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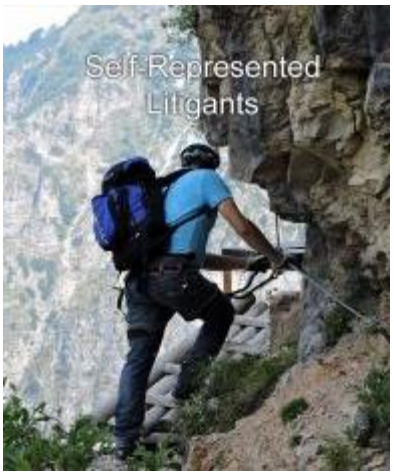
Self-Represented Litigants

41-1: Self-Represented Litigants



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Self-Represented Litigants have Mountains to Climb

By Owen Le Blanc

Self-represented litigants present a host of challenges to some of the core assumptions of the legal system. Here are three of the most significant issues.

Access to Justice

The right to a fair trial is a principle of fundamental justice in Canada. If the unrepresented litigant is a lay person, this right to a fair trial might be infringed based on procedural issues alone. Judges in Canada have been attuned to this possibility and provided some common law solutions to assist self-represented litigants. In *A(JM) v Winnipeg Child & Family Services,* Scott C.J.M. acknowledged that courts should offer some assistance to unrepresented litigants. Furthermore, it was also acknowledged in *Dunsmuir v New Brunswick* that the exact amount of assistance that will be required will vary from case to case, largely based on what is required for a litigant to understand proceedings. Judges in these circumstances must be careful, however, because it is possible that they may compromise judicial neutrality if they are viewed assisting a litigant too much. This is the Catch 22 with self-represented litigants. It has placed judges in the impossible situation of trying to reconcile competing ideals to maintain the integrity of the legal system. Obviously, it would be ideal to get all of these litigants representation, but this is most often easier said than done.

The Cost of Litigation

According to the National Self-Represented Litigants Project, the most common challenges self-represented litigants reported in legal proceedings are the ability to afford legal representation and the difficulty of understanding legal forms. A two-day civil trial in Canada costs an average of $31,330. appearance. By contrast, Statistics Canada reported that the median household income in 2014 was just $78,870 across the country. Therefore, an average two-day trial with representation costs around 40%

of the median Canadians household income for the year. Most potential litigants effectively have to choose between justice and rent. Furthermore, there is some legal authority that has been floating around that suggests litigants may not necessarily be eligible for lost wages when preparing for trial. These factors may have a double effect on litigants by causing those willing to put in the time to research to self-represent and risk losing wages, but it may also cause many people to forego enforcing their legal rights entirely because they view it as not worth the time and money.

The Representation Gap

One of the main problems with self-represented litigants is that many, if not most, fall into what could be called the representation gap. Litigants in the representation gap are those individuals too poor to afford to retain a lawyer, but too rich to gain access to most *pro-bono* services. In Edmonton, for example, there were 66 services available for self-represented litigants in 2007. Of those, 42 only provided information and only 14 provided services beyond information, almost all of these exclusively served the low-income community. These organizations are forced to turn away individuals above the arbitrary cut-offs, even if they would prefer to be able to help them. For litigants who are confused and scared by the legal system, they are unfortunately forced to attempt to argue their case without always knowing the traditions and expectations of court.

The representation gap presents one of the greatest challenges surrounding access to justice. Many of the organizations that are providing assistance to self-represented litigants lack the resources and expertise to act as agents for these people and, in some provinces, they may not even be allowed to depending on provincial laws. There is no easy solution to this problem, but that is not to say that the legal information provided by organizations, such as Pro-Bono Students Canada cannot provide significant assistance to self-represented litigants. Most legal clinics across Canada can help to explain legal forms to litigants. Every Canadian law school has an organization to help provide legal information to those who need it. Litigants may also want to seek out the lawyer referral service to perhaps find a lawyer that might be willing to work for less, or at least can provide a free consultation. Furthermore, most major centers have a Dial-A- Lawyer service that will help litigants with some basic information. These services are all great for getting some initial consultations and possibly explaining some forms. However, for those litigants in the representation gap terrified to present a legal argument, systemic change may be the only solution.

Your Self-Representation Road Map: Five Steps to Success (And 5 Mistakes to Avoid)

By Devlin Farmer

As a lawyer, I've been to court hundreds of times. And I've coached hundreds of self-represented litigants on how to go to court on their own. Here are some steps to consider. Remember, these are general guidelines and you should always check the rules of court and seek legal advice in your own jurisdiction for your particular kind of case.

1. Do You Have a Case? Don't Go to Court if You Can't Win

You might feel you are morally right in a dispute but that doesn't mean you have the ingredients necessary to win in court. Judges are bound to follow the law. So, begin by researching what the law says about your particular situation. Legal research can be tricky so make sure you are looking at material for your jurisdiction (don't look up what you need for a restraining order on a California legal website if you live in Nova Scotia!) and your kind of dispute. Then look at what you need to meet the legal requirements to be successful. How are you going to prove the things the law says you need to prove to win your case?

One big mistake self-represented people make is filing a case where there is no legal issue. What this means is that a judge can only make an order if there is a legal reason to do so. Thus, if your regular coffee shop stopped selling your favourite cupcake, you cannot bring a legal claim against them for damages because you can't get those fabulous cupcakes anymore. Similarly, if your neighbour announces that Martians are controlling Ottawa, you cannot sue him to make him change his mind. Make sure there is a legal rule that can be applied to your facts and that there is a remedy (a solution) that a judge has the authority to make happen if you win your case.

The way I usually determine whether to proceed with a case is to first ask if the chance of winning is greater than 50%. If it's more likely that I'm going to lose, I will ask my client to give serious thought to

considering a reasonable settlement offer or even walking away (if possible) from the dispute. If my research and analysis indicates that the chances are that I will win, I still ask my client, "Is it likely that you will be better off having gone to trial than not?" After all the stress, time and money spent on a trial, sometimes it is not worth winning.

2. Organization is Key – Don't miss a deadline!

Going to court can feel totally overwhelming with a million jigsaw pieces to put together. But litigation has timelines with goals. So, take a breath and plot out what you need to do at each stage. Start with the next one, then the next and so on. Don't get overwhelmed! Here are some tips to stay organized:

- Put all deadlines and dates in a calendar with reminders ahead of the deadline.
- Use checklists and spreadsheets – if I need to prove something to succeed at trial, I write that on one side of a page and on the other I write out how I'm going to prove it. For example, if I want to prove that I paid a deposit to a contractor, I will write out "proof of payment" on one side of the page and on the other I will list the evidence such as the receipt, my oral testimony and my bank statement.
- Organize your litigation materials either in file folders or a binder. Litigation involves lots of paper. Don't drown in it. Keep your evidence (for example, receipts to show proof of payment) separate from papers you file in court (pleadings) and any letters you send or receive.
- Create a Trial Book – When you go into court for your hearing or trial, you will likely need to have your notes, the law and your evidence at your fingertips. You should also have a copy of all the filed court papers, checklists so you don't forget anything and an outline of your opening and closing arguments. Organizing and distilling the material from your case into a trial book is what lawyers usually do. A trial book is usually a three-ring binder divided into different sections that follow the development of a case. (You'll need to look up how to actually make one in, for example, a book on trial techniques.)

Now once you're organized, don't make one of the biggest mistakes I see self-represented people make in court: not listening to the judge. So many times I've heard a judge ask a litigant or a lawyer a question, and instead of really thinking about the question and what the judge is asking, that person will give a cursory answer and swing right back into their scripted argument. Being organized doesn't mean slavishly following your checklist from A to Z, it means hitting each point, but in a way that organically flows from the way the hearing is proceeding.

Take cues from the judge but make sure you still make all your points.

3. Use a Lawyer in These Four Situations: Don't Avoid Lawyers Just Because You're Self-Represented

Most people are self-represented for financial reasons. They can't afford a thousand plus dollar retainer. However, you can strategically seek out a lawyer's help without retaining them for a whole case; for

example, for a quick consultation or to draft papers to file in court. These kinds of services will typically cost hundreds, not thousands. And if you can't afford even a 30-minute consultation, there may still be ways to get a free or low cost legal opinion either through legal aid, courthouse duty counsel or a volunteer lawyer referral agency. For example, legal consults can be as little as $25 through a referral service such as the B.C. branch of the Canadian Bar Association.

These four scenarios are ones where it is especially important to get the insight a lawyer can offer (remember, while you have one case in court, lawyers have dozens, and their on-the-ground experience can provide invaluable tips):

- Before you file papers in court;
- Whenever you are served with court papers;
- Before you sign any agreement or court paper; and
- When you are panicking or guessing in your case: a lawyer can offer perspective.

Don't make the mistake of locking yourself into court proceedings, a court order or an agreement without learning first what a lawyer can tell you about the implications of your actions, as well as possible alternatives.

4. Settlement isn't always fair but it might be your best option: Don't overvalue being "right."

Most cases these days settle before trial. However, settlement will require work. One of the biggest issues for anyone in a court battle is that they want what is "fair" or they want to be "right" and the court to say that the other side is "wrong." And typically, there are a lot of emotions involved in what is "fair" and "right." It may sound harsh, but you probably need to set aside your idea of what is fair and look instead at:

- What do you want? This isn't just out of the dispute but the bigger picture. What would it take for you to move on and leave the dispute behind you? This is different from what you might ask for at trial. It might be "peace of mind" or an apology and a portion of the money you are claiming in your case.
- What can the law give you? The law probably can't tell you who was morally "right" and who was "wrong." Focus on what you actually can get (or give up) if you and the other side sign a settlement agreement together.

I tell my clients to look at their disputes as a business transaction. You might have years of bitterness accumulated with the other side because things have been building between the two of you. Well, you are probably never going to succeed at convincing the other side that they are wrong and you are right. Instead, focus on what you need or can live with to move on. Usually, it's a dollar figure. Focus on that in your settlement negotiations.

5. Use mediation (and other forms of Alternative Dispute Resolution) but don't expect the mediator to tell you or the other side what to do.

If the other side is willing, mediation is a great alternative to court. It usually costs less than hiring a lawyer (often you split the fees with the other side) and gives you direct control over the outcome of your case, avoiding the risk of a trial. While litigating in court is built around a model that is adversarial and uses procedures and rules developed by lawyers for lawyers, mediation can be used by just about anyone. A mediator is a trained neutral (they aren't on either side) who facilitates communication between the parties in order to help them reach agreement. "But I already tried talking to the other side and they won't listen," you say, "So what's the point of mediation?" Mediators have techniques to bring people away from being locked in a position and to open up two opposing sides to common ground that they may not even be aware of.

Mediators, however, are not acting as lawyers (while your mediator may also be a lawyer, they aren't "your lawyer") and they are not acting as judges. In mediation, you cannot get legal advice from the mediator and the mediator cannot make a decision for you like a judge can. Do not go into mediation thinking you'll just do what the mediator says and that the mediator will tell the other side what to do. A good mediator will help you roll up your sleeves and work at the table to put together a solution that everyone can live with.

Conclusion

In sum, representing yourself can be hard work. But knowing how to put together a game plan, knowing when to use a lawyer, and what resources and tools to depend on are key to assembling a road map through your dispute to get to resolution.

Hurdles for Self-Represented Litigants in Small Claims Court

By Amer Mushtaq

The rules and processes at Small Claims Court were designed to be simple and flexible, so that everyday people could have their disputes resolved without hiring lawyers or paralegals. However, the reality is that many self-represented litigants continue to face significant hurdles in accessing the justice system through Small Claims Court without professional help.

This problem has become significant in the last few years, as more and more people are representing themselves in Small Claims Court. Due to the significant rise in self-representation, one hopes that the court system will evolve to better meet the needs of self-represented litigants. In the meantime, here are answers to some of the common issues that the self-represented litigants are currently facing.

Where to Begin: does your case belong in a Small Claims Court?

Monetary Jurisdiction

Each Canadian province has enacted specific legislation for small claims matters. This legislation deals with various relevant procedural matters. For instance, the legislation will confirm the monetary jurisdiction of a provincial small claims court or lay out the procedure for determining which specific court office location to choose when commencing a court action in a small claims court. In Alberta, for example, a claimant can seek monetary remedy of up to $50,000 in the Provincial Court – Civil (commonly known as Small Claims Court), whereas in Ontario, the monetary limit is $25,000 in small claims court. Self-represented litigants must check the applicable provincial legislation to ensure that their claim is commenced in the appropriate court.

Subject Matter of the Claim

Sometimes, when a case is within the monetary jurisdiction of a small claims court, a litigant may still not be permitted to issue a claim there. For instance, in Ontario, when a case is specifically related to a human rights discrimination matter, the only place a litigant can file his case is with the Human Rights Tribunal. Similarly, the majority of landlord and tenant matters cannot be commenced in Small Claims Court in Ontario, but only in the respective provincial landlord and tenant tribunals. In Alberta, on the other hand, landlord-tenant disputes are properly adjudicated before the small claims court. Therefore, it is important for self-represented litigants to consider whether the subject matter of their claim properly belongs to a small claims court.

Court Location

Many self-represented litigants in Ontario assume that they can simply commence their claim in a small claims court near their home or place of work. This is not true. A claim in small claims court must be commenced in a specific court office based on Small Claims Court Rules. Based on these rules, a self-represented litigant can choose the appropriate court office in one of the three ways: a court office in

the territorial division where the disputed events occurred, where the defendant lives or carries on business, or the court office that is nearest to where the defendant lives or carries on business.

Preparing for Trial

Persuasive presentation at trial requires a lot of preparation. A self-represented litigant must remember that a Judge will make his/her decision based solely on the facts and supporting evidence presented at trial. Broadly speaking, before attending at trial, self-represented litigants must know the legal test they need to meet at trial to win the case. This will ensure that the self-represented litigant will organize the facts and supporting evidence in the same fashion. One way to organize the evidence at trial is by preparing a table of facts and evidence where each fact that needs to be proven is listed along with the evidence (oral, documentary etc.) that would prove that fact.

Sometimes a party may introduce evidence at trial that was not shared with the other side before-hand. When faced with a surprising evidence at the commencement of a trial (or during a trial), self-represented litigants often don't know how to respond. In this regard, it is important to note that our court systems do not allow "trials by ambush". This means that each side is entitled to know the full extent of the other side's case well before the commencement of trial. When faced with a new piece of evidence at trial, a self-presented litigant (or for that matter any party) can object to the inclusion of that evidence especially if the new evidence is harmful to her case, or ask the judge for an adjournment till the party can consider the evidence and prepare an appropriate response.

Leveling the Odds

Going against an opponent who is represented by a top-tier lawyer or paralegal may be daunting to a self-represented litigant. Many self-represented litigants feel that despite the merits of their case, the legal fire-power on the other side puts them at a significant disadvantage. In such a situation, the self-represented litigant must remember that a courtroom is probably the only place where what matters the most to a judge is the strength of a party's argument and the relevant evidence. A self-represented litigants must, therefore, focus on presenting their own arguments in simple terms to a judge backed by credible evidence. Focusing on what really matters to a judge inevitably levels the odds for the self-represented litigant and provides an opportunity to succeed on the merits of the case.

Representing Yourself at the Tax Court

By Owen Le Blanc

The Tax Court of Canada has gone to some lengths to make information available for self-represented taxpayers who want to appeal a tax decision. The website of the Court prominently displays a tab for Self-represented litigants. Under the tab there is a wealth of information about forms, procedures and the Court itself.

This information can be found at: http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/tcc-cci_Eng/Litigants

For many Canadians, few things are more destructive emotionally or financially than a legal dispute. The legal system exists to resolve the inevitable conflicts of humanity. We have left behind the days *of Game of Thrones* style trial by combat for a significantly more complicated procedure. The challenge of the legal system is not just to resolve disputes, but to decide a fair resolution between two sides, both of which have merit. Even for those with legal training, however, the legal system can be a dizzying array of statutes, regulations, and confusing judgements. The Canadian *Income Tax Act*, for example, is over 2600 pages of complex small print legalese. For the average person, just getting started with this document can be a daunting task of figuring out exactly where in that 2600 pages the solution to one's legal problem can be found. Clients pay lawyers to wrestle with these unwieldy documents so that they can go about dealing with other aspects of their lives. It stands to reason that if one side of a dispute has legal representation and the other does not, then there may be an inherent unfairness in the judicial proceedings.

According to Pro-Bono Students Canada, there were an astounding 5000 self-represented litigants in the Canadian tax courts alone between 2008 and 2012. Many of these individuals had a legitimate claim against the Canada Revenue Agency, but they ended up losing their cases due to lack of expertise. The Honourable Gerald J. Rip, Chief Justice of the Tax Court, suggested that Pro-Bono Students Canada begin a tax advocacy project to help cope with this problem. It is easy to see why Chief Justice Rip thought this was a good idea. If self-represented litigants come to view the legal system as unfair, then they may begin to lose confidence in it and Canada would be left with a justice system that denies justice. Lack of access to justice represents a problem where the very legitimacy of the legal system as a way for all

Canadians to resolve disputes is at stake. As a result of Chief Justice Rip' suggestion, Pro Bono Students Canada began a Tax Advocacy Project. Pro Bono Students in Edmonton, Toronto, Montreal and Ottawa now assist low-income taxpayers in Tax Court. The University of Ottawa common law section has begun a pilot project that has four students working in two teams to advocate on behalf of unrepresented taxpayers in the Tax Court's informal procedure appeals. Students meet with the taxpayer who is appealing, research the relevant law and prepare for hearings at the Court.

Self-Represented Parties at the Alberta Appeals Commission for Worker's Compensation

By Lynn Parish

The Alberta Appeals Commission for Worker's Compensation is a tribunal that hears appeals from decisions made by the Worker's Compensation Board (WCB). In Alberta the scheme for worker's compensation is governed by the terms of the *Worker's Compensation Act* RSA c. W- 15 and WCB policies that amplify the provisions of the Act. The WCB makes many decisions every day with regard to the management of claims involving injured workers. Anyone who has a direct interest in a claim for compensation can request that any decision relating to the claim made by a WCB claims adjudicator be reviewed internally by the WCB. The decision will be referred for review to the internal Dispute Resolution and Decision Review Body (DRDRB).

Anyone with a direct interest in the claim can then appeal decisions of the DRDRB to the Appeals Commission. Those with a direct interest in the claim are typically the injured worker or the date of accident employer. The WCB may also appear at Appeals Commission hearings and will usually do so when an appeal includes argument concerning the application and interpretation of legislation and WCB policy.

A rationale often quoted for the existence of tribunals like the Appeals Commission is the provision of a speedier and cheaper procedure, as tribunals avoid the formality of the ordinary courts. Less formality supports the idea, in theory, that parties should be able to represent themselves without hiring representatives, legal or otherwise, to advocate for them.

Figures published in the Appeals Commission Annual Report for 2015 show that for the year 2013-2104, 14% of parties before the Appeals Commission were unrepresented, 43% were represented by the Office of the Appeals Advisor and 43% by other representation. For the year 2014-2015, 8% of parties

were unrepresented, 51% were represented by the Office of the Appeals Advisor and 41% by other representation. The numbers therefore demonstrate that the great majority of parties appearing before the Appeals Commission do secure some form of representation, either from the Office of the Appeals Advisor or another representative.

The Office of the Appeals Advisor is a free service funded by the Accident Fund, which also funds the WCB. The Office of the Appeals Advisor is however completely independent of the WCB and is available to assist injured workers with their claims. The Office of the Appeals Advisor is not available for assistance to employers who may wish to contest WCB decisions. Parties at the Appeals Commission can also be represented by lawyers and non-legal agents.

Even though the number of self-represented parties at the Appeals Commission is relatively small, processing the appeals of those who are self-represented can be more labour intensive than dealing with parties who are represented. The most difficult areas in assisting self-represented parties tend to be associated with the procedures of the Appeals Commission. Without representation, parties will rely upon the good offices of the Appeals Commission administrative personnel to guide them through the appeals process. Assistance is provided although the time required to work with an unrepresented party can sometimes be significant. In a very small number of cases, lines have to be drawn with regard to the amount of time provided because the demands become too great. Matters can become problematic for example, when a party does not understand that an appeal on one issue does not automatically involve the entire WCB file being reviewed, or when a party wants to file multiple documents, many of which are not relevant to the issue under appeal.

With regard to the hearing of the appeal, the same procedural issues often have to be explained again to the self-represented party by the hearing chair. However, in my opinion, the Appeals Commission adjudicators are sufficiently experienced and skilled so that the fact that a party is self-represented does not impact the provision of a fair hearing. Adjudicators are familiar with the applicable legislation and policy and will ask appropriate questions and seek relevant information, even if the party does not adequately address the required information for the issue of appeal.

However, some caution is required when adjudicating cases with self-represented parties, as demonstrated in the recent case of *Malton v Attia*, 2016 ABCA 130. Mr. Malton and his wife sued a lawyer, Mr. Attia for negligence after he represented them in a trial. The Maltons represented themselves at the hearing against Mr. Attia. The trial judge found that Mr. Attia was negligent. Mr. Attia appealed on the basis that the trial was procedurally unfair. The Court of Appeal agreed with Mr. Attia and found that the trial judge had gone beyond assisting the self-represented Maltons by descending into the arena and acting more as their advocate. The Alberta Court of Appeal acknowledged the difficulties in assisting non-represented parties at trial but stated that "… at the same time this must be done in such a way as not to breach either the appearance or reality of judicial neutrality." It ruled that the trial judge based her conclusions on an alternative scenario of liability and damages that she developed as opposed to the allegations in the pleadings.

The scenario presented in the *Malton* case is perhaps even more cautionary in tribunal hearings such as those conducted by the Appeals Commission where the hearing may only involve one self-represented party in attendance. Even though the other party (often the employer) does not attend the hearing, the hearing panel must still exercise caution in the assistance provided to the self-represented party. In the absence of an opposing party, it may be easier to unwittingly assist the self-represented party. However, the employer is still a party to the appeal and upon receiving a decision, can request a transcript of the hearing and appeal the decision.

The Appeals Commission provides written decisions following all hearings. It is at this point that Commission administrative and legal staff can again spend time with unrepresented parties in explaining next steps, even though all decisions issued by the Commission include additional instructions regarding further review and appeal options. The obligation to provide information regarding further review and appeal was commented upon by Martin J. in the Court of Queen's Bench in the case of *Yuill v. Worker's Compensation Appeals Commission* 2016 ABQB, 369. The comments raise some interesting questions about the extent to which a tribunal has an obligation to advise self-represented parties of their rights of appeal.

Ms. Yuill wished to seek judicial review of an Appeals Commission decision. Her employer did not participate in the Appeals Commission hearing, but under the terms of the legislation was still a party to the proceedings. Ms. Yuill did not serve her employer with notice of the application for judicial review within six months from the date of the Appeals Commission decision as required by the legislation. Ms. Yuill only served notice on the WCB and the Appeals Commission. In the Court of Queen's Bench decision, Justice Martin expressed concern that, although the WCB had provided written information to Ms. Yuill about the appeal process, the information did not state that the employer had to be served. The WCB argued that such information would constitute legal advice. Justice Martin disagreed and stated that providing the information about service would be more like providing information that would make the process run smoothly. He was very specific in stating that informing a self-represented litigant of the requirement to serve an employer was reasonable. Justice Martin ruled that the fact that Ms. Yuill had not served the employer with notice of the appeal meant that she could not proceed.

The decision in *Yuill* raises some questions as to the extent of the obligations of a tribunal towards a self-represented party and what constitutes legal advice as opposed to information. For in-house legal counsel at the WCB and the Appeals Commission, it may be contrary to professional obligations owed to their clients (the WCB and the Appeals Commission) to provide legal information to parties who are seeking to take legal action against their clients. However, administrative staff at the WCB and the Appeals Commission do not have the same restraints and arguably could provide more information about procedural requirements on appeal and other issues. It remains to be seen whether the courts will elaborate in future cases about placing increased obligation on tribunals and administrative agencies to assist self-represented parties.

As a result of the assistance available to injured workers through the Office of the Appeals Advisor and the assistance available for both injured workers and employers from other agents, there are relatively

few self-represented parties appearing at the Appeals Commission. Those that choose to self-represent do require more administrative assistance from the Commission and in a small number of cases the demands can become unrealistic. As the number of self-represented parties increase in all forums it is likely there will be more court decisions addressing appropriate procedures and conduct towards self-represented parties.

The Law of Costs and the Cost of Law

By Peter Bowal and John Rollett

Photo Credit: Dreamstime

Introduction

Equality is one of the most important underpinnings of law and justice. This encompasses equal access to the law. Numerous initiatives ease the difficult and expensive engagement with law that most citizens encounter. These measures include free public legal databases, *pro bono* programs and legal aid services. However, when you need a lawyer, access to law comes at an extremely high price.

This article describes the law of costs when engaging lawyers.

Legal Costs and Expenses

The cost of law can generally be divided into court costs, other litigation costs, and lawyer costs.

Court Costs

Governments largely socialize the costs of justice. They pay for the construction and operation of the courthouses and the judges' salaries. They only ask that users of courts in civil cases pay a small 'filing' fee. Even the Supreme Court of Canada charges only $75 as a user fee. The lower courts charge slightly more. For example, it costs $200 to launch a small claims matter over $7500 in Alberta.

While relatively low, these filing fees may still be waived by a judge if you claim it would be a financial hardship to pay them. Court costs are either readily affordable or waivable. They are not a bar to accessing the legal system. The doors of justice ought to be open to all.

Other Litigation Costs

There are various other ligitation-related expenses that must be paid. These can include covering a portion of the lawyer's business overhead, such as secretarial and paralegal time, computer use and photocopies. Other costs are called "disbursements" – actual and necessary expenses incurred by the lawyer performing legal services for their client and paid to third parties. Long distance telephone calls, medical reports, document binding and courier charges come to mind, as well as charges for database legal research and expert witnesses.

Each party pays according to what is needed in the litigation. Like court fees, overhead charges and disbursements are not usually prohibitive cost components for most people. By far, most of the high cost of using the courts arises from the very expensive professional service fees charged by law firms to perform their services.

Lawyer Costs

For small value disputes, you should consider whether you should go to the law at all. The angst, uncertainty, stress, possible adverse publicity, risk of not collecting on judgments, possible appeal, and the time and energy consumed in a lawsuit are all non-pecuniary reasons to walk away from a small debt.

Every province maintains small claims courts where claims up to $50,000 can be launched and prosecuted without a lawyer. This is an effective option where the dispute is straightforward and you are likely to actually collect the judgment amount if successful. For complicated or highly adversarial cases and those in higher courts, you may still represent yourself (called "*pro se*") and this trend is increasing. However, most people who become involved in this litigation choose to hire a lawyer to represent them. Legal services, unlike medical services, are not socialized (and are largely uninsured) in Canada. They have to be paid directly by the client.

Legal Fees

Legal fees are the costs of a range of professional services provided by lawyers, ranging from advice and drafting of documents to preparation and representation in court. A lawyer may bill for services on the basis of a flat rate fee, a contingency fee, or an hourly fee. Flat rates (or tariffs) are rare in litigation. Contingency fees require no payment for legal services unless the client wins the case. The client only pays the lawyer a percentage of the successful outcome obtained. The lawyer must agree to work on this basis and will only offer it when the chances of winning are strong. The contingency model for legal fees is most common when suing to recover for personal injuries after car accidents and in tax cases.

The hourly rate is by far the most common basis for hiring a lawyer to assist in a court case. The rate will vary based on the lawyer's experience, expertise and skills. These fees vary from lawyer to lawyer and are guided by supply and demand. You should be able to hire a competent lawyer for about $300 per

hour. Clients may request an estimate of total costs to complete a lawsuit, but estimates cannot be accurate when no one knows for certain the amount of work and time that the lawyer will need to dedicate to the case. The hourly lawyer will usually bill the client on an interim basis, such as every month or after defined stages in the proceedings.

Review of a Lawyer's Bill

The lawyer-client financial relationship in Canada is the only one in which the law establishes a review procedure. Clients may ask a third, neutral party to review the lawyer's bill for reasonableness and seek a reduction of the amount of fees payable. This is called "taxation of the account."

Clients must ask for the review within six months (12 months in British Columbia) of receiving the lawyer's bill for legal services or, if the bill was paid, within three months of payment. The deadlines may vary from province to province, so you should check locally. The taxation officer is usually located at the courthouse where the request for taxation must be filed.

The reviewer must consider all aspects of the bill, such as the difficulty and complexity of the services, the lawyer's seniority, skill, specialized knowledge and standing in the legal profession, the amount of money involved, the time reasonably spent, whether any hourly rate agreed to was reasonable, the importance of the matter to the client, and the result obtained. Contingency fee agreements may also be reviewed and adjusted for reasonableness.

The reviewing officer may adjust the lawyer's bill, but must approve fees and disbursements found necessary to conduct the proceeding, as well as all fees authorized and approved by the client. If the client was informed of the futility of services, but requested them anyway, the client will have to pay for them.

The taxation of a lawyer's bill, as a court-related procedure, also comes at a cost. The taxation or reviewing officer may order the client or lawyer to pay for it depending on who enjoyed the most success in the review. I recall once winning a reduction in the opposing lawyer's bill. Yet I was still assessed the (higher) costs of the taxation, which rendered the successful taxation a losing proposition in the end.

Lawyers may also apply to have their own legal bills reviewed. Once approved, they can take steps to collect on them.

Legal fees can become expensive very quickly even when dealing with simple matters. This high cost can serve as a powerful deterrent to accessing legal recourse.

Cost Shifting

If you hire a lawyer and wins the lawsuit – whether suing or defending – it seems reasonable that you should then be indemnified for the cost of that litigation. After all, you had to hire a lawyer to sue and

were successful in the judgment. Why should the judge not also add the costs of scoring the win to your successful judgment? Likewise, where you hire a lawyer to successfully defend against someone's claim, why should the losing party not also have to pay for your lawyer's bill? In both cases you had to hire the lawyer to prove you were on the right side of the case.

Canada follows a modified loser-pay model. Requiring the loser of the lawsuit to bear not only their own legal costs but also the costs of the winning party would mean that the financial risk of bringing any dispute to court for resolution would be exceptionally high. Indeed, it might be viewed as being such a high risk that it forecloses practical access to the courts.

Therefore judges will usually only order the losing party to pay a portion – generally about one third – of the winning party's legal bill. This partial cost-shifting increases access to the legal system, because it allows winning parties to be indemnified for their litigation costs somewhat without dealing a paralyzing costs blow to the losing party.

It is important to realize that if winning comes at a very high legal cost (professional legal fees) relative to the financial gain of the win, you may have won the battle but still lost the war. Your legal win can easily be over-ridden by the legal fees that you must ultimately pay to your own lawyer. In other words, even when you win the case, you might lose financially.

The law allows judges almost unfettered discretion to order that disbursements and legal fees be paid by the losing party. Usually, the shifted fees will be based on an itemized schedule corresponding to the amount in issue in the litigation. This schedule is found in each province's *Rules of Court*. The basis of cost-shifting is referred to as "party and party" costs.

In rare cases, the judge will decide that a party should be indemnified for court and legal costs on a "solicitor and client" basis. This is to say that the other side is ordered to pay the full legal bill. Solicitor and client costs can also be used to sanction a party or lawyer who has acted egregiously in the litigation in some way.

Recently, the Ontario Court of Appeal upheld a decision that ordered Toronto lawyer Paul Slansky to personally pay $84,000 in costs awarded against his "vexatious" client. In her decision, the trial judge wrote: "Mr. Slansky counselled the plaintiff or otherwise allowed his client to proceed with a series of unmeritorious steps and to take unreasonable positions to achieve goals in this action." She applied Rule 57.07 of the *Rules of Civil Procedure* which permits such orders against lawyers when they cause "costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default." Slansky was also ordered to pay a further $30,000 in costs related to the appeal. Some have argued this could discourage lawyers from representing controversial clients and from advocating unpopular positions in court especially in relation to difficult cases. Others view it as a hardy example of the enforcement of lawyer ethics and civility in the practice of litigation.

Legal Aid

Governments may cover the costs of legal representation for Canadian citizens who otherwise cannot afford it for essential legal services as family law, criminal law and immigration law. However, many poor Canadians are refused legal aid because the means testing extends to only the lowest income individuals and only to these limited domains of legal services. Legal aid is not available for civil cases such as wrongful dismissal, car accidents and collecting a debt as in a landlord and tenant dispute.

Pro Bono Publico

Lawyers have an ethical duty to devote a modest portion of their time and effort toward *pro bono* work. *Pro bono publico* is Latin, meaning "for the public good." Lawyers may offer *pro bono* work to whomever they choose. There are also programs to match lawyers with clients in need of their services. In 2007 the Law Society of Alberta created a non-profit organization, Pro Bono Law Alberta, to act as a liaison between lawyers offering *pro bono* work and indigent clients.

Pro Bono Law of British Columbia accepts invoices of $2,500 in disbursements. Lawyers can more easily offer free services to those in need, because basic expenses required to practice this law are covered.

Conclusion

This article is about the law of costs and the high cost of law which can effectively close the courthouse doors to average low-and middle-income earning Canadians. The reality of more people representing themselves today was acknowledged in the last iteration of procedural rules in Alberta.

The new Alberta *Rules of Court* state that "[i]ndividuals may represent themselves in an action. Judges may permit another person to assist the self-represented party "in any manner and on any terms and conditions the Court considers appropriate," including offering quiet suggestions, note-taking, support, or addressing the particular needs of that party. Such assistance may not be "disruptive" and cannot amount to a layperson practising law.

The new *Rules* also now allow you to retain a lawyer for limited purposes. This enables you to assume the parts of the case that you feel comfortable with and designate a lawyer to handle other more technical and complex parts.

Apart from these minor adjustments, professional service fees of lawyers continue to be a major impediment to accessing the civil justice system for many Canadians. The high cost of law can be used to wear down financially weaker opponents or foist unfair settlements on them.

The law is a high cost endeavour. Even in light of these law of costs measures, you may discover it is still too expensive to pay to play in the Canadian justice system.

Journalists Feel the Chill in a Changing Media World

By John Cooper

Journalism students who are mulling over important questions such as “Where will I find a job?” and “Will I be able to cover the legal beat?” as they face a potentially shrinking job market, may have more than just job prospects to worry about.

Today, the media world is rapidly shrinking, consolidating, shedding jobs and shutting local media outlets. According to the Canadian Media Guild, between 2008 and 2013, Canada lost 10,000 media jobs. More recently, PostMedia cut 90 jobs and consolidated newspaper operations in several cities.

What does this mean for up-and-coming journalists? With big business running the media and advertising dollars become more sought-after, there may be less media management support for uncovering big stories that could bring reporters into a situation where they might be threatened with libel. The result? A controversial, high-profile, contentious story may never see the light of day because of libel chill.

Defined as the reluctance to publish or broadcast stories for fear of a defamation lawsuit, libel chill may make journalists think twice about running stories that may be critical of big business or overly-influential politicking, or which may shed light on, for instance, under-the-table payouts or backroom deals between politicians and developers.

Taking up the fight are organizations like the Canadian Association of Journalists, which has been pressing the Supreme Court to reject expanding libel laws that may impact the freedom of public interest journalism, and Canadian Journalists for Free Expression (CJFE), founded in 1981 to protect journalists’ rights to free expression.

CJFE Executive Director Tom Henheffer said in an email interview that libel chill has intensified because "newsrooms have fewer and fewer resources, meaning they have less money for lawyers and as such are less likely to run a story if it could result in a potential lawsuit. (And) because of the lack of resources, there are fewer staff jobs, meaning more work is done by freelancers who aren't covered by an outlet's libel insurance (and can't afford it on their own)."

The result is that freelancers may hold off on pitching a story that might cause them financial problems. A recent exception involved *Georgia Straight* freelancer Laura Robinson, who wrote of allegations of residential school abuse involving a former Vancouver Olympics official and was subsequently sued for defamation. The action led to a highly publicized court battle pitching a citizen's public credibility against the freedom of the press and public interest. It was a case that Robinson ultimately lost.

Additionally, "there is no national law protecting journalists (or anyone else) from deep-pocketed businesses and individuals launching frivolous lawsuits," said Henheffer. These petty lawsuits are called SLAPP suits (for strategic lawsuit against public participation), and they're used to intimidate defendants with the prospect of a potentially bankrupting defence. Ontario has anti-SLAPP legislation (CJFE, along with Greenpeace and the Canadian Civil Liberties Association, pushed the government for changes) as well as Quebec, and activists are lobbying New Brunswick for protections. In the U.S., almost every state has anti-SLAPP laws, said Henheffer.

Libel chill affects journalists because "it makes them less likely to aggressively pursue investigative pieces that are crucial to the public interest," said Henheffer. "And when they do get the story, it makes publishers less likely to send them to the presses. It means a lot of stories, the most important, controversial ones, aren't being told."

According to University of Calgary law professor Emily Laidlaw, "Canada and the U.K. have taken steps to broaden the protections offered to journalists to combat libel chill, but whether they are working or not is yet to be determined."

A number of years ago, the *Grant v Torstar* case resulted in the 2009 creation of the responsible journalism defence, giving journalists more latitude regarding the reporting of facts in the public interest.

"The problem with that test is that it is supposed to be a non-exhaustive list of factors for the court to consider (i.e. did they check their sources, seek a response from the individual, the focus of the article and so on)," Laidlaw said via email. "But it is not always applied that way, and so the responsible journalism test ends up being an incredibly high bar to meet for journalists. It can certainly dissuade important investigatory pieces from being published."

Added to this is the concentration of media ownership. It "means fewer voices, it means outlets are more likely to kowtow to advertisers, it means publishers are more likely to hire editors (who are more likely to hire journalists) who share their political point of view," said Henheffer. "Real editorial

interference is rare, but when it happens, it happens on the most important stories that will have the biggest impact on public life. It also means less innovation, which leads to the kind of crisis we have in Canadian media now. That leads to shrinking coffers and fewer jobs, which makes the threat of a lawsuit over libel all the more dangerous and all the more chilling."

If they don't already have anti-SLAPP legislation in their communities, journalists need to push for it, said Henheffer. "This is a crucial piece of legislation and it's crazy we don't have national protection, it can save an individual hundreds of thousands of dollars in court costs fighting completely frivolous lawsuits." And libel insurance, while prohibitively expensive for freelancers, is essential for media outlets.

The essential approach for journalists is the common sense one that uses good reporting habits as a baseline. "They must cross all their t's and dot all their i's, get both sides of the story, find corroborating evidence, give each side enough time to respond," said Henheffer. "And when negotiating a contract with a publisher, ensure you're covered by their libel insurance."

Laidlaw takes a similar position in putting the onus on journalists to maintain a commitment to rigorous standards, including ensuring "the reliability of the sources the journalist uses and accurately reporting the plaintiff's side of the story. I think the *Charter* (*of Rights and Freedoms*) is only helpful in having broad discussions of freedom of speech and reputation, but on the ground, it doesn't provide the kind of specific guidance that can help a journalist navigate whether an article is ready to be published. It's all well and good to say a journalist has rights to free speech, but we need a different kind of discussion, namely, what it means to be a journalist and what responsibility means in this context, and this specificity is better served through discussion of defamation law and reform."

Laidlaw cites the U.K. as a place where major legal change for the media took place because of concerns over libel chill, and those changes "include a new serious harm threshold for something to be defamatory and a new public interest defence. We are in desperate need for defamation reform in Canada, and I am involved in a project with the Law Commission of Ontario, which is examining this area in the Internet context."

Freedom of Expression, Publication Bans and the Media

By Linda McKay-Panos

Photo Credit: Dreamstime

The issue of publication bans in the context of criminal matters ordered by the courts became more complex with the advent of the Internet. Some may remember when the criminal proceedings of Karla Homolka were subject to a publication ban. There were several alleged breaches of the ban when the close proximity to the United States and the inability for an Ontario court order to apply to the United States, coupled with public access to the Internet, effectively nullified the court's order. In addition, in 2005, author Stephen Williams was sentenced for violating a publication ban by including details of the criminal activities of Homolka and Paul Bernardo in two books (Nick Pron and Robert Benzie, "Bernardo Author called 'a criminal' Stephen Williams guilty of breaking publication ban" *Toronto Star* (15 January 2005) online: http://www.thefreeradical.ca/moviesBernardo/articlesOnStephenWilliams.html).

A publication ban is a court order that prohibits the public or the media from circulating certain details of a judicial procedure that is normally public. Often publication bans are issued when a victim or witness may be somehow hindered by having their identity openly broadcast in the media. Sometimes there is a concern that the publicity may affect the outcome of the case or violate the accused's right to a fair trial. Publication bans can be ordered because they are required by statute (e.g., the *Criminal Code*) or they may be ordered when a judge has the discretion to ensure an accused person's right to a fair trial needs to be protected by a publication ban.

Because freedom of expression is enshrined in the *Canadian Charter of Rights and Freedoms* ("*Charter*") section 2(b), any limits on this right must be defended by the government under *Charter* s 1 as being reasonable and justifiable in a free and democratic society. At the same time, the public's right to know about judicial proceedings may also have to be weighed against the accused's *Charter* right to a fair trial.

The leading case involving publication bans is *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 ("*Dagenais*"). Four former and current members of a Catholic religious order were charged with physical and sexual abuse of young boys in their care at Ontario training schools. The accused applied to court for an injunction stopping the CBC from airing and publicizing *The Boys of St-Vincent*, which was a mini-series depicting a fictional account of sexual and physical abuse of children in a Catholic institution in Newfoundland. The lower court granted the injunction, prohibiting the broadcast of the mini-series anywhere in Canada until the end of the four trials. The Court of Appeal of Ontario affirmed the publication ban but limited its scope to Ontario and Montreal, and also reversed any order about banning the publicity about the proposed broadcast. The majority of the Supreme Court of Canada ("SCC") set aside the publication ban.

In discussing freedom of expression and publication bans, the SCC noted that the traditional common law rule (established before the *Charter* was passed) governing publication bans—that there be a real and substantial risk of interference with the right to a fair trial—unfairly emphasized the right to a fair trial over freedom of expression. When two protected *Charter* rights come into conflict, they must be balanced in a way that fully respects both rights. Because publication bans curtail the freedom of expression of third parties (e.g., the press), the common law rule must be changed so as to require consideration of both the objective of the publication ban and the proportionality of the ban to its effect on protected *Charter* rights. The SCC set out the modified rule as follows:

A publication ban should only be ordered when:

> (a) Such a ban is <u>necessary</u> in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

If the ban fails to meet this standard (which clearly reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*), then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful.

Thus, *Dagenais* introduced the idea of weighing the salutary (positive) effects of the publication ban against the deleterious (damaging) effects to the freedom of expression of those affected by the ban. This raised the consideration of the effect on freedom of expression to an important factor that must be balanced with the right to a fair trial.

More recently, in *Toronto Star Newspapers Ltd. v Canada,* 2010 SCC 21, [2010] 1 SCR 721 ("*Toronto Star*"), the Supreme Court of Canada considered two high profile cases—a murder case in Alberta and an Ontario case involving terrorism-related offences. *Criminal Code* s 517 requires that, if an accused applies, a justice of the peace must order a publication ban applying to the evidence and information

produced to the representations made at a bail hearing and to any reasons given for the order. Several media organizations challenged the constitutionality of the publication bans as violating their freedom of expression. In Alberta, the lower court allowed the media's application, but the Alberta Court of Appeal set aside the order and upheld the constitutionality of s 517. The SCC dismissed the media's appeal. In Ontario, the media's application was dismissed by the lower court, but the Ontario Court of Appeal allowed the media's appeal in part, finding that s 517 was too broad, and reading it down to exclude bans for any cases in which the accused would not be tried by a jury. The SCC allowed the appeal and upheld the constitutionality of s 517.

The majority of the SCC distinguished *Dagenais*, because that case applied to *discretionary* publication bans (i.e., where the judge may or may not order a publication ban based on his or her discretion). The *Toronto Star* case applied to a *mandatory* statutory publication ban (i.e., the judge must order a ban). The SCC noted that while the publication ban in s 517 violated freedom of expression, it was justified in a free and democratic society. The limitations on publication of bail hearings ensure that the accused receive a fair trial. The accused should be focusing on the upcoming criminal process and not on whether they should compromise their liberty in order to have evidence aired outside the courtroom. The media is still permitted to publish the identity of the accused, to comment on the facts and the offence for which the accused has been charged and for which a bail application has been made, and its outcome. The ban is only temporary and ends once the accused is discharged after a preliminary inquiry or at the end of the trial.

In the 2012 case of *AB v Bragg Communications Inc*, 2012 SCC 46, [2012] 2 SCR 567 ("*Bragg*"), the issue of publication bans arose in the context of cyberbullying. A 15-year-old girl discovered that someone had posted a fake Facebook profile using her picture, a slightly changed version of her name, and other identifying information. The picture also was accompanied by unflattering comments about her appearance and sexually explicit references. The girl (through her father) brought an application for a court order requiring the Internet provider to disclose the identity of the person(s) who had used the IP address to publish this profile so that potential defendants to a defamation action could be identified. She also applied to be anonymous and for a publication ban on the content of the profile. Two media groups opposed her request for anonymity and for the ban. The Supreme Court of Nova Scotia granted her request that the Internet provider disclose information about the publisher of the profile, but denied the request for anonymity and the publication ban because there was insufficient evidence of specific harm to her. The Court of Appeal upheld the decision because the girl had not proven the evidence of harm to her, which would justify restricting access to the media.

The SCC allowed the appeal in part. The SCC recognized the critical importance of the open court principle and freedom of the press, privacy and the protection of children from cyberbullying. However, once the girl's identity is protected through the right to proceed anonymously, there is little justification for a ban on the non-identifying content of the profile. If the non-identifying information is made public, the information cannot be connected to her. Thus the public's right to open courts and freedom of the press prevailed with respect to the non-identifying Facebook content.

The Canadian Journalists for Free Expression believe that publications bans are overused and often too broad (Peter Jacobsen, "The Problems with Publication Bans" (29 May 2015)) online: < http://www.cjfe.org/the_problems_with_publication_bans) ("CJFE"). The result is that the public is not able to scrutinize the court system in a timely fashion (CJFE). Also, CJFE notes that mandatory publication bans can place victims and their advocates in the difficult position of hoping they will not be prosecuted if they violate the ban. They cite the situation of Rehtaeh Parsons in Nova Scotia, who was a victim of cyberbullying and child pornography, and who committed suicide at age 17. Because the nature of the charges against the two young men involved required a mandatory publication ban, Rehtaeh's parents were technically violating the *Criminal Code* when they advocated against cyberbullying, although the Nova Scotia Attorney General indicated it would not be prosecuting anyone for using Rehtaeh's name (CJFE).

While publication bans are implemented in part to assist in the guarantee of a fair trial under *Charter* s 11(d), the role of social media cannot be overlooked (CJFE). Social media, the Internet, and other advanced methods of communication have resulted in the public hearing more about cases before trial than previously. Thus, when discretionary publication bans are granted, the media has to apply to court to show that the ban is unnecessary or inappropriate, which can significantly delay the release of important information to the public (CJFE). This damages the public's right to know about what is happening in our public court system. Alternatively, if one of the main purposes of publication bans is to ensure an impartial jury, courts can admonish jurors to decide cases based on what is presented to them in court, and can allow counsel to question the prospective jurors about their advance knowledge of the case, rather than imposing a publication ban (CJFE). Also, with advances in technology, there can arise numerous rumours that could be more harmful than the truth. This could even result in mistrials, which are costly, and which diminishes the public's confidence in our legal system.

On the other hand, the Canadian Resource Centre for Victims of Crime (CRCVC) notes that in cases of sexual offences, publication bans serve to protect the identity of the victims and witnesses. One of the reasons for publication bans for victims of sexual assault is to encourage reporting of the crime. The CRCVC notes that as many as 90% of victims of sexual violence do not report their situation to the police. Victims report that they did not want anyone to know. The publication ban serves to protect the identity of the victim and witnesses. This can encourage the victims to come forward.

The law around publication bans is mostly based on the *Charter* right to freedom of expression, coupled with the *Charter* right to a fair and public trial. The *Charter* right to freedom of expression (freedom of the press) can only be limited if the government is able to justify its limitation. At the same time, the government has an interest in ensuring victims of sex crimes come forward and are protected. The Homolka and Bernardo cases contained all of these aspects (right to a fair trial, freedom of expression (freedom of the press), protection of the privacy of the victims). In addition, these cases also demonstrated that the law is having difficulty keeping up with advances in technology. Certainly, wherever possible, publication bans should be carefully crafted to protect only those aspects that are absolutely necessary to ensure a fair trial, while protecting victims and allowing the public to know the real facts of the situation in a timely fashion.

Kent v *Postmedia*: The Largest Individual Defamation Award Given in Alberta

By Kent Jesse

On June 8, 2016, the Court of Queen's Bench of Alberta released a 60-page ruling in the cases of *Kent v. Martin,* and *Kent v. Postmedia*, awarding $150,000 in general damages for the print publication of a defamatory article, and a further $50,000 for continuing online publication. Costs of the legal proceedings remain to be determined.

This decision provides a thorough overview of defamation law related to media publications in Canada, and represents the most current application of the defence of Responsible Communication on Matters of Public Interest established by the Supreme Court of Canada in *Grant v. Torstar Corp*.

That defence provides that, even if the statements made or comments published defame the Plaintiff, if the matter communicated about is of public interest and the defendant acted responsibly with proper diligence, defamatory statements will not attract liability.

Background

Arthur Kent is an Emmy Award winning journalist and documentary film producer who rose to fame during the Gulf War, earning himself the nickname the "Scud Stud". After an extensive career reporting around the world, Mr. Kent returned to his home province of Alberta to run as a candidate for the Progressive Conservatives in the 2008 provincial election.

During the course of his election campaign, on February 12, 2008, the *Calgary Herald, Edmonton Journal*, and *National Post* published, in print, an article written by Don Martin which contained serious factual errors related to his campaign and which also heavily impugned Mr. Kent's character. Although some parts of the article contained opinion, it was published on the "Top News" page. The article was

also published on the defendants' many websites and was available for viewing for nearly five years until Mr. Kent achieved its removal from those websites in November 2012.

After the initial publication, Mr. Kent pointed out errors in the article and asked the news organization to publish his written response, but it refused. Publishing Mr. Kent's response would have ended the matter. Instead, litigation commenced in 2008 and was vigorously contested by both sides, resulting in numerous reported and unreported decisions regarding procedural matters pursuant to the Alberta Rules of Court.

In October 2015 Mr. Kent retained Kent Jesse at McLennan Ross LLP to assist him at trial. The trial commenced in November 2015 and was concluded by December 2015. Over 30 witnesses testified, including journalism standards and ethics experts and over 200 exhibits were entered for consideration by the Court.

The Findings

The Court analyzed defences which included Qualified Privilege (where there is a duty or pressing need to disclose information), Justification (where the defendant establishes that the statements were substantially true), and Responsible Communication on Matters of Public Interest. The Court quickly rejected the defences of Qualified Privilege and Justification, with the bulk of the decision focusing on the Responsible Communications Defence.

The Court found that the defendants had not established the defence of Responsible Communication based upon seven factors:

- the seriousness of the allegation;
- the public importance of the matter;
- the urgency of the matter;
- the status and reliability of the sources;
- whether Mr. Kent's side of the story was sought out and accurately reported;
- whether the inclusion of the defamatory statements was justifiable; and
- whether the defamatory statements' public interest lay in the fact it was made rather than its truth (the reportage defence).

The application of these factors resulted in a decision in favour of Mr. Kent for several reasons, two which are set out here.

First, the defendants used, and concealed the identities of sources whom they knew had an axe to grind with Mr. Kent, but did not take reasonable steps to verify the information they provided. The concealment of the sources deprived a reader of determining whether the sources were reliable.

Second, “it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond” (from *Grant v. Torstar*). The Court found that, given the harsh tone of the article, the defendants did not make sufficient efforts to reach Mr. Kent for verification of the facts or to comment.

The Court found that the defendants’ level of diligence fell far short of what was required in the circumstances and found the article to be defamatory. The Court also found that parts of the article presented as fact were untrue, and the article had a harsh and sarcastic tone, based in part on those factual assertions which were actually false. The article damaged Mr. Kent’s reputation and was found to cause right-thinking members of society to think less of Mr. Kent.

How to Avoid Liability in Similar Situations

This decision shows that liability for defamation can result when there is a failure to verify facts before publishing a highly critical piece which also contains significant errors. It also demonstrates the pitfalls of proceeding with pre-conceived notions instead of investigating to obtain the facts. Journalists in particular are expected to look for all sides of a story, not merely latch onto one idea and then make efforts to dig up information that only supports that pre-conceived notion. On the facts in this case, the journalist in question was found to have been actively seeking “more dirt”.

Hard-hitting, critical pieces can be published, provided the facts are accurate. Verification of facts is crucial when relying upon sources with an axe to grind. When relying upon those sources, resist concealing them unless there is a pressing need to do so. Lastly, if a critical piece is published, provide the subject of the piece with a genuine opportunity to respond.

Bieber and Beachclub: What is Defamation in the Social Media Era?

By Matt Gordon

On May 16, 2016, the *Montreal Gazette* and the *New York Daily News* reported that Stratford-born pop star Justin Bieber had been sued in Montreal by event promoter Team Productions for $650,000 CDN for defamation.

Bieber's offending comment was a tweet on August 22, 2015, which would have been the day of a show he cancelled at Montreal nightclub called Beachclub. It read, "Montreal due to the promoter of today's event breaking his contract and lying I will not be able to attend today's event". Bieber was due $250,000 upon signing the agreement to play the concert, and an additional $175,000 five days before the event. Team Productions cited a hit to its reputation and an associated loss of revenue. It also claimed Bieber failed to promote the event on social media as he promised.

Beyond the wow factor of having a celebrity sued for that much money over a cancelled show, this case demonstrates how easy it is for social media use to turn into defamation.

According to the Supreme Court of Canada in *Grant v Torstar*, a plaintiff in a defamation lawsuit has to prove three points.

1. First, the words in question diminish the plaintiff's reputation in the eyes of a reasonable person.
2. Second, the words in fact refer to the plaintiff.
3. Third, the words have to be "published, meaning that they were communicated to at least one person other than the plaintiff".

"Communicated" is intentionally open-ended. Defamation can be verbal, written, or otherwise expressed. It also does not have to be intentional, as the Court in *Grant* states: "The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless."

The plaintiff does not have to show monetary or other damages beyond harm to reputation. The Supreme Court of Canada in *Éditions Écosociété Inc v Banro Corp* echoed the lower court's ruling that "the vindication of the plaintiff's reputation was just as important as any monetary award that might be obtained". It is harm to reputation, not financial harm, that Team Productions needs to prove. Although proving financial loss could help the Team Productions case, only the financial loss that is also evidence of loss of reputation matters here.

Two 2016 decisions in different provinces have discussed Twitter as a forum for defamation. In *Sciquest v Hansen et al*, the Ontario Superior Court of Justice determined that defamation "occurs when [defamatory] material is read or downloaded by a third party. A single instance of publication is sufficient for the tort to crystallize." Considering that a single pageview or download of Bieber's Tweet is enough to constitute publication, and the *Montreal Gazette* reported that Bieber has over 80 million Twitter followers, the publication test does not bode well for Bieber. In *Pritchard v Van Nes*, the British Columbia Supreme Court noted that a social media post is the words only of the person who posts it, meaning someone who defames on Twitter is liable – Twitter, the company, is not. Nor is anyone who links to or shares Bieber's Tweet. This is reassuring news to anyone who owns a social media platform, or who aggregates social media posts through blogging, but not so much to anyone who is malicious or reckless online.

A 2014 Ontario labour arbitration decision is notable for being the first citation of Twitter's Privacy Policy in Canadian law. According to *Toronto (City) v Toronto Professional Fire Fighters' Association, Local 3888*, publication occurs even when the defendant thinks the posts are private but is mistaken: "The grievor testified that he did not understand that his Tweets could be accessed by members of the public. He said he thought he was communicating in private only with people he knew." These Tweets, although not defamatory toward any one person, were sufficiently offensive to lead the Toronto Fire Department to terminate his employment. As Twitter's Privacy Policy warns the site's users: "What you say on the Twitter Services may be viewed all around the world instantly. You are what you Tweet!"

Media viewable worldwide does not have a physical location. In *Club Resorts v Van Breda*, the Supreme Court of Canada established that a lawsuit can be filed where there is a "real and substantial connection" to the case. The cancelled concert was set to take place in Montreal, so Quebec is a logical place for Team Productions to bring its lawsuit. However, considering the *Sciquest* case, Team Productions could have hypothetically tried to bring a lawsuit anywhere Bieber has a Twitter follower. Thankfully, Team Productions did not attempt to test the limits of the *Van Breda* criterion.

Whatever happens, this case will make for an exciting ongoing news story. Team Productions will have to prove the Tweet harmed its reputation. The second and third parts of the test, that the words referred to it and that they were published, should be easier. Most cases settle, and there is a good

chance this one will too – or already has, and each side is very good at being discreet. Most defamation lawsuits are not for as high a number as $650,000, a number Team Productions will have to back up with evidence.

No matter what happens between Bieber and Team Productions, the law is increasingly clear that social media is a forum for defamation. Posts are published instantly. They belong to the users who create them. In pop culture and in the law, social media is everywhere.

BenchPress – Vol 41-1

By Teresa Mitchell

A Different Divorce

A British Columbia Provincial Court judge has divorced himself from a couple who have long been bickering in his court over custody and access issues concering their young child. Judge Bruce Hyer ordered a very detailed and specific parenting plan to take the family through to 2018, as they had requested. He then wrote: " I believe the time has come for me to direct that I will not in future hear matters pertaining to these parties, unless there is some emergent situation and no other judge is available. I say this because I now have a real concern that rather than struggle to reach a fair compromise on issues, these parties, and particularly the Father, will elect to have someone who knows all about them resolve the issue. In a sense, I am a known quantity. I believe the time has come for these parties to face perhaps an unknown quantity, a new judge in this court, if they cannot, including with the help of, for example, a parenting coordinator, reach a new agreement.

I think having to face a new judge who knows nothing about them will add a strong incentive or impetus to resolving issues out of court, rather than litigating them before a known judge."

Z.S.R v R.S., 2016 BCPC 200 (CanLII)

http://www.canlii.org/en/bc/bcpc/doc/2016/2016bcpc200/2016bcpc200.html

The Entrapment Defence

Entrapment is defined as inducing someone to commit a criminal offence as a result of unfair practices by the police such as trickery, fraud and persuasion. British Columbia Supreme Court Justice Catherine Bruce recently ruled, for the first time in Canada, that two defendants had been entrapped by the RCMP into committing a terrorist act. The RCMP's involvement with the couple began in 2012 and escalated into an elaborate scheme to plan, organize and carry out a terrorist attack. But Justice Bruce concluded that in fact, the RCMP manufactured a crime. She wrote: " …the police took two people who held terrorist beliefs but no apparent capacity or means to plan, act on or carry through with their religiously motivated objectives and they counseled, directed, urged, instructed and moulded them into people who could, with significant and continuous supervision and direction by the police, play a small role in a terrorist offence." She added: "Simply put, the world has enough terrorists. We do not need the police to create more out of marginalized people who have neither the capacity nor sufficient motivation to do it themselves".

R. v Nuttall 2016 BCSC 1404 (CanLII)

http://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1404/2016bcsc1404.html

No Really Does Mean No!

Madame Justice J. Topolniski has overturned the acquittal of a teenage youth and entered a conviction for sexual assault. In her judgment she stated that there is no place for sexual stereotyping in sexual assault cases and no inference should be drawn about a complainant's credibility about how a victim of sexual assault is to react to the trauma. She ruled that the trial judge erred in interpreting and applying the law of consent. She wrote: "Consent in the context of sexual activity is not a difficult concept. It means just what the word implies….It is long beyond debate that in Canada 'No means No', that 'No' does not require a minimal word or gesture and acquiescence or ambiguous conduct do not equate to consent."

She also ruled that the defence of mistaken belief was not available for this defendant. This defence requires that the accused take reasonable steps to make sure the complainant was consenting. In this case, the Justice found that the defendant did the opposite of what was required: he persisted in the face of objection. She returned the case to Youth Court for sentencing.

R v JR, 2016 ABQB 414 (CanLII)

http://www.canlii.org/en/ab/abqb/doc/2016/2016abqb414/2016abqb414.html

Obtaining Evidence in High Conflict Parenting Disputes, Part 1: Lawyers for Children

By Sarah Dargatz

In most disputes over parenting time, parents come to reasonable decisions about what is in their child's best interests. However, a small percentage of disputes are "high conflict". In high conflict cases, the parents have great difficulty communicating, make decisions together, and treating each other with respect. Each parent will advocate for very different schedules. High conflict cases may be driven by only one unreasonable parent or by both parents (and sometimes by very involved step-parents or extended family). Parents may be dealing with mental health issues, personality disorders, family violence, or simply high emotions that cloud their judgment. Whatever the reason, the court must decide what is ultimately in the child's best interests. When the parents are advocating for such different proposals, the court generally requires evidence from neutral third parties and from experts.

Often, parents in high conflict cases claim the child has strong opinions about the parenting schedule. Or, they may claim that the other parents' actions are negatively affecting the child. Usually, the other parent reports the opposite. In these cases, the court does not know whom to believe, as both parents may be self-motivated. Also, it is common for a child to tell their parents what they think they want to hear, which can result in parents being told very different things by their child. For these reasons, information from a parent about what a child thinks or says can be unreliable.

It is very rare in Alberta for a child to give evidence directly to the court as a witness in a family law matter. This can be very stressful for a child. Children usually love both their parents, despite all their faults, and it's unfair to make them feel as if they have to choose between them. This can also open the door to manipulation, either by a parent or by a child, to get what they want. Further, depending on their age and maturity level, children are often not able to determine what is in their own best interests. Just as we don't let children decide if they should go to school or eat their vegetables, we don't let children decide with whom they live, unless their reasons are well-founded.

Sometimes, the court can gain insight from non-experts such as teachers, doctors, and counsellors who can provide objective information about grades, attendance, and health. However, these professionals are not experts that can give an opinion about what parenting schedule is best for a child, only what they have seen and heard themselves in the course of their interactions with the child. Also, these professionals are often reluctant to get involved in a messy divorce where they themselves may come

under attack from one or both parents. They often do not want to be perceived to take sides and want to maintain their neutral role working with the child. Psychologists, in particular, must be very careful about the evidence they share with the court, especially if they have a duty to keep information they have received from their child client confidential. Also, it is a very different task to do therapy than to do an assessment of a child or their situation.

One effective method to understand what is motivating the child and what the child is truly saying and feeling is for the court to order that an independent lawyer be appointed for the child. This lawyer's duty is to the child and to the court; it is not to the parents. In Alberta, when an order is granted, the parents can access a lawyer through Legal Aid Alberta. Unless the court says otherwise, each parent will pay for half of the resulting Legal Aid Alberta account. Parents can also retain a lawyer privately. Both parents should be involved in the decision of who will do this work and the lawyer should communicate with both parents. There should be no actual, or perceived, bias toward one parent.

Lawyers for minor children can act in various capacities. This will depend on the age and maturity of the child.

> (a) The lawyer can take a "direct advocacy" role, which is the role they take with competent adults. In this case, the lawyer advocates for the child's expressed views and interests. This is usually done with older children who can give principled reasons for their instructions.
>
> (b) The lawyer can take on a "best interests" role, in which they hear what the child has to say but balances it against what the lawyer believes is in the child's best interests. This is usually done with younger children or where the child's wishes are incongruent with what would be best for their healthy development.
>
> (c) The lawyer can take on an "*amicus*" role. This means that the lawyer will put forward relevant evidence about the child's best interests to assist the court.

The court can also direct the lawyer to take a particular role. If the court does not do so, the lawyer should tell the parents and the court what role they are taking.

Lawyers for children will usually have rules about how the parents and their lawyers communicate with them. They will usually ask that the parents alternate which parent brings the child to appointments. This is to ensure there is no bias, or apparent bias, shown to either parent. The lawyer should meet with the child and develop a rapport with them. It is not uncommon for lawyers to spend time building a relationship with their child clients in order to build trust. This will help them to get the best information from and about the child. Lawyers will talk to people involved with the child including teachers, doctors, and counsellors. The lawyer might recommend that the child see a psychologist or other professional to help gain valuable information.

Lawyers for children often make it clear to their child clients, the child's parents, and the court, that the child is to be given a voice in the legal proceedings but not a choice. Again, children need to be relieved of the pressure of choosing between two people they love. They also should not be empowered to make decisions they are not mature enough to make for themselves. However, information about what they have experienced, witnessed, and what they feel is important for the court to understand will help the court to decide what is best for them.

During the litigation process, a lawyer for a child has the ability to bring applications and provide evidence on behalf of the child. At a Questioning or in a trial, the lawyer can cross-examine witnesses. Also at a trial, the lawyer can call witnesses who would provide evidence about what is in the best interests of the child and take positions and make submissions on behalf of the child, in accordance with the role they have adopted.

Appointing counsel for a child can be helpful in high conflict cases to sort out what is truly going on from the child's perspective, apart from the parents' influence. Though not appropriate in all cases, it is one option to help the court get at what is in a child's best interests. In part 2, I'll explore other options available to the court, particularly the assistance of trained psychologists.

Gender Equality in Canadian Politics

By Linda McKay-Panos

There is a long-standing concern about the under-representation of women (and minorities) in our political system. There are several theories about why these groups are not reflected in politics in ways that represent their numbers in Canada. The issue has been recognized, and recently, a proposed amendment was introduced in Parliament and received second reading: Bill C-237, *An Act to amend the Canada Elections Act (gender equity)*(First Session, Forty-second Parliament, 64-65 Elizabeth II, 2015-2016). Will this proposed amendment, if implemented, actually result in any change in the gender balance in Parliament?

An American study, "Girls Just Wanna Not Run: The Gender Gap in Young Americans' Political Ambition" (J. Lawless and R. Fox, American University, School of Public Affairs, 2013; online: http://www.american.edu/spa/wpi/upload/Girls-Just-Wanna-Not-Run_Policy-Report.pdf), cites five reasons why there is a difference between the number of men and women who enter politics. These include:

- Young men are more likely than young women to have played organized sports and care about winning;
- Boys are more likely than girls to have been socialized by their parents to think about a career in politics;
- Young women tend to be exposed 'to less political information and discussion' than are young men;
- Young women generally get less encouragement to run for office than young men do; and
- Young women consequently are less likely to think they will be qualified to run for office, 'even in the not-so-near future'.

At the same time, the problem of lack of gender equity in Canada does not appear to be the result of prejudice among the electorate (CBC News, "50% population, 25% representation: Why the parliamentary gender gap?" online: http://www.cbc.ca/news2/interactives/women-politics/ ("CBC News")). The presence of sexual harassment, lack of civility, attention to appearance, speaking style or personal lives, and the male-dominated political culture in Parliament may be a deterrent to some women (CBC News). The older democracies in the world seem to move more slowly towards gender

equity than newer democracies, because they are tied to old conventions (CBC News). Finally, there appears to be discrimination by parties in the nomination process (CBC News).

What potential difference will result from greater inclusion of women in politics? Coupled with accountability mechanisms, the inclusion of women in politics would result in differences in the nature of governance and decision-making and the inclusion of gender concerns (Rosa Linda Miranda, "Impact of women's participation and leadership on outcomes" United Nations Department of Economic and Social Affairs, October 2005 online: http://www.un.org/womenwatch/daw/egm/eql-men/docs/EP.7_rev.pdf).

How will greater gender equity be reached? The amendment to the *Canada Elections Act,* SC 2000, c 9, will reduce the reimbursement each party receives for its election expenses if there is more than a ten percent difference in the number of male and female candidates on the party's list of candidates for a general election. The preamble sets out the reasons for the proposed amendment quite clearly:

> *Whereas Canadians are committed to achieving gender equity in all aspects of political, economic and social life, including representation in Parliament;*
>
> *Whereas equal access to Canada's democratic institutions is a question of social justice;*
>
> *Whereas women have never held more than 26% of the seats in the House of Commons or constituted more than 29% of the candidates in a federal election since first acquiring the right to run for office in 1920;*
>
> *Whereas the systemic under-representation of women in politics is not caused by a lack of willingness to stand for elected office, but rather by barriers within the process used by political parties to select candidates;*
>
> *Whereas currently, under the Canada Elections Act, political parties are eligible for a reimbursement of up to 50% of their election expenses provided they meet certain conditions and can at any time decline to receive this public subsidy;*
>
> *And whereas all political parties lack an adequate incentive to promote parity in the candidates they nominate for a general election;*

When introducing the legislation, MP Kennedy Stewart said (*House of Commons Debates* 42 Parl, 1st Sess, No 148 (10 May 2016) at 1835):

> *Despite electing a record number of 88 women MPs in the 2015 election, women currently hold only 26% of the seats in this place, meaning that almost three out of every four MPs is male. As a result, Canada ranks 61st out of 191 countries when it comes to the proportion of women elected*

> *to Parliament. That is not a proud record. It positions us behind countries such as Iraq, Afghanistan, and El Salvador, according to the Inter-Parliamentary Union.*
>
> *What is worse is that we are dropping like a stone in those international league tables. In 1991, we were ranked 21st in the world in terms of the proportion of seats held by women, but have since been passed by 40 countries who now elect more women to the legislature than we do. Although Canadian women were granted the right to vote almost 100 years ago, it might take us until 2075, which is another 60 years, for women to hold half the seats in our Parliament if we continue at this current rate. Throughout history, only 6% of the seats in the House of Commons have ever been held by women. This needs to change. This is more than mere statistics. These numbers mean something.*

He goes on to state the reasons why so few women are elected or selected as candidates (*House of Commons Debates* 42 Parl, 1st Sess, No 148 (10 May 2016) at 1835):

> *The reason so few women are elected to Parliament is that parties nominate so few women to stand as candidates. More than enough women put their names forward to stand as candidates. Therefore, there is not a lack of supply of women to run in half of the 338 ridings in Canada. This makes sense. After all, we have 18 million women in Canada. Parties need only 169 women candidates to present a balanced slate. I do not think anyone can argue that parties would be unable to find 169 qualified, deserving women candidates.*
>
> *The reason so few women are selected as candidates is bias within the nomination processes used by political parties. In many cases, party officials and selectors are biased toward selecting men over women, because they think men candidates have a better chance of winning elections. It has nothing to do with merit. The merit argument has been thoroughly discredited in the academic literature. Not only do more than enough women come forward to run for office, they are usually more credentialed than their male competitors. The idea of merit is now seen as a mere cover to disguise patriarchal values, that is, systematic preference for men over women.*

Mr. Stewart notes that over 100 countries have passed laws on gender equity, with many of them being coercive. By way of comparison, the proposed legislation is considered to be an incentive rather than a punishment. He also notes that in countries where such incentives are used, there have been significant increases of women in Parliament. For example, in Ireland, which has a single transferrable voting system that is different than Canada's, a similar law resulted in an increase of 90% in women candidates and a 40% increase in the number of women elected to the Irish Parliament (*House of Commons Debates* 42 Parl, 1st Sess, No 148 (10 May 2016) at 1840).

While the other parties seemed to be supportive generally, the bill was criticized for not including other minority groups (Mr. Mark Gerretsen (*House of Commons Debates* 42 Parl, 1st Sess, No 148 (10 May 2016) at 1850). Perhaps it could be a model for future inclusion.

It will be interesting to see if this bill is actually passed. And, if it is, whether the parties will take advantage of the incentives it includes. It appears as though any change in incentives will also have to be coupled by changes in our socialization of females. Finally, if the number of women in Parliament increases, it will be interesting to note any changes that result in Canada's democracy.

Divorce and Bankruptcy Law in Canada

By J. Doug Hoyes

Almost one in five insolvencies in Canada (a bankruptcy or consumer proposal) involves someone who has experienced a marital or relationship breakdown. Often the financial problems occurred long before the divorce. Financial pressures often increase after divorce as two households are now trying to live on the same income as one household did before the separation. When these problems become severe enough to lead to the insolvency of one or both ex-partners, there are special legal complications when it comes to divorce and bankruptcy that need to be considered.

Alimony and child support

Some insolvent individuals have fallen behind in their alimony and child support payments. It is important to note that alimony and child support payments are not discharged in bankruptcy. However, if you are responsible for child support or alimony and you file for bankruptcy, you can deduct the payments from your income when your licensed insolvency trustee is calculating the cost of bankruptcy. For example, if you make net $3000 a month but owe $800 a month in alimony and child support, you can deduct the payments from your monthly income to lower your net income and reduce or avoid possible surplus income payments, as well as avoid extending the length of your bankruptcy.

If your ex files for bankruptcy, and is in arrears of support payments, the spouse who is owed money can file a claim in the bankruptcy like any other creditor and receive dividends from their share of the bankrupt's estate. Payments that are in arrears for 12 months prior to the date of the bankruptcy are considered a preferred claim, which means that they will be paid before all other creditors. Any alimony or child support that is not paid by the bankrupt estate is still owed by the paying spouse after they are discharged from bankruptcy.

Lastly, any unpaid equalization payments, as a result of a divorce or separation agreement, are treated like unsecured debts and are eliminated in bankruptcy (although this is a complicated area of law, so legal advice should be sought it the amounts are significant).

Assets

How your assets will be affected will depend on what came first: the divorce or the bankruptcy. If you divorced or separated first, and your assets were transferred to your spouse because of a legal

separation agreement or court order, then those assets will not be affected by your bankruptcy. This assumes the transfer was not fraudulent in any way.

If you've filed for bankruptcy first, before any of the separation or divorce proceedings, then your assets will be considered as a part of your bankruptcy estate, and they must be surrendered to the licensed insolvency trustee. How bankruptcy will affect your assets will depend on your province's exemption rules regarding which assets are exempt from seizure.

Joint and Co-signed Debts

As married couples build their lives together, they often incur joint debts. A joint debt is one where both parties are responsible to repay the loan. Debts are joint simply because you are married. One spouse can have their own credit card or bank loan. Debts become joint if both spouses sign for the debt.

In the event of divorce, it's commonly believed that the amount owed on joint debts will be split evenly between each spouse. However, that is not the case. Both spouses are 100% liable for joint debts for which they were both responsible before the divorce or separation. That means if one spouse defaults or files for insolvency, creditors *will* approach the other spouse for the whole amount owed. Filing for bankruptcy will not eliminate your portion of the debt; instead responsibility for that joint debt will shift to your ex. Divorcing does not absolve you or your ex of your financial responsibilities and obligations. Divorce does not protect you or your ex from the effects of insolvency. In fact, if you and your ex have joint or co-signed debts, bankruptcy will have an effect on both of your finances.

The same is true of co-signed debts. If you have co-signed your spouse's loan and he or she file for insolvency, you're liable for the total amount owed.

Even if you're divorced or separated, and you have made a legal separation agreement that says you and your ex will split the debts evenly, you are still responsible for your ex's debt until it is paid off. The legal agreement you made is between you and your ex, not between you and the lender. Only the lender can release you or your ex from a co-signed loan or joint debts. Even then it is prudent to close the account once it is paid off, or request a letter from the lender stating you have been released from that debt or loan.

If you are divorced, struggling with post-divorce debt or have co-signed loans and joint debts with your ex, speak with a licensed insolvency trustee. They will be able to examine and assess your financial situation, and provide different options for dealing with your debts. They will also explain how your options will affect your ex, and whether one or both ex-partners will need to file for insolvency. If both spouses should file, they can give you a choice to file separately or together in a joint bankruptcy or consumer proposal, depending on which option makes the most sense for you and your ex.

Having Problems with another Tenant?

By Judy Feng

Is another tenant living in your building driving you crazy? Are they making excessive noise? Leaving garbage out in the hallway? Are they dumping dirty water or flicking cigarette butts onto your balcony? For many renters, living alongside people who they may or may not get along with is a fact of life. But that doesn't mean that you can do nothing and continue to wallow in misery. After all, tenants have a right to peaceful enjoyment of the property – meaning that they have a right to not be disturbed while living in a rental property. Here are a couple of ways to deal with any problems that arise with another tenant.

If there is another tenant that you are not getting along with, one of the first things you should do is to try to work things out. You can talk to or write to the person and voice your concerns politely. It's not always the case that the person is aware of the impact of their actions on others.

The other person you should talk to is your landlord or property manager. One of the obligations that a landlord has under *the Residential Tenancies Act* (RTA) is to ensure that each tenant has peaceful enjoyment of the property. If the action of a tenant is depriving another tenant of their peaceful enjoyment, then it is up to the landlord to come up with a solution to the problem. To help your landlord or property manager come up with a solution, you can:

- talk to your landlord or property manager about the steps that they are taking to deal with the other tenant;
- make your complaint(s) to the landlord or property manager in writing; and
- if your landlord or property manager is attempting to deal with the problem, you can assist them by providing a written record of what has occurred with the other tenant.

In most situations, problems with another tenant can be resolved between the two of you and/or with the help of your landlord or property manager. However, there are some situations where you may need to contact the police.

For example, if you believe that you are in danger, you should contact the police. You may want to write a letter to your landlord or property manager informing them that you are concerned for your safety. One of the obligations that a tenant has under the RTA is to not interfere with the rights of other tenants. If your rights are being interfered with, then you can inform the landlord of this interference in writing and request that the landlord take action against the other tenant.

If a tenant assaults or threatens to assault you or other tenants, then you should inform the landlord/property manager and police immediately. A landlord can serve a tenant with 24-hour notice to vacate if he or she assaults or threatens to assault other tenants. For more information about 24-hour notice, please see: http://www.landlordandtenant.org/notices/eviction-notice/.

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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Legal Remedies at Human Rights Commissions

By Peter Bowal and Lora Walsh

Introduction

Canada has one federal and separate provincial and territorial Human Rights Commissions established and governed by their respective enabling legislation. These human rights commissions exist to protect human rights, prevent discrimination, foster equality and resolve complaints. The various versions of human rights legislation are fundamentally similar across the country.

This article describes the legal remedies that may be ordered in Canada for illegal employer discrimination in the workplace. To simplify, only the federal (applies only to federally-regulated workers) and Alberta legislation will be compared here.

Scope and Purpose of Remedies

Both Commissions seek to work with the worker and employer to reach mutual understanding and resolution through mediation. If this fails, the Commissions send the matter to their respective quasi-judicial Tribunal for ultimate adjudication.

Both Commissions protect employees from discrimination based on race, ancestry, colour, religion, age, sex, sexual orientation, marital status, family status, and disability. The federal level additionally protects workers from discrimination based on a conviction on an offence for which a pardon has been granted and Alberta protects from discrimination based on source of income.

Human rights legislation "recognizes and affirms that all persons are equal in dignity and rights" *[Walsh v Mobil Oil Canada*, 2013 ABCA 238], but it is not meant to punish employers *[Robichaud v Canada* (1987) 2 SCR 84]. Legal remedies ordered by commissions are remedial in nature and are meant to restore workers to the position they would have been in if the discrimination had not occurred. The remedies are also educational and serve to deter future infractions. While the remedies are not intended to punish employers, they can be substantial sanctions to demonstrate public denunciation of human rights violations.

Available Remedies

The remedies available under the *Canadian Human Rights Act* include orders to [section 53(2) and (3)]:

- cease the discrimination and take measures to prevent recurrence;
- adopt a special program, plan or arrangement (such as an apology or sensitivity training);
- compensate the victim for wages and expenses; and/or
- compensate the victim for pain and suffering up to $20,000 and up to another $20,000 if the discrimination was willful or reckless.

The federal legislation [section 60(2)] authorizes fines against employers for breaching settlement agreements, certain other requirements and for obstructing tribunal process. That money goes to the government, not the employee.

The Alberta legislation confers broad jurisdiction on the tribunal to redress the discrimination and sets no limit to damages for reckless or willful conduct or for injured dignity and self-respect. The Alberta tribunal can also order costs to a party [s. 32(2)].

Employers need not have discriminatory intent to be liable. They can be liable in both jurisdictions even if they are unaware of an employee's protected attributes [*Robichaud,* para 11]. Both tribunals may order more than one remedy.

Determining Remedies

Remedies are given broad and flexible interpretations according to each context. Previous human rights decisions, as well as the nature of the discrimination, its frequency and intensity, and the vulnerability and impact on the complainant are considered to decide the remedy. Despite the guesswork in awarding pain and suffering damages, they are frequently awarded. Employees must show attempts to mitigate their losses by searching for alternate employment, after allowing for a reasonable period to recover from the discrimination.

Employers can help their own cause by showing remorse and acting to promptly address the discriminatory practice so it is not repeated. Such measures may soften the consequences.

Comparing Remedies at the CHRC and AHRC

The Tables below outline random samples of decisions where remedies were ordered.

Alberta Human Rights Commission			
Case	**Rehabilitative Remedies**	**Income and Costs**	**Pain and Suffering**
Lays v Daryl Remus Professional Corporation, 2001 AHRC 9		Loss of income (amount not specified)	$500
Lund v Boissoin, 2008 AHRC 6 (later overturned by court)	Cease publication; future prevention; public announcement of order and apology	Costs up to $2,000	$5,000; written apology
Rawleigh v Canada Safeway Limited, 2010 AHRC 1		$20,000, plus lost pension benefits (amount not specified)	$10,000
Martyn v Laidlaw Transit Ltd, 2008 AHRC 2		50% of solicitor costs	$10,000
Anderson v Alberta Health Wellness, 2002 AHRC 16	Cease contravention; future prevention; amendment of offending provision	$7,500	
Walsh v Mobil Oil Canada, 2013 ABCA 238		$472,766 loss of income; $139,154 loss pension benefits; $10,000 treatment costs	$20,000 (plus $15,000 for reckless or willful)
L'Archeveque v City of Calgary, 2002 AHRC 7		$2,000 loss of income; loss of pension benefits (unspecified); $2,000 for loss of stat holidays	$9,000
Simpson v Oil City Hospitality, 2012 AHRC 8	Participate in educational program; develop policy; signage that stipulates inclusion		$15,000
Malko-Monterrosa v Scolaire Centre-Nord, 2014 AHRC 5		$175 for costs (self rep)	$7,500
Kennedy v Save-on-Auto Limited, 2002 AHRC 11		$1,293 loss of income	$4,000

Canadian Human Rights Commission			
Case	**Rehabilitative Remedies**	**Income and Costs**	**Pain and Suffering**
Grant v Manitoba Telecom Services Inc, 2014 CHRT 14	employer to work with CHRC to end discrimination; create policy	Lost pension benefits (unspecified)	$10,000 (plus $10,000 for reckless or willful)
Public Service Alliance of Canada v Canada (Treasure Board), (1991) 14 CHRR 341	Cease relying on discriminatory system, work with CHRC to draft new rules and system	Difference in Income (unspecified)	
Hughes v Elections Canada, 2010 CHRT 4	Consultation with voters; cease order; verification of accessibility of facilities; draft new policies; implement standard lease for polling stations; training; etc.		$10,000
First Nations Child and Family Caring Society of Canada v. Attorney General of Canada, 2016 CHRT 2	Cease discriminatory practices; reform program; training; ongoing monitoring	To Be Determined	To Be Determined
Robichaud v Canada, (1987) 2 SCR 84	Implementation of a program/policy addressing sexual discrimination in the workplace; educational awareness activities	Settled privately	$5,000; apology
Warman v Lemire, 2014 CHRT 6	Remove offensive material; cease engagement		
Walden v Social Development Canada, 2009 CHRT 16	New position	legal costs	$6,000 (to only 2 of several complainants)
Cassidy v Canada Post Corporation & Raj Thambirajah, 2012 CHRT 29	Preventative measure to stop reoccurrence		$13,000 (plus $3,000 for reckless or willful)
Chapeline v Air Canada, 1991 CHRT 553		$115,000 loss of income	($2,000 for reckless or willful)
Public Service Alliance of Canada v Canada Post Corporation, 2005 CHRT 39		Loss of income (unspecified)	

Conclusion

All Human Rights Commissions in Canada can award a variety of remedies to both compensate discriminated workers and impose measures to preclude future discrimination. Workers comprise the largest group of complainants.

The indeterminate nature of discrimination poses a challenge for assessing legal remedies. Many factors are considered when determining remedies and damages, including the nature of the infringement, the severity and frequency of the infringement, and the vulnerability and impact on the complainant. Human rights legislation is remedial. Accordingly, tribunals exercise significant discretion in each case.

Prevention and Relief of Poverty

By Peter Broder

A couple of years ago, the refusal of the Canada Revenue Agency (CRA) to allow Oxfam Canada to include prevention of poverty in its objects if it wanted to retain its status as a registered charity drew widespread press attention. The CRA took the position that relief or alleviation of poverty was a recognized charitable purpose, but that prevention of poverty was not.

Last June the Federal Court of Appeal (FCA) upheld that position in *Credit Counselling Service of Atlantic Canada v. Minister of National Revenue.* That case concerned the work of a group that provided research and education on credit-related concerns, as well as professional financial and debt counselling services. The counselling services were available to the clients without evaluation of their financial circumstances, so potentially assisted people in avoiding rather than escaping poverty.

The decision is clear authority for the proposition that prevention of poverty is currently not a recognized charitable purpose in Canada, and thus cannot be stated as the (primary) purpose of an entity eligible for registration. With respect, however, the decision provides little clarity on some essential aspects of charity law in addressing poverty. No doubt this stems in part from the facts the Court had to deal with – "prevention of poverty' was a stated purpose of the organization – but, unhappily, the brevity of the analysis disposes of the matter without fully engaging with some important issues.

The 23-paragraph decision offers organizations that work to alleviate poverty little guidance on how to deal with some practical problems they face daily. For example, a significant hurdle many such groups have to grapple with is the challenge of offering services without stigmatizing clients. Related to this is the administrative burden placed on a charity to segregate those legitimately eligible for services from those that ought not to qualify.

In terms of stigmatization, this may be a less obvious consideration in credit counselling than in, for example, a school breakfast program. Generally, such programs are made universally available to children in a particular locale, rather than having participants singled out and potentially embarrassed or shamed. Even for credit counselling, an agency that is known to scrutinize clientele for impoverishment

may scare away potential beneficiaries because they don't want to be seen as poor. So, leaving aside the human cost of demeaning people, stigmatization can impair a group's efficiency.

Charity law permits some incidental benefit to those that are not disadvantaged when a charity is carrying out its work, so long as that benefit is reasonable and proportionate. But there is little jurisprudence to assist in determining what is onside and what is not. It seems self-evident that, if the occasional student who is less needy enjoys a free breakfast so that others participating in the program are not stigmatized, that ought to be an acceptable outcome and not negate the charitability of the broader undertaking. The same approach could be used in determining the charitability of the credit counselling work. However, the decision in the *Credit Counselling* case does not address this issue.

Also left unanswered is the question of what amount of incidental benefit to non-beneficiaries might be permissible before the organization was required to put in place a potentially costly and cumbersome screening process. The decision seems to assume that, as there was no screening process, a significant number of the users of the service would not be found eligible through such a screening. The cost/benefit of screening is not addressed.

Lastly, those who work on poverty issues know that alleviating poverty is more complex than providing marginal additional resources to lift individuals or families beyond a financial threshold for a limited time period. Sustainably enabling people to escape poverty often requires repeated or on-going support and investment. To be effective, programming may need to help them stabilize themselves beyond the cusp of poverty.

This again highlights the inadequacy of using a point-in-time monetary evaluation as the basis for providing services. The United Kingdom has acknowledged the dynamic nature of poverty by including prevention of poverty in their *Charities Act;* an approach that was, ironically, used as a basis for the FCA's holding that, in Canada, it is no longer open to the courts to determine that prevention of poverty qualifies as a charitable purpose, but must be left to the Canadian Parliament to be enacted through legislation.

Though research and experience suggest the approach in this area reflected in the United Kingdom statute is a sensible one, the possibility of legislation akin to the *Charities Act* being enacted in Canada in the near future appears remote. And the *Credit Counselling* decision seems to foreclose the possibility of either the courts or the CRA moving on such a change.

Without a change in the law or in how it is interpreted, some use might also be made of the permissibility of incidental benefit in dealing with different points along the continuum addressing poverty issues. But for that to happen effectively, at a minimum the courts need to provide more clarity than they have to date on assessing when it is that incidental assistance to non-beneficiaries may be permissible in alleviating or relieving poverty.

Given the decision in *Credit Counselling,* without further clarification there is a real danger that an unintended consequence of disallowing prevention of poverty as a charitable purpose may be thwarting other *bona fide* charity work. Ruling against prevention of poverty should not result in prevention of charity.

Supreme Court: No Warrant to Swab Your Genitals? No Problem!

By Melody Izadi

In a logically confusing and weakly justified ruling rendered on June 23, 2016, the majority of the justices of the Supreme Court of Canada in *R. v. Saeed* decided that upon arrest, without warrant or consent, when Mr. Saeed was commanded to drop his trousers and a cotton-tipped swab was wiped along the length of his penis and around the head of his penis, somehow, his rights under the *Charter of Rights and Freedoms* were not infringed.

Mr. Saeed was charged and convicted of sexual assault causing bodily harm and unlawful touching for a sexual purpose. One of the key pieces of evidence relied upon by the Crown to secure a conviction was the DNA of the complainant found on Mr. Saeed's penis several hours after the assault. The DNA was found after a warrantless penile swab was conducted at the police detachment after Mr. Saeed's arrest. The defence sought to exclude the results of the penile swab on the basis that it contravened Mr. Saeed's section 8 rights under the *Charter* to privacy and to be free from unreasonable search and seizure. The Supreme Court held that Mr. Saeed's rights were not infringed, and the police were acting within their ambit of evidence gathering.

What ought to be shocking to the Canadian public is this: prior to the penile swab, Mr. Saeed was placed in a dry cell (meaning no toilet or sink) and his hands were cuffed to a metal pipe behind his back; he was forced to sit on the floor without changing positions for over an hour; he was not allowed to use the washroom or drink any water; he was eventually commanded to expose his genitals so that a swab could be taken from his penis; and at no point did Mr. Saeed consent to the swab.

Justice Abella, was the only Justice who found a breach of Mr. Saeed's *Charter* rights and would have remedied the breach by excluding the evidence under section 24(2) of *the Charter*. Justice Abella found it significant that Mr. Saeed was in police custody for several hours and no steps were ever taken by the police to obtain a general warrant or a telewarrant for the invasive search of his genitals.

The majority on the other hand found no breach whatsoever of Mr. Saeed's rights. Justice Moldaver reasoned that because it was the complainant's DNA that was sought via a penile swab and not Mr. Saeed's, Mr. Saeed did not have "a significant privacy interest in the complainant's DNA, any more than [he had] a significant privacy interest in drugs that have passed through [his] digestive

system." However, if there was evidence to suggest that there was drug residue on an accused person's penis, asking the individual to drop their pants to search for it would certainly be a breach of section 8, and quite frankly, outrageous. In addition, a drug test is worlds apart from the invasiveness of a penile swab, because, after a penile swab, the accused's DNA would be transferred onto the swab, and thus would be in the hands of investigators. Moldaver, J. briefly acknowledges this reality, but dismisses it by stating coldly that if the accused's DNA is obtained, "the accused's DNA cannot be used for any purpose." This of course assumes that it would somehow always be disclosed if the accused's DNA is used by investigators.

The majority also held that the invasive search was justified because the procedure was lawful. "It's quick and painless" says the Supreme Court, and "it's not penetrative. The cotton swab touches only the accused's outer skin. It does not cause pain or physical discomfort. It does not pose any risk to the accused's health." This may be so. However, unjustified strip searches have the same lack of injury to the accused, but have been found to breach the section 8 rights of an accused. This also assumes that "the accused's health" only encompasses the accused's physical well-being.

In this case, the Supreme Court has decided that if an officer has reasonable and probable grounds to think there is evidence on your genitals, you can be chained to a pipe for a few hours, in a dry cell without food or drink, and have your genitals swabbed at the command of the officers, and this does not violate your rights under the *Charter of Rights and Freedoms*. Perhaps if the accused had been a woman in this case, socially constructed gender binaries would have helped magnify the inappropriateness and invasiveness of having an individual's genitals investigated without consent or a warrant, and authorized by nothing more than reasonable and probable grounds. Would the Supreme Court have come to the same conclusion? Because, a warrantless search of an individual's genitals without their consent is a clear breach of Section 8 of the *Charter.*

Whatever Happened to …*R. v. Oakes*

By Peter Bowal and Mark Kelndorfer

> *Mr. Oakes is compelled by s. 8 to prove he is not guilty of the offence of trafficking. He is thus denied his right to be presumed innocent and subjected to the potential penalty of life imprisonment unless he can rebut the presumption. This is radically and fundamentally inconsistent with the societal values of human dignity and liberty which we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(*d*). Let us turn now to s. 1 of the* Charter. *[para 61]*
>
> *In my view, s. 8 does not survive this rational connection test. . . . possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. [para 78]*
>
> – *R. v. Oakes* [1986] 1 SCR 103

Introduction

In 1981 David Edwin Oakes, a 23-year-old construction worker, was approached by police outside a tavern in London, Ontario. They found eight one-gram vials of hashish oil worth $150 and $619.45 in cash on him. He was charged with unlawful possession of a narcotic for the purpose of trafficking, under the then *Narcotic Control Act*. Under section 8 of that Act, if you were found guilty of possession of a certain amount of an illegal narcotic, you would be convicted of trafficking in that drug, unless you could prove otherwise. This "reverse onus" was a rare and contentious part of the criminal law in Canada which effectively forced an accused person to prove his or her innocence. At the time, conviction for trafficking in the narcotic carried a maximum penalty of life imprisonment.

So began one of the most famous cases in Canadian legal history, *R. v. Oakes*, [1986] 1 SCR 103 [http://canlii.ca/t/1ftv6]. It would set one of the most important legal precedents to do with the application of the *Charter of Rights*.

Facts

Oakes claimed that the drugs in his possession were for purely personal use to relieve his pain from a workplace accident. He said the money was from having recently cashed his worker's compensation cheque.

His lawyer took aim at the constitutionality of the reverse onus when the *Charter* came into effect the next year. Oakes' position was that the reverse onus in section 8 of the *Narcotics Control Act* violated the presumption of innocence contained in section 11(d) of the new *Charter.* Even if the reverse onus did violate the constitutional presumption of innocence, could that violation be excused by section 1 of the *Charter*? This provision limits some rights and freedoms as may be "demonstrably justified in a free and democratic society."

By 1985 the case reached the Supreme Court of Canada, which took almost a year to render a decision. It unanimously held that the shift in onus violated Oakes' section 11(d) right to presumption of innocence. It went on to find the section 8 reverse onus unconstitutional and, further, that it was not justifiable under section 1 of the *Charter*.

From this case a three-part test was developed to apply section 1. How a government in Canada can justifiably and constitutionally limit one's rights under section 1 of the *Charter* became known as the *Oakes* test. It remains central to *Charter* interpretation today.

The *Oakes* Test

The *Oakes* test is a judicial three-part test to determine which Canadian legislation is permitted to violate or limit constitutional rights under section 1 of the *Charter*. Government, whose legislation contravenes one or more specific rights, may argue that the legislation is "demonstrably justifiable" and that it should remain in force.

Let's take the CheckStop program as an example. When police stop every driver who happens to be travelling along a road, on the face of it they are conducting "arbitrary detentions" in contravention of section 9 of the *Charter of Rights*. The unconstitutional roadside practice of stopping vehicles would cease, except that the government has one more opportunity to rescue it. This is under section 1 using the *Oakes* test.

The first part of the test was that the law must address a pressing and substantial public policy objective. In this case, CheckStop seeks to reduce the carnage and suffering on Canadian roads caused by drunk driving.

The second part of the test asks whether there is a rational connection between the government action that violates the right and achievement of the objective. In other words, do CheckStops actually nab impaired drivers and thereby discourage the behaviour?

The third and final part of the *Oakes* test determines whether the government interference with the right is as minimal as possible. If you have been through a CheckStop, you will likely agree that the "arbitrary detention" is not a serious inconvenience (unless you have consumed too much alcohol or have warrants for your arrest).

Police stopping vehicles randomly on roadsides is today a constitutional form of criminal law enforcement. It is an excusable, "demonstrably justifiable" exception to the right against arbitrary detention, because the Supreme Court of Canada has ticked off these three boxes of the *Oakes* test in a succession of decisions: *Dedman v. The Queen* (SCC, 1985) http://canlii.ca/t/1ftwf; *R. v. Hufsky* (SCC, 1988) http://canlii.ca/t/1ftg3; *R. v. Ladouceur* (SCC, 1990) http://canlii.ca/t/1fsvs; *R. v. Wilson* (SCC, 1990) http://canlii.ca/t/1fsvv. It is noteworthy also that the judges were seriously divided on most of these cases. The *Oakes* test can generate highly differing opinions.

In the *Oakes* case itself, the Supreme Court found that the federal government failed to rationally connect Oakes' possession of a small amount of illegal drugs and money to the presumption that he was engaged in the crime of drug trafficking. The burden of proving that he was not trafficking in drugs should not have been transferred to him. He was convicted of the minor possession charge and found not guilty of trafficking. The reverse onus on accused persons in section 8 of the *Narcotics Control Act* was ruled unconstitutional.

Where Are They Now?

Oakes' lawyer, Geoff Beasley, was quite junior when he took on the *Oakes* case. It was a remarkable win early in his career. After the *Oakes* case, Beasley became a Crown prosecutor and handled numerous other high-profile cases. These included the *Ssenyonga* case (first trial of an accused for knowingly spreading HIV/AIDS) and the trial of McClintic and Rafferty for the murder of Tori Stafford. In 2004, Beasley was appointed a judge in Ontario but chose to resign shortly afterward to return to prosecuting.

David Oakes became famous for the legal doctrine that bears his name. The *Oakes* test has been applied in more than 1700 written judicial decisions.

Around 2011, Oakes appears to have moved from London, Ontario to Calgary to work as a self-employed network installer of phone and computer systems. From a legal perspective, Oakes was lucky because he was charged with illegal possession and trafficking of drugs **before** the *Charter* was enacted but benefited from the *Charter's* protections **after** it was enacted.

However, major judicial decisions endure in perpetuity. They are named after, and continue to be associated with, the individuals who are involved in them. Almost 60 years old now, David Oakes prefers not talk about his famous case and still lives with the stigma of it. Referring to the role he played in one of the most influential cases in Canadian constitutional law, Oakes was quoted as saying "I could do without."

Extraordinary Criminal at the Heart of The Man Without Qualities

By Rob Normey

At our recent meeting of the Who Killed D'Arcy McGee History Club in the hospitable surroundings of the Russian Tea Room in downtown Edmonton we were discussing the early thrillers of Graham Greene, including his short novel *The Third Man.* Greene had written it after a journey to a bombed and shattered Vienna shortly after the war.

After our meeting, I thought back to my trip to Vienna a number of years ago, taking with me as my guidebook the first volume of Robert Musil's encyclopedic novel, *The Man Without Qualities*. Musil might be considered an odd choice for my guide, but in fact, his novel surely captured some of the beauty and contradiction and instability of pre-WWI Vienna. The Vienna of today lends itself to thoughts and imaginings of the glittering imperial capital that once existed, precisely at the point the novel captures so splendidly and insightfully – the eve of the cataclysm that was the First World War. Musil's never-completed work, stretching to three volumes, is multifaceted, leisurely and, like many other modernist novels, barely concerned with plot. Perhaps, it makes sense to refer to Musil's "pseudo-plot", which depicts the efforts of some of Vienna's political and cultural elite to plan a gigantic celebration of the pending 70th anniversary of The Hapsburg Emperor's ascension to the throne and rule over the sprawling Austro-Hungarian Empire. This Collateral Campaign leading up to the jubilee is set in the fateful year of 1913 – readers know that the following year will destroy all hope for a celebration, and indeed, will by the end of the brutal four-year struggle of World War I, result in the total collapse of the Empire.

Ulrich, the main character, is our "man without qualities" – a brilliant but unfocussed member of the upper class: trained as a mathematician but taking a lengthy sabbatical from all practical concerns. He serves as the vital connection to another of the central themes of the novel, the role of the criminal defendant Moosbrugger. By de-emphasizing plot and revealing the characters and their thoughts, ruminations and absorption in the *cause celebre* of the Moosbrugger Affair, Musil offers penetrating insights with wit, irony and erudition. Vienna becomes a key location in which many of the themes of modernity are studied. The narrator takes us from the upper class salons of Diotima, Ulrich's name for his cousin (after the female Greek philosopher of love) who is a leader of the Collateral Campaign, together with her husband, a high-ranking civil servant, to the homes of friends of Ulrich's who

comment regularly on the news reports about the conviction of Moosbrugger for the rape and murder of a prostitute. This turns out to be one in a long line of such murders. Ulrich and his friends Walter and Clarisse exchange various ideas and positions on the possible motivations for these crimes. They speculate on whether Moosbrugger possessed a "guilty mind" or instead was lacking *mens rea* (or a guilty mind) due to serious mental illness. They consider the arguments advanced by Moosbrugger's lawyer to challenge his conviction and the penalty of execution, or alternatively, a lengthy term of imprisonment. There are fascinating commentaries showered on the reader on Austrian legal procedures and also, more importantly, basic universal principles underlying criminal law and the proper punishment for serious violations of law and morality.

The author employs the character of Christian Moosbrugger, a large, powerful, poorly educated carpenter who drifts from town to town seeking casual work, as a provocative contrast to the other central characters. They belong to either political, legal, business or artistic circles that have an understood function in the seemingly plush and elegant world of imperial Vienna. The criminal who so fascinates Ulrich and the others has become an enigmatic outcast and a possessor of a rebellious will to power that impresses them even as it troubles them. Indeed, in the case of Clarisse, married to the musician Walter, fascination gives way to an unhealthy obsession with Moosbrugger. Perversely, he becomes for her some kind of "new man" prophesized by the influential philosopher Nietzsche, a living presence in the novel as he was for Austria and Germany generally in that era. Nietzsche, who went mad and resided in a mental asylum prior to his death in 1900, challenged the prevailing liberal humanist world-view and considered that a new great man (*ubermensch*) or a class of superior persons was bound to seize power at some point to usher in a new era. The German philosopher would not have been a supporter of Hitler and the Nazi Party that was to, in fact, wrest power from the old elites and wreak havoc on the entire world. However, it is remarkable that Musil's novel, published initially in the first part of the 1930s, offers a convincing sense of the premonitions of Ulrich, Clarisse and others that their world was bound to change utterly. It is the criminal Moosbrugger whom they sense represents the dark forces at work under the smooth veneer of modern civilization. At one point the narrator tells us that all Europe dreamed Moosbrugger. His fate is symbolically tied to the political and legal structures of the Austrian Empire and suggests both the key role of sexuality in modern-day Vienna and the way in which unhealthy thoughts as well as sexual acts can lead to disintegration. After all, Vienna was the birthplace of psychoanalysis. Not only Freud, but the playwright and novelist Arthur Schnitzler, and Gustav Klimt, the painter of sensuous, erotic and at times frightening female figures, all lived and worked in Vienna in this era.

Musil is most adept at bringing Moosbrugger to life as a charismatic and oddly persuasive speaker in his own defence, both in the courtroom and later in recounting the vain criminal's overweening sense of himself in the interviewing room at the police station. The carpenter's vanity might suggest that he is a rather ridiculous man, but in fact, his fearlessness in the face of potential death marks him as a man to respect and to endeavour to understand. Moosbrugger's speeches might be brilliant and unconventional defences of his actions or the weird logic of a madman. The answer lies on a knife edge.

Near the end of Book One, the narrator, in summing up the case for and against treating Moosbrugger as insane, offers this gem:

“Law courts are like cellars where the wisdom of our forefathers are bottled. Opening these bottles, one could weep at how unpalatable the human striving for exactitude is at its highest degree of fermentation before reaching perfection. Yet it does seem to intoxicate those who are not hardened.”

This address, which is an example of the essay style of narrating the novel, is a good example of the controlled irony employed in Musil’s investigation. The case of Moosbrugger, in offering no easy answers to the question of guilt and responsibility, opens out into a wider portrayal of a society on the edge of an abyss.