project tendering processes. A complete job application today calls for reflection, organizing time, and effort, much like a bid on a commercial project. Bidders and job applicants invest in the application process and are vulnerable in relation to how their bid is treated by the organization conducting the tender or job recruitment. The Contract A common sense duty of fairness, equality and good faith can be applied to job applicants in the same way it is applied to bidders on construction jobs in the commercial world along the lines of *Ron Engineering*. If an employer wants to operate by a different playbook, it can indicate its intention to do so by invoking a privilege clause. Then fewer applicants will participate and invest in that process. The result will be self-correcting, as it is in the tendering world. Use of privilege clauses will be reduced in order to attract the best bidders and bids.

Most people will always assess the stakes of wasted efforts on ineffective job recruitments and insensitive employers as too small. They will not seek any legal recourse. On the other hand, if this model is accepted and is enforced by monetary damages, one might expect employers to be more transparent and caring in recruitment campaigns in the future, aware that job recruitment and applications encompass human processes with profoundly human impacts.

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By Teresa Mitchell

1. Miscarriage as a Workplace Disability

The Ontario Human Rights Tribunal has issued a decision stating that a miscarriage can be a disability. Winnie Mou was dismissed from her position after failing to meet work targets. She had missed three weeks of work due to a deep tissue injury, and several months later had a miscarriage and fell into a deep depression. She alleged workplace discrimination on the basis of disability. Her employer sought to dismiss her claim, arguing that in order for an injury or illness to constitute a disability, there must be an aspect of permanence and persistence to the condition. Adjudicator Jennifer Scott disagreed, writing: "I also find that the applicant's miscarriage is a disability…It…is not a common ailment and it is certainly not transitory. It is clear from applicant's testimony that she continues to experience significant emotional distress from the miscarriage even today." She ruled that Ms Mou had established a disability under the Ontario *Human Rights Code*.

Wenying (Winnie) Mou v. MHPM Project Leaders, 2016 HRTO 327 (CanLII)

http://www.canlii.org/en/on/onhrt/doc/2016/2016hrto327/2016hrto327.html

2. Mandatory Minimums are Cruel and Unusual

The Supreme Court of Canada recently struck down a mandatory minimum sentence for repeat drug traffickers. The case involved a young man who had a prior drug offence conviction within ten years of his second offence and was addicted to crack, heroin and crystal meth. He was living in downtown East Vancouver and sold small amounts of drugs to his friends to support his addiction. Justice Beverley McLachlin wrote: "At one end of the range of conduct caught by the mandatory minimum sentence provision stands a professional drug dealer who engages in the business of dangerous drugs for profit, who is in possession of a large amount of drugs, and who has been convicted many times for similar offences. At the other end of the range stands the addict who is charged for sharing a small amount of drugs with a friend or spouse and finds herself sentenced to a year in prison because of a single conviction for sharing marijuana in a social situation nine years before. Most Canadians would be shocked to find that such a person could be sent to prison for one year". The Court found that the sentence violated s. 12 of the *Charter of Rights*, in that it was cruel and unusual punishment.

v. Lloyd, 2016 SCC 13 (CanLII)

http://www.canlii.org/en/ca/scc/doc/2016/2016scc13/2016scc13.html

3. Over Two-Hundred-Years-Old BC/Alberta Métis Settlement Applauds Supreme Court of Canada Decision

April 14, 2016 – Kelly Lake. "Today is a good day to be Métis", pronounced Lyle Campbell Letendre, President of the Kelly Lake Métis Settlement Society. The Supreme Court of Canada has issued its decision in *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC12, acase which includes Métis and Non-Status Indians as within the Fed*eral jurisdiction under s.91(24) Constitution Act 19*82 (a.k.a. *British North America Act 1867*).

President Campbell Letendre said, "We are independent and equal with First Nations and the Inuit, and as of today, we are fully recognized. The history in this province for us has been one of the most discriminating things you have seen against Aboriginal peoples in BC."

Campbell Letendre added, "All these years we have had nothing but discrimination and no consultation, but today all of that has changed. I now have invitations to engage from Indigenous and Northern Affairs Canada Minister Carolyn Bennett, to pipeline companies, energy developers and others."

In May 2015, the Kelly Lake Métis Settlement society put the government and other parties on notice when they filed in the New Westminster, BC Supreme Court, a claim concerning their Aboriginal rights and title, which includes relief for the discrimination they have endured. Part of the claim is for an injunction against future infrastructure development without their free, prior and informed consent.

The Daniels decision was a unanimous decision of the Supreme Court of Canada. The Court ruled that, "The fact that a group is a distinct people with a unique identity and history whose member's self identify as separate from Indians, is not a bar to inclusion with s.91(24)". Likewise, President Letendre Campbell said, "The Kelly Lake Métis are only represented by the Kelly Lake Métis Settlement Society, that is why our Notice of Civil Claim was filed on behalf of all Otipemisiwak Ayesinowak which means, we are half breeds that own ourselves".

President Campbell Letendre added, "We always hunted in BC and Alberta. We have never given up any rights to anybody in Canada, provincially or federally". Under the *Powley* case and *Tsilhqot'n* case, our territorial rights should also be established.

Tenant Move-Outs: Cleaning and Security Deposit Deductions

By Judy Feng

Your lease is expiring in one week and you have already given notice to your landlord that you are moving out. You think that everything looks clean but you are just not sure whether you should stay up until 2:00 a.m. to scrub the place down before you leave. You may also be wondering whether your landlord can make deductions from your security deposit and charge you for cleaning …so, what are the rules for cleaning and security deposit deductions anyway?

First of all, a landlord cannot make any deductions from a security deposit for damages resulting from normal wear and tear of the premises. Normal wear and tear means the declining condition of the rental premises that occurs over time, even though the tenant has been regularly cleaning and maintaining the premises. For example, having mild scratches on a kitchen work surface is probably normal wear and tear. On the other hand, having food and dirt on your walls, cupboards and appliances is damage beyond normal wear and tear.

Secondly, a landlord can make deductions from a security deposit if there are damages beyond normal wear and tear on the premises (assuming that the landlord did a proper move-in and move-out inspection). For example, a landlord could make deductions from your security deposit to cover the costs of cleaning up food and dirt on your walls, but not for mild scratches on the kitchen work surface.

One common dispute between landlords and tenants is carpet cleaning. If you left obvious stains and dirt on the carpet while living there, then it could be considered damages beyond normal wear and tear and the landlord could deduct carpet cleaning costs from your security deposit. However, if you left the carpet clean with only signs of normal wear and tear, then the landlord could not charge you for cleaning it.

In order to avoid difficulties when it comes to cleaning and security deposit deductions when you move out, here are some tips:

- You have an obligation under the law to keep the premises in a reasonably clean condition. It would be prudent for you as a tenant to regularly clean and maintain your rental premises.

- Clarify expectations with your landlord in writing about what will be required in terms of cleaning when you move out. It is a good idea to do this when you first move in or well ahead of moving out.
- If you have a pet, it is a good idea to take extra precautions in cleaning the property. For example, if you have a dog, make sure that you clean up any fur, excrement and dirt tracked into the premises. Be prepared for any security deposit deductions when you move out as you may have to pay for professional carpet cleaning of any obvious dirt and stains caused by your dog.
- If you need extra time to clean before moving out, talk to your landlord and see if you can make an agreement to a different move out time. Any agreement should be in writing.
- Keep any photographic and video evidence of what the premises looked like when you moved in and moved out, in addition to the inspection reports. If you ever have a dispute with your landlord over security deposit deductions, the evidence and reports will be helpful.

Keep in mind that there are also other situations where the landlord can make deductions from a security deposit. For example, a landlord can keep money from a security deposit when:

- you owe money for rent.
- you damage the property (and the landlord completes proper inspection reports). For example, if you punched a hole in the wall, then your landlord can keep money from your security deposit to fix it.
- you owe the landlord money for utilities or fees.

If your security deposit does not cover all of the damages beyond normal wear and tear, a landlord can go to the Residential Tenancies Dispute Resolution Service or court to recover extra money from you. It will ultimately be up to the dispute resolution officer or judge to decide whether you should pay for the damages.

To learn more about security deposits and how you can get your security deposit back, you can view our following resources:

Laws for Landlords and Tenants in Alberta, Security Deposits –
http://www.landlordandtenant.org/security-deposits/

Getting Your Security Deposit Back – http://www.lawnow.org/getting-your-security-deposit-back/

Stuff I Wish I'd Known Yesterday – http://www.cplea.ca/stuff-i-wish-id-known-yesterday

Even More Stuff I Wish I'd Known Yesterday – http://www.cplea.ca/even-more-stuff-i-wish-id-known-yesterday

For more information on general landlord and tenant law matters:
Laws for Landlords and Tenants in Alberta, http://www.landlordandtenant.org/

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Dealing with Pets after Separation, Part 2: Going to Court

By John-Paul Boyd

In the first half of this article, I wrote about the laws on personal property that might apply when a couple can't agree on how they'll manage their pets after they separate. In this half, I'll talk about the sorts of orders you can and can't ask the court to make about pets, assuming you and your ex haven't been able to settle the problem.

If you must go to court about your pet, remember that because pets are personal property, the "best interests" of your pet aren't relevant the way they would be if you were asking for an order about a child. Nor is who loves the animal more or, usually, who would provide the pet with a better home. What counts is ownership. As the adjudicator put it in *Hawes v Redmond*, a 2013 decision from Nova Scotia:

> "[26] I have no doubt that the dog currently has a good home with Dr. Hawes and her family, but that is not the point. This case is not about the best interest of the dog; it is about who has the better claim to legal ownership. The analysis is no different than it would be if we were talking about a bicycle."

Here are the orders you can and can't ask the court to make about your pets.

You can't ask for custody of the animal.

"Custody" is a *Divorce Act* term that applies to children. Human children.

What you're probably looking for instead of a custody order is an order that gives you the right to have the animal that's enforceable against your ex; more on this a bit later.

You can ask the court to make a declaration about who owns the animal.

If you do this, you're asking the court to decide who the animal's owner is. This is helpful when there are doubts about who owns the animal. Besides, being the pet's owner usually lets you say where the animal lives… like, for example, with you.

If you lose, however, the court will most likely declare that your ex owns the animal. The court isn't likely to refrain from making a declaration about who owns the animal once the issue has been brought up.

You can't ask for access to the animal.

"Access" is also a *Divorce Act* term that only applies to human children.

The closest I can put the idea of access into an order about property is an order that would give each person the right to possess a pet on an alternating basis. Although there's nothing stopping anyone from agreeing to that in a contract like a separation agreement, and the court would probably make an order like that if everyone agreed to it, the idea of a right to the possession of property on a periodic basis doesn't fit well with the law on personal property, or the general principle that court orders should resolve, or at least decrease, the conflict between litigants.

First off, if you're not the owner of the animal you don't have the right to possess the animal, on a periodic basis or otherwise, unless you've got a contract with the owner. Second, if you're the owner and you don't have a contract requiring you to let someone have the animal from time to time, there's nothing I can imagine that could oblige you to do so.

Third, if the two of you both own the animal and can't agree to share it, the court won't make you share it. Here's what the court said about it in *C.S. v D.S.*, a 2005 case out of Newfoundland and Labrador:

"The dog is a matrimonial asset but it is, without being facetious, indivisible."

Accordingly, the court's options are these:

- decide which of you will be entitled to own and possess the animal, and possibly require the person keeping the animal to pay compensation to the person who doesn't get to keep the animal; or,
- make you sell the animal, and then divide the sale proceeds between you.

The compensation potentially payable in the first case would likely be based on the current fair market value of the pet – what a neutral stranger would pay to buy the animal from you, at its current age and in its current health.

You can ask the court to make an order about who should possess the animal.

Owning something is sometimes different than the right to have something. Landlords, for example, own the apartments they rent out but don't have the right to possess apartment they have rented; the right to possess the apartment is what they sell to their renters. Orders for the possession of things are

useful because they say that you have the right to have those things with you, whether you're the legal owner or not.

If you're asking the court for a decision about who owns the animal, you could ask for an order for the possession of the animal at the same time and kill two birds with one stone. (My apologies to bird owners.) This will be especially useful if you're the owner and your ex is keeping your pet from you.

You can't ask for an order that you jointly own the animal, or that you continue to jointly own the animal.

Although you and your ex can make an agreement that you'll continue to jointly own the pet, and the court would probably make an order that you jointly own the pet with your agreement, the court is not likely to make an order that you jointly own the animal over someone's objection. This would create, or perpetuate, pointless conflict. If you can't agree that both of you will continue to own the animal together, the court's options are to:

- decide which of you will be entitled to own and keep the pet, and possibly require the person keeping the pet to pay compensation to the person who doesn't get to keep the pet; or,
- make you sell the pet, and then divide the sale proceeds between you.

Again, the compensation potentially payable in the first case would likely be based on the current fair market value of the animal.

You can ask that you be compensated for the money you spent feeding and taking care of the animal.

If you don't own the pet, you can ask the court to make a declaration that the owner of the pet was "unjustly enriched" by your contributions to the care and maintenance of the animal, as I described in the first part of this article. If the court decides the owner was unjustly enriched, and you can somehow prove what you spent on the pet and what your non-monetary contributions were worth, the court might then make an order that you be compensated for your contributions. "Non-monetary contributions" might include taking the animal for walks, bathing it, grooming it and so on.

Proof of your spending on the pet might include grocery bills and receipts from the vet, but few people take the trouble to keep all of these receipts and you'll likely be out some money. It will be difficult to establish the value of non-monetary contributions, but you can get some idea by looking at what commercial services charge for things like dog-walking, grooming and so on.

You can ask that you be compensated for the money you put into buying the animal.

If you're not the pet's owner, or the court isn't likely to decide that you are, but you still put money into buying the pet, you can ask to be repaid for what you paid toward its purchase.

This isn't an unreasonable order to ask for, but I'd imagine that most animals are depreciating assets. The amount you'd pay for a very young dog with years of life ahead of it is not what you'd pay for a middle-aged or elderly dog. If you're arguing about an eight-year-old dog, should the person keeping it be obliged to give you back your original investment or a proportion of that investment based on the dog's current commercial value? The current value might be fairest, especially if you also enjoyed the dog while you were together.

You can ask for an order that the animal be sold, and that the money from the sale be split between you.

This is the scorched-earth option. It's saying "fine, if I can't have the dog, you can't either." It reflects your strong emotional bond to the dog and how upset you are at not being able to keep it, but also disrespects your ex's attachment to the animal. It also comes across as rather petty and vindictive.

The adjudicator in Gardiner-Simpson summarized the problem with this sort of approach as follows:

> "[8] In matrimonial cases, parties often agree to sell jointly owned assets (whether realty or personalty) and split the proceeds. The problem would take on a Solomonic quality, where splitting the asset (be it a dog or a child) destroys the thing for both of them. Selling the dog to an outsider would only double the pain."

I can't imagine too many judges making this sort of order. In fact, I can really only imagine this order being made as a way of signaling the court's frustration with the behaviour of everyone involved.

You might also be able to ask for orders about the animal under your province's or territory's legislation on family property.

Your pet may qualify as divisible property under your province's or territory's laws about the division of matrimonial property. In British Columbia, property bought after a couple began to live together is "family property" that the court can divide under that province's *Family Law Act*. In Alberta, a pet that both spouses enjoyed is a "household good" that the court could award to one spouse under the the *Matrimonial Property Act*. Under Ontario's *Family Law Act*, a pet could qualify as part of a spouse's "net family property." You get the idea.

Now, just because pets may qualify for division under the family law legislation doesn't mean they should be. In *Ireland v Ireland*, a 2010 case from Saskatchewan, the parties' lawyers agreed that a labrador retriever was "family property" and divisible under that province's *Family Property Act*, however the court commented that:

> "[9] It is an unacceptable waste of these parties' financial resources, the time and abilities of their two very experienced and capable legal counsel and most importantly the public resource of this Court that a dispute of this kind should occupy all in a one-day trial involving three witnesses, including an expert called by one of the parties. It is demeaning for the court and legal counsel to have these parties call upon these legal and court resources because they are unable to settle, what most would agree, is an issue unworthy of this expenditure of time, money and public resources."
>
> "[10] Except in the most compelling of circumstances (perhaps to avoid a breach of the peace or potential harm that parties may do to one another), the court should not be engaged with interim applications or the trial of an issue such as this."

Really, the judge's observation in this case goes beyond dividing pets by application under the family law legislation; the point that arguing about such claims in court is a waste of litigants' financial resources seems to me to apply to all court claims involving pets. As the court said in *Warnica v Gering*, a 2004 case from Ontario:

> "[19] … Whether in the Family Court or otherwise, I do not believe that any court should be in the business of making custody orders for pets, disguised [as property orders] or otherwise. …"

Why Do Some Human Rights Complaints Take So Long?

By Linda McKay-Panos

From time to time, concerns are expressed about the length of time human rights complaints take to resolve. There are some circumstances where resolution of these cases does seem to take too long. Unfortunately, those who criticize the existence of human rights commissions often take these occasional delayed cases as opportunities to add fuel to their calls for elimination. However, an examination of the circumstances surrounding the delays, which only occur in a small fraction of human rights cases, helps to assess possible alternative solutions.

In one recent example, the CBC reported on the case of Kathleen Viner (Richard Woodbury, CBC News, "Zellers human rights allegation resolved 4 years after complainant dies" online: http://www.cbc.ca/beta/news/canada/nova-scotia/kathleen-viner-zellers-racial-discrimination-human-rights-1.3502475). In 2009, Ms. Viner complained to the Nova Scotia Human Rights Commission that Zellers had racially discriminated against her in 2008, when it unfairly accused her of stealing. The 78-year-old was detained by security and searched, even though she had a receipt for the rug she bought. Ms. Viner died in 2011 (at age of 81), before the Commission had heard her case. The case was able to proceed based on statements Ms. Viner had made before she died. When Zellers was sold in 2011, and all Zellers stores in Canada were closed. Zellers' parent company, Hudson's Bay Company, continued as respondent. Hudson's Bay did not believe that the Zellers clerks discriminated against Ms. Viner, but agreed to develop and launch a program to teach Nova Scotia-based floorwalkers how to deal appropriately with customers and about racial profiling. The matter was settled in 2016, more than four years after Ms. Viner had died. Thus, although she had experienced humiliation and hurt, these could not be addressed (*Viner v Hudson Bay Company*, 2012 CanLII 98528 (NS HRC).

Before this case and others like it are used to argue for the abolishment of human rights commissions for being inefficient, it is important to look at several facts. Consulting the 2014-2015 Annual Report of the Alberta Human Rights Commission ("AHRC"), we can see that approximately 50% of complaints were resolved within one year. Of 1,395 complaints submitted to the office, the Commission accepted 853 as meeting the requirements: falling within AHRC jurisdiction; having reasonable grounds; being made within one year as required; and meeting other requirements . Ninety-four (94) percent of the complaints received were dealt with by the complaint resolution process. This means that they were resolved through conciliation or investigation, dismissed or discontinued, or abandoned or withdrawn

by the complainant. Only six per cent were handled by the Commission's tribunal process. This relatively small percentage of unresolved complaints is largely responsible for the outcry that the process takes too long.

One of the most startling examples of an excessive delay took place in Alberta in the Delorie Walsh case (*Walsh v Mobil Oil Canada*, 2008 ABCA 268, online: https://www.canlii.org/en/ab/abca/doc/2008/2008abca268/2008abca268.pdf). Delorie Walsh was hired by Canadian Superior Oil (which later merged with Mobil Oil) in 1984 as a junior map clerk. Having a B.Sc. in Agriculture, Ms. Walsh wished to be a land agent. At that time, there had never been a female land agent working for the company. Walsh pursued her interest in becoming a land agent and obtained a licence. She also moved into a clerical position in the land department and later became a land representative. Walsh received good performance appraisals, yet encountered a number of obstacles in becoming a land representative. These barriers related to her being a woman in a field dominated by men. Although Walsh's responsibilities increased significantly, her designation and pay scale did not increase with her responsibilities.

In December 1990, Walsh was offered a field position in Olds, subject to a three-month probation period. She was required to commute on her own time, using her own vehicle and did not receive any salary change. Other male land agents were not required to undergo probation, nor were they required to commute using their own vehicle. When Walsh expressed her concerns to her supervisors, their responses led her to conclude that if she did not accept the offer with the different conditions, her employment at Mobil would be jeopardized. Eventually, Walsh was assigned a company vehicle to commute to Olds and was transferred to the Olds office.

In August 1991, Walsh filed a human rights complaint with the (then) Alberta Human Rights and Citizenship Commission ("Commission") against Mobil, alleging discrimination based on gender under the equal pay for equal work provision. She alleged that, despite her abilities, she had been prevented from advancing, and regardless of the degree of responsibility she was given relative to men doing similar work, she did not receive appropriate employment designations and compensation. Mobil responded denying that there was discrimination.

In the meantime, Walsh was transferred to Wimborne/Lone Pine in 1992 and was promoted to Land Representative II in March 1993. Her workload was very heavy and her performance appraisals indicated that this might have affected her follow-through with administrative tasks. At the time, she was reporting to three supervisors.

In early January 1994, Walsh was involved in a car accident while working and suffered severe whiplash. At the same time, relations with one of her supervisors, McNamara, were strained and he had said to her that the human rights complaint was at least in part responsible. On September 6, 1994, Walsh received a performance appraisal indicating that she needed improvement. Also, she was told that if her performance issues continued she would be dismissed. She was also assigned to one supervisor, North, who developed for her a three-month action plan, which included reading *Seven Habits of Highly*

Effective People and conducting surveys of landowners and co-workers about her performance. On September 9, 1994, the Commission sent a letter indicating that its investigator had recommended that the complaint be dismissed.

Walsh's action plan progress was regularly monitored by North, and the plan records indicate that Walsh met a number of the targets. Nevertheless, North focused on Walsh's completion of surveys, lists of activities, time sheets and communication/network problems. The plan was revised in November 1994, and several additional expectations were added. Walsh was notified that she was on written notice about serious performance problems regarding her ability to work as part of a team and her ability to follow through. North continued to be dissatisfied with Walsh's performance in early 1995, and although Walsh attempted to clarify his expectations, contest his criticism and justify her actions, North recommended that Walsh be terminated, and she was indeed terminated on February 21, 1995. On the same day, Walsh was notified by the Commission that her human rights complaint was being dismissed.

On August 15, 1995, Walsh filed a second human rights complaint against Mobil, alleging it had retaliated against her for making the human rights complaint. Both the original human rights complaint and the retaliation complaint were referred by the Commission to a one-person human rights panel for a hearing.

The Panel in *Delorie Walsh v Mobil Oil Walsh v Mobil Oil Canada*, 2005 AHRC 13 (CanLII), held that Walsh had not been paid commensurate with her male counterparts and ordered that she receive damages to compensate for the differential in salary between August 1990 and 1991. Damages were to be determined in a later proceeding. The Panel found that the behaviour of the supervisors did not amount to gender discrimination. The Panel also found there was no retaliation and dismissed Walsh's second complaint.

Walsh appealed the Panel's decisions regarding the limitation period, equal pay, gender discrimination, retaliation and procedural fairness. The Court of Queen's Bench (per Macleod J.) allowed the appeal and held that the conduct of the supervisors was indeed discriminatory and that retaliation had occurred. The complaint was remitted back to the Panel for reconsideration and for the assessment of damages.

Mobil appealed Macleod J.'s decision. The Alberta Court of Appeal held that Walsh was discriminated against on the basis of gender and that Mobil had retaliated against Walsh for making a human rights complaint.

After several additional tribunal and court proceedings, taking place over 22 years, Mobil was found to have discriminated against Delorie Walsh and to have retaliated against her for complaining by terminating her employment. This did not end the matter, however, as the parties continued with litigation over related matters such as retaliation, damages and costs. The last reported decision dealt with the issue of remedies (see: *Walsh v Mobil Oil Canada (Exxmobil Canada Ltd.)*, 2013 ABCA 238 https://www.canlii.org/en/ab/abca/doc/2013/2013abca238/2013abca238.pdf).

It must be remembered that the delay in cases where the Commission has determined that there is merit to the complaint is often due to the parties utilizing the court system to make applications on various substantive and procedural issues (e.g., costs), and, if they have the resources to appeal, resolution of the matter is delayed significantly. Often, it takes several years to resolve matters heard before the court. One does not hear many arguments that we should abolish the court system for this reason. Perhaps the parties in human rights complaint matters, particularly respondents, should be criticized for refusing to settle matters in a reasonable way rather than delaying the case to the point where some of the complainants become completely disheartened and give up.

Termination for Insolence

By Peter Bowal and Nicole Bowal

We hear that "attitude is everything", and nowhere is this more important than at work. Consider whether the employee's attitude below should be enough to justify his firing.

Henry, 31, had been working for seven and a half years as an auto body repair technician at the Fox Ford dealership in Woodstock, New Brunswick. He complained that his supervisor, Graham, a few years younger, had a "smug look". Last year there was a minor shoving incident but nothing came of it.

Henry was a slow worker. One day, he was assigned to remove decals from two vans. Late in the afternoon, Graham came by and said to Henry, "I hope that's the second truck." Henry replied, "No, it's the first. Maybe you'd like to do it yourself." He became irate, started yelling and swearing at Graham saying, "What's your fuckin' problem? You've been on my fuckin' case all day and I'm fuckin' sick and tired of it."

Henry taunted Graham five or six times to fire him. Finally Graham relented, "OK, you're fired."

Insubordination Versus Insolence

Employee misconduct comes in various forms such as dishonesty, conflict of interest, competing with the employer, breaching trust, disobedience (insubordination), incompetence and insolence. Dishonesty is the worst misconduct: for example, theft, fraud, misappropriation and false statements. Misconduct suitable for firing involves a serious lack of judgment that is incompatible with the employee's duties.

Insubordination is the deliberate refusal by an employee to obey the lawful and reasonable instructions of the employer. In 1959 Lord Evershed stated in *Laws v. London Chronicle:* "It is, no doubt, therefore, generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard — a complete disregard — of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master."

Several instances of insubordination may cumulatively justify termination. One refusal, like a single incident of absenteeism, will usually not be enough to fire an employee unless it is so serious that it amounts to a repudiation of the employment contract. This is always a question of fact. The firing of a

sales executive was upheld where he defied an order forbidding him to directly communicate with the company's board of directors. Another employee who took home the employer's proprietary customer information despite a confidentiality agreement prohibiting removal of such information from the premises was justly dismissed for cause.

Disagreeing with the employer, even in the presence of other employees or outsiders, does not necessarily constitute insubordination. A British Columbia judge in the 2010 case of *Kokilev v. Picquic Tool Company* concluded a manufacturing company vice-president was not sufficiently insubordinate to his employer to justify dismissal. He had expressed strong disagreement with the company's president on business matters in front of other employees on several occasions. The eight-year employee was awarded damages of ten months' pay.

By comparison, insolence is derisive, contemptuous or abusive language or conduct, perhaps expressed in a confrontational attitude, directed by an employee toward the employer. In general, several instances of insolence are required to fire someone. However, a single serious insolent act will justify summary dismissal if the employment relationship has been irreparably destroyed. This is judged by:

1. whether the employee and superior are capable of continuing a working relationship;
2. the incident undermined the supervisor's credibility and ability to supervise effectively in the workplace; or
3. the employer suffered a material financial loss, a loss of reputation or serious prejudice to its business interests as a result of the incident.

One "acrimonious discussion" between an insurance manager and his boss was found not to be sufficient insolence. Likewise, a rude message ("shove it") faxed to the president of a hockey team was not cause for firing. The fired employee won 28 months pay as damages.

However, many single acts of insolence have led to justified summary terminations. In *Blainey v. F.R. Hickey* (Ont. 1985), a sales manager continued to interrupt and undermine his superiors at a sales meeting although he had been asked in advance of the meeting not to do so. His firing was upheld.

In *Codner v. Joint Construction Ltd.* (NL 1989), the sacking of an employee who called the company president a "fucking liar" during a private argument over the misuse of a company credit card was also upheld. In another case, hanging up the phone on a superior was adequate cause.

In *Bennett v. Cunningham* (ONCA, 2012) a lawyer operating a law firm was justified in firing an associate who sent her a letter accusing her of "dishonesty and negligence". The relationship between lawyers working in the same office is fundamentally based on confidence, respect and trust, and the highly critical letter had destroyed the employment relationship. The cost of the allegations was not only the lost job. In the end, the employee had to pay for her own lawyer and the legal costs of her former employer through three levels of court.

In *Wise v. Broadway Properties Ltd.* (BCCA, 2005), the Court upheld the firing of a 10-year resident caretaker of an apartment block who believed for years he was not being paid for all his time and work. He wrote a five-page letter to his employer, venting his frustration at the perceived injustice of his unpaid work. He threatened to sue the employer, which the judge said was not itself a sufficient basis for firing.

What was found to be unpardonable was this statement in the letter: "I do not expect to be treated as the unfortunate Jews were treated when impressed into working without pay for Mercedes Benz, Volkswagen and Siemens during the Second World War." The Jewish employer, then in his 80s, (he died before trial), was deeply offended by this comparison and said he could no longer work with this person. The comparison drawn by the worker between his treatment and the treatment of the Jews as forced labourers irretrievably destroyed any chance of a workable relationship between the two men and the firing was upheld even though it was a single incident.

Henry versus Graham: The Outcome

Returning to the facts set out at the beginning of this article, do you think they are sufficiently serious to support firing?

The case is *Henry v. Foxco Ltd.*, 2004 NBCA 22 (CanLII), http://canlii.ca/t/1gsb0. The trial judge concluded the confrontation justified dismissal, and one of the Court of Appeal judges agreed. However, the other two appellate judges reasoned that Henry's actions did not repudiate an essential condition of his employment, and that this one incident was not serious enough to destroy the employment relationship. Despite the presence of many concerns about the ongoing employment relationship, the public nature of the insolence, and the intensity of the confrontation, the majority said Henry's misconduct was a mere isolated incident of insolence that should be overlooked. Henry was having a bad day: "many things are said and done in the heat of the moment that, on reflection, are regretted by all. This is one of those cases."

Consequently, the employer could not establish that Henry's insolence led to irreparable harm to the working relationship, and that this isolated incident rendered it impossible for Henry and Graham to continue to work together. The employer was ordered to pay Henry $14,200.00 with 7% interest for four years, as well as his legal costs.

Conclusion

In Canadian employment law, there is a distinction between insubordination and insolence, although the terms are sometimes used interchangeably. Insubordination is the refusal to follow an employer's direction. Insolence, the weakest category of misconduct, is characterized by words and attitudes, which explains why it will be harder to justify termination upon one act of insolence. In most cases there will be evidence of both insubordination and insolence. A single incident of either may be sufficient to justify an employee's summary dismissal but outcomes in these cases are hard to agree upon and predict.

The Ins and Outs of Board Elections

By Peter Broder

One of the more murky areas of charity and not-for-profit law is the issue of the proper conduct of board elections. Many of the older pieces of legislation that deal with constituting and operating non-share capital corporations – the typical structure adopted by charities and not-for-profit groups – provide little guidance on the process for such elections.

The current Alberta *Societies Act* is typical in this regard. The statute itself, though it has almost nothing to say on the subject, mandates that the bylaws of groups seeking incorporation as a Society must set out provisions on "the appointment and removal of directors and officers and their duties, powers and remuneration" as well as provisions on the holding of general meetings of members, the rights of members and how members are admitted, withdraw or, if applicable, can be expelled.

A Society is free to include as much detail about elections and other governance processes as it likes in its bylaws, but many choose to provide minimal direction beyond fulfilling the basic requirements under the statute. The standard bylaws available on Service Alberta's website also provide limited specifics. The merit of this is that organizations are afforded lots of flexibility in how they operate, and are not subject to a 'one-size-fits-all' approach.

However, this flexibility also means that elections may be conducted on a 'because that is the way we have always done it' model. In the average organization this may leave unanswered questions like:

- at what stage in the member application process does someone attain voting rights?;
- what rights do members have to member lists and other corporate records (for example, for purposes of presenting a motion at a General Meeting)?; and
- if candidates for directorships are identified and/or vetted through a Nominations Committee, can the general membership nonetheless nominate other candidates from the floor of a general meeting?

The mechanics of nominations recently became an issue in a large Canadian co-op retailer, which sought to implement a vetting process to ensure nominees for its board had expertise in its core business. Though not structured as a charity or not-for-profit organization, that corporation's initiative mirrors the

approach of many voluntary sector groups that seek to keep a tight rein on who can stand for election as a potential director.

For sector groups, to some extent the lack of guidance on questions around these processes was addressed at the federal level with the replacement of the *Canada Corporations Act, Part II* with the *Canada Not-for-Profit Corporations Act* (*CNCA*) a few years back. That legislation includes measures to clarify the uncertainty that sometimes arises about the composition of an organization's membership, and explicitly deals with the procedures for accessing member records to bring a motion at a general meeting or for other legitimate purposes related to the governance of the corporation.

That said, even that legislation leaves lots of unanswered questions about election processes. An insight into some of the potential difficulties that can arise in the conduct of elections, and how courts are likely to view them, was provided by the decision in a recent Ontario case concerning the election of directors to a *CNCA* corporation: *Syed v Choudry*, 2015 ONSC 7653 (*Syed*).

The case arose in the context of a governance dispute in a religious association. A new election was ordered because the Court found that the conduct of the original election had been flawed. Generally, provincial superior courts have authority to review the governance processes of corporations.

In *Syed*, Justice Gray took as a starting point, the following proposition, drawn from *Lee v. Lee's Benevolent Assn. of Ontario*, [2004] O.J. No. 6232 *(Lee*):

> *Non-profit organizations such as the Association should not be required to adhere rigorously to all of the technical requirements of corporate procedure for their meetings as long as the basic process is fair. Nor should the court be too quick to grant relief in such circumstances that may only serve to encourage a disgruntled member of such an organization to seek such relief. Absent some demonstrated evidence that any irregularities went to the heart of the electoral process or lead to a result which does not reflect the wishes of the majority, the court should be loathe to interfere in the internal workings of such groups.*

This approach gives lots of latitude for breaches of technicalities to be ignored. However, the Court found in the *Syed* case that, in light of allegations that the organization's membership list had been improperly expanded and that there had been failure to comply with repeated requests for a copy of the membership list, the election should be set aside. The specific flaws cited by the Court included an election where it was questionable whether those voting, or entitled to vote, were all legitimate members of the corporation and where candidates were denied information they needed in order to effectively campaign for positions as directors.

The Court held that these defects were "fundamental" and not merely technical breaches. Such small mistakes could ostensibly be overlooked pursuant to a bylaw provision that excused minor errors or omissions in governance proceedings or be determined not significant enough to warrant court

intervention pursuant to the holding in *Lee.* Since the Court found that they were fundamental, however, a new election was ordered under the supervision of an independent solicitor.

The case highlights the need for the staff and boards of corporate charities and not-for-profit organizations to look beyond the minimal procedural requirements set out in the statute and generally expanded on to some extent in an organization's bylaws. They must examine their governance processes and ensure they can withstand scrutiny as fair.

This suggests that protocols ought to be carefully developed (with the help of legal or other expert advice), written down and adhered to. Entrenching practices in bylaws is an option, but not a necessity, and will mean a more onerous process must be undertaken to change practices when that is deemed desirable. Documenting what was done is also essential, in case the conduct is ever called into question. The law being murky in this area is all the more reason for organizations not to be.

Missing the Mark: Why the Post-Ghomeshi Outrage Makes Little Sense

By Melody Izadi

Almost everyone has an opinion about one of the most followed trials in Canadian history. The Jian Ghomeshi trial left a trail of furious people in its path like an F5 tornado that veered off course. Many of those who are angry about the Ghomeshi trial allege that there was an injustice— that the Ghomeshi trial is proof that rape myths still run rampant in our court system. However, those who opine that "women's rights" have been trampled by this case are not only wrong, but also seem to have a narrow, uninformed view of the outcome. This problematic viewpoint that many Canadians share has spread across the country like a viral outbreak, and has infected the Canadian population with poor judgment.

The result of each cross-examination of the complainants in the Ghomeshi trial led to a public outcry for sexual assault case reform, and defence counsel Marie Henein was demonized for discrediting the complainants. A popular opinion seems to be that a complainant's word should, absent cross-examination and any resulting damage, be enough for a conviction. Because, as the nay sayers argue, a decimating cross-examination in a sex assault case undermines "women's rights" and causes irreparable harm.

What the public lacks, it seems, is an understanding of the term "credibility" in a court of law. It's quite clear in his reasons for judgment that Justice Horkins found Ghomeshi not guilty not because the complainants were women, or because there was no direct evidence, or because he is a rape myth supporter, but because each of the complainants showed a serious lack of honesty and candour in their testimony at trial. If Canadians are in support of a system of justice that can convict people based on testimony from witnesses who have been clearly shown to withhold information (and outright lie), then what is the point of having an adversarial system of justice at all? Why even have a trial? Why not skip the whole thing and convict people after statements are given to police?

What these angry Canadians should be considering is what damage has been done to "women's rights" when three complainants come forward to report an historically under-reported crime, and choose to do so without being forthcoming or honest. The damage to the credibility of the three complainants was not done by fancy lawyer tricks, and Mr. Ghomeshi was not found not guilty because of a "technicality." Rather, the women were found to have lied about things that were at the very core of their statements and at the very heart of their complaints. Their actions (and inactions) were far more than just a minor

inconsistency between their testimony at trial and their statements to police. Had Justice Horkins convicted any individual on such evidence, our justice system would be a mockery of what it's been designed to be.

The term "women's rights" has been nestled between quotation marks in this article because the way it has been used by many Canadians when talking about the Ghomeshi case implies some sort of one-size-fits-all approach. In reality, the concept of "women's rights" has not only been compartmentalized, but it is a widely accepted notion in academia that a conversation about "women's rights" cannot be devoid of class, race, ability, sexuality and so on. In the Ghomeshi trial, three English-speaking, middle-class women, with many resources and opportunities afforded to them (including representation by their own counsel) arrived in court and chose to give evidence that was not honest.

What's ironic about the post-Ghomeshi "women's rights" championing has been the targeted anger towards Marie Henein. Marie Henein has been labelled as a "traitor" to her own gender even though she showcased her competence, vigor, talent and advocacy. Women should champion Marie Henein's mere existence in our legal system, and should be gently reminded that she is a successful woman in a society that is not yet absent of patriarchy, sexism and unequal opportunity and pay. She has flourished in a career path that most women leave after a few years of practice. In addition, if any of Marie Henein's Twitter assassins were accused of sexual assault, or if any of their husbands, fathers, or sons were accused, and complainants testified against the accused in a similar fashion as the complainants did in the Ghomeshi trial, two things would be profoundly certain: (1) they would want Marie Henein to represent them or their loved one; and (2) they would be outraged if they or their loved one was convicted on the word of complainants who were dishonest about extremely relevant information, in an extremely important matter.

This case was not a perpetuation of rape myths or false social constructions of the ideal victim. This case was about the basic principles of credibility in a courtroom and the strength of the evidence the Judge had before him. Any future complainant who braves the humiliation of having to testify in court will not be scarred or tainted by the Ghomeshi decision— not to worry, verdicts of guilty will still be found in the courts. But this country cannot support convictions on less than truthful evidence. This country cannot support convictions when there is reasonable doubt. This country cannot support or give credence to people in our society who take an oath to tell the truth, but instead, figuratively spit in the face of the court. Otherwise, our court system would just be, in the words of Lucy DeCoutere, "theatre at its best."

Organizations Get Religion: *Loyola High School v. Quebec*

By Peter Bowal and Jacqueline Bowal

Introduction

Do organizations and corporations have a constitutionally protected freedom of religion under the *Canadian Charter of Rights and Freedoms?*

The *Charter* has existed for 34 years and we are still not clear whether non-human entities enjoy religious freedom as they do other freedoms, such as expression. The Supreme Court of Canada last year had an opportunity to answer that in *Loyola High School v. Quebec* [http://canlii.ca/t/ggrhf]. It took a small, but important, step in that direction.

The Individual Nature of *Charter* Freedoms

The *Charter* rights and freedoms were intended for human beings. There are collective, public interest dimensions in how they operate, such as in the limitations clause (section 1) and the override clause (section 33). Many freedoms require a balance of individual and public interests on reasonableness grounds. Pierre Trudeau wrote that "only the individual is the possessor of rights." Chief Justice Dickson said the purpose of religious freedom was to ensure that "every *individual* be free to hold and manifest whatever beliefs and opinions his or her conscience dictates…" Section 28 of the *Charter* suggests that it is only intended to apply to human beings: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

On the other hand, section *2* rights and freedoms are granted to different legal persons. In some cases, the right is conveyed to "everyone" (the freedom of religion is included in this group), to "any person", to "every citizen", to "any member of the public in Canada", and to "every individual."

It has been established for well over a century that corporations are "legal persons" (though they are not citizens or individuals) and enjoy the same status as human beings. Therefore, freedoms conferred on "persons" and "everyone" should belong equally to human beings and companies. The *Charter* freedoms of expression, freedom from unreasonable search and seizure and trial within a reasonable time are already conferred on companies. What about the freedom of religion?

But the law is never that simple. Some *Charter* rights marked for "everyone", such as the right to life, liberty and security of the person (section 7), have been held by the Supreme Court of Canada to be unavailable to corporations. The Court said: "only human beings can enjoy these rights. 'Everyone' then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings."

In the words of the *Irwin Toy* decision, it must not be "nonsensical to speak of a corporation [having a religion]" and the idea of a corporation subscribing to a religion should not "stretch the meaning of [religion] beyond recognition . . . That is, read as a whole, it [must not] appear that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the [freedom of religion]" serves to underline the human element involved; only human beings can enjoy these rights. [Should] "everyone" then, be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying [religion], and include only human beings?"

It is plausible that Canadian courts would no more find a non-cognitive, non-sentient corporation capable of a conscience or religious belief than its non-physical existence is capable of imprisonment. As Dickson C.J. stated in *Edwards Books*, religion is about "profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices." It is hard to imagine business corporations (themselves legal fictions) having any religious dogmas "to connect with the divine or as a function of [its] spiritual faith."

Despite "everyone" having freedom of religion in Canada, business corporations and other non-human legal persons generally do not appear to have a strong argument in favour of an independent constitutional freedom of religion in Canada. What about religious organizations?

The *Loyola* Case

Loyola is an incorporated non-profit Catholic high school in Montreal. The Quebec government mandated a secular program of studies, the Ethics and Religious Culture course ("ERC"), to be taught in all school. ERC required teachers to be objective and impartial when presenting the course, although private schools like Loyola could request and receive an exemption if the Minister decided that an "equivalent" program was offered.

Loyola objected to being neutral about its Catholic doctrines and sought the exemption. It wanted to teach the ethics of its own religious tradition from the Catholic perspective. The exemption was denied and Loyola went to court claiming, "the religious nature of the school prevented it from teaching Catholic beliefs or other religions from a neutral or detached perspective" and the denial of the exemption was a breach of Loyola's freedom of religion under section 2(a) of the *Charter.*

The Supreme Court of Canada was unanimous in the outcome that Loyola's and its community members' religious freedoms were violated, but the judges were divided on the issue of independent religious rights for the incorporated Loyola entity. The four-judge majority spoke vaguely about religious community, saying "the religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education." The majority spoke of communal aspects of religious beliefs and practice, such as the transmission of faith. It said: "religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions." But it concluded it was not "necessary to decide whether corporations enjoy religious freedom in their own right under s. 2(a) of the *Charter* . . . in order to dispose of this appeal."

The three concurring judges would have characterized Loyola as a religious corporation with its own right to freedom of religion, pointing out that "the individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith." These judges reasoned that protecting the religious freedom of individuals sometimes requires the assertion of religious freedom claims by their affiliated religious institutions, such as Loyola in this case. They would assign section 2(a) protection of religious beliefs to non-human entities which are *created* primarily for religious purposes and *operate* according to the same religious purposes.

Conclusion

Three judges of the Supreme Court of Canada have now opened the door to extending religious freedoms to non-human religious organizations. They decided that inanimate things, indeed mere creations and fictions of the law, can possess religious belief and conviction worthy of constitutional protection. This proposition, if it is to be elaborated in the future, will need to answer many more questions, such as:

- what "religious purposes" are,
- whether for-profit religious organizations and even a secular or atheist organizations would qualify, and
- how to deal with internal dissent within the religious organization, as all members of religious communities may not hold the same religious beliefs and agree on interpretations.

This preliminary analysis by the concurring minority in *Loyola* is poised to serve as the foundation for a more nuanced analysis of a constitutional freedom of religion for religious organizations in the future.