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Solitary Confinement **Economic Woes** Genatic Discrimination

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Criminal Justice

41-2: Criminal Justice

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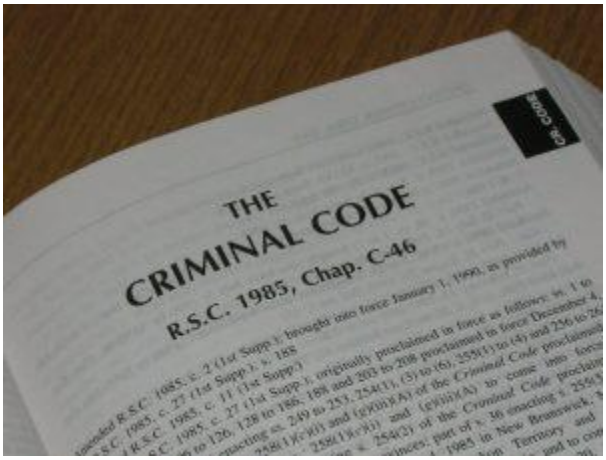
The Law of Sexual Assault in Canada

By Charles Davison



Perhaps no offence under our laws is as politically charged as sexual assault. And in no other offence situation are the gender lines as clearly drawn: while there are some exceptions, most sexual assault allegations are made by women who say they have been violated by men. Because of the infinite variations of factors which are at play when men and women interact, this crime covers a very wide range of situations. So, ordinarily non-criminal individuals may nonetheless find themselves facing charges.

To properly understand our present laws about sexual assault we should begin with the legal history involved.

For centuries, our laws failed to properly protect women and children from the criminal behaviour of men. Women and children were often considered little more than items of property and this left them vulnerable to many forms of abuse and mistreatment. Until the early 1980s in Canada, it was impossible to convict a man for raping (having intercourse without her consent) a woman on the evidence of the complainant alone. A woman's evidence of rape was considered so inherently unreliable and untrustworthy that the Crown had to offer independent, supporting confirmation in some form before a man could be found guilty of this offence. Children suffered from the same disadvantage: in some situations they were simply not able to testify, and even when they were allowed to give evidence, there virtually always had to be some form of independent support for what they were alleging. These rules had the effect of allowing many perpetrators of horrendous crimes against women and children to go free.

In the 1980s, as a result of a government review (the Badgley Commission) into issues about sexual abuse of women and children and the law, the *Criminal Code* underwent a significant revision. The old rules were abolished, and the evidence of women and children was placed on a level equal to that of men. For children , there continued to be legal changes over the years in order to receive their evidence with fewer legal hurdles.

The main change in the law was the replacement of the crime of rape (and many other forms of sexual crime) with the broader, all-inclusive concept of "sexual assault". Under the new law, the offence would be treated as a form of assault, and prosecuted in accordance with principles common in this area although, as we will see, there would be additional, special rules applied in particular situations. As part of these changes to the *Criminal Code* new, special sexual offences in relation to children were also brought into our law. To be clear, sexual assault applies where children are the victims even where some of the other, more specialized provisions of the *Criminal Code* also apply.

Any crime in Canada involves two basic elements: a wrongful or prohibited act committed by the accused person, and an accompanying intention to commit the offence (sometimes referred to as a "guilty mind"). Under the law of sexual assault – as with any other form of assault – the wrongful physical action is any intentional application of force without the consent of the person being touched. What takes unwanted touching from being an "ordinary" assault to a sexual assault is the sexual element itself. The act of touching may be found to be the basis of a sexual assault if the force was applied for a sexual purpose, or violated the sexual integrity of the person being touched.

The scope of this offence is extremely broad. It covers everything from an unwanted kiss on the cheek or a hand touching another person's buttocks on top of clothing, to the most violent, horrific rape of a stranger, and everything in between. Even the removal of another person's clothing – pulling down someone's pants, or lifting a woman's shirt – can be the basis for a sexual assault charge. And even where an action is not intended for any sexual purpose or gratification, if it is considered to violate the sexual integrity of the person touched, it can still be found to amount to a sexual assault. For example, a babysitter or parent whose hand strays too close to the crotch of a child with whom they are rough-housing or tickling may be found to have committed a sexual assault even where sexual contact was the furthest thing from their minds. Virtually any type of touching between two persons may potentially be found to amount to a sexual assault if there is even a hint of sexual content to the action in question.

In addition to the physical actions, as with any other form of assault, this offence can only be proven if the touching was without consent of the person touched (I will refer to this person as "the complainant" in the rest of this article), and if the accused is shown to have had the necessary "guilty mind" at the time of the touching. This is where things tend to get complicated; confusing these two factors – the state of mind of the complainant and the state of mind of the accused – has led to much judicial debate and a number of significant court rulings in this area.

The mindset of the complainant is important because, to be an assault, the contact between the parties must be without the consent of the person touched.

Our laws permit people to agree to have others touch them in many everyday situations. Someone who takes the arm of another person who has reached for assistance as they start to fall does not commit an assault. A doctor who touches a patient in the course of a requested medical examination does not commit an assault as long as the touching is limited to what is necessary for proper medical purposes.

Similarly, persons who willingly engage in intimate physical activity together do not commit sexual assaults upon one another as long as each remains consenting to the conduct and behaviour of the other. To be valid:

- consent must be voluntary and it must be given by the person who is being touched in the situation: no one can give valid consent to the unwanted sexual touching of another person;
- the individual in question must be capable of consenting at the time: he or she cannot be so mentally ill, or affected by alcohol or drugs, for example, that they do not know what they are doing;
- consent must not be obtained by the accused exercising a position of trust or authority over the other person: adult caregivers cannot therefore seek to obtain the consent to having sexual contact with persons in their charge by means of their power over those other persons;
- consent cannot be given in advance to sexual contact which takes place while a person is asleep or unconscious;
- because it is always revocable, consent must be on-going and conscious throughout the activity in question; and finally
- to protect children, no one under 16 may consent to have sexual contact with an adult (there are a number of special rules which sometimes apply where both parties are under 19 years old which are intended to avoid criminalizing consensual teenage sexual activities) .

Even when consent is given, it may be retracted and it may also be limited. Agreeing to a minor form of sexual activity does not mean everything sought by one side has necessarily been agreed to by the other. At any time a "yes" can be made into a "no" by the complainant telling (by word or deed) the accused exactly that.

At the same time, care must be taken not to confuse later regret or embarrassment with a lack of consent. "In the heat of the moment" – and especially after alcohol has been consumed (though not so much as to render someone incapable of consenting to what is being done to them) – men and women may engage in activities of which they would never dream in most other situations. Sometimes, after a sexual encounter has ended, one or both parties feel ashamed and embarrassed. However, those later feelings do not nullify the consent which existed at the time of the contact; an assault has only taken place where, *at the time of the actions* of the accused person, the complainant was not consenting to that contact, even if the complainant later wishes he or she had behaved differently in that situation.

In addition to what is in the mind of the complainant, what is in the mind of the accused person is essential to deciding whether a criminal act has been committed. The accused person must be proven to have had a "guilty mind" before he or she can be convicted of committing a criminal offence. In the case of sexual assault the Crown must be prove that the accused intended to touch the complainant in a sexual fashion, knowing the complainant was not consenting to that activity or contact. If the touching was accidental, or if the accused believed that the complainant was consenting, or if there is doubt about the accused's state of mind, he or she must be acquitted. Again, this is not a special principle in

sexual assault law, but rather, is a basic rule followed and applied in every criminal prosecution in Canada.

That said, there are some special and unique rules which are applied in the context of sexual assault to determine whether the accused validly – but mistakenly – believed the complainant was consenting to the conduct in question. To begin with, the accused cannot rely upon his or her own self-induced drunkenness as a basis for having mistakenly believed the complainant was consenting. This is consistent with other areas of the criminal law. Only in certain, limited situations will self-induced intoxication provide a form of defence; sexual assault is not one of those. If, because of self-induced intoxication from drugs or alcohol, an accused person is not able to or does not realize the other person is not consenting to sexual contact, the accused will not be able to later rely upon their lack of understanding.

The accused is also not permitted to rely upon his or her own alleged mistake about the complainant's consent if the lack of understanding is the result of recklessness or willful blindness.

Recklessness is defined as not caring whether the complainant is consenting or not. It may be found where a complainant has not given consent, but the accused continued without bothering to stop to ask about consent.

Willful blindness may be found where the accused is proven to have known that a reasonable person would see a need to make further enquiry, but the accused failed to do so specifically so he or she would not know the true state of affairs. In other words, the accused willfully kept him- or herself ignorant.

At the same time, there are some situations where an accused's mistaken belief about consent *will* be a defence. In most criminal prosecutions an accused who believes in a mistaken set of facts may be found not guilty if those facts,had they been true,would have cloaked his or her actions in innocence. This is the application of the basic requirement that the accused must have criminal intent at the time of the wrongful act. If the accused committed the act with an innocent state of mind, he or she is not guilty of a criminal offence.

In the context of sexual assault, this principle allows for the possibility that even though the complainant may not have *actually* consented to the act in question, the accused person may have mistakenly but honestly believed that the complainant *was* consenting. In sexual assault prosecutions there is an added wrinkle to this defence, in that the accused person must take "reasonable steps" to determine that the complainant is consenting. What amount to "reasonable steps"will depend on the circumstances in each case. Where the complainant seems reluctant and unwilling, but not overtly and clearly so, and the accused continues with his or her sexual contact without taking reasonable steps to determine the actual state of mind of the complainant, the accused is not likely to be able to argue "mistake". On the other hand, where the actions of the complainant seem, objectively and reasonably, to suggest he or

she is willing to take part in sexual activity, it may be reasonable for the accused to continue, taking minimal, or even perhaps no steps to determine consent.
The principles about consent and mistake can be summed up by the adage “ambiguity is not consent”. If one person says or does something ambiguous or uncertain about whether he or she wishes to have sexual contact with the other person, the other party cannot simply continue without first checking to see if consent is present or not.

Some examples may serve to illustrate how these various rules and principles apply in our courts on a daily basis. These situations are taken from the facts of actual court cases.

A frequent scenario is that, after consuming a fair amount of alcohol, the complainant goes to sleep (or “passes out”) only to awake some time later to find the accused engaged in sexual activity with them. Because consent must be given to any touching that takes place, individuals may not engage in sexual activities of any sort with a person who is unconscious or asleep. Furthermore, even where a complainant gave consent to sexual activity before falling asleep or passing out, to continue to be valid, the person giving consent must remain conscious throughout the activity. Therefore, in a situation involving an unconscious or sleeping complainant there is unlikely to be any issue of consent. An accused who says, due to his or her own consumption of copious amounts of alcohol, that they did not know what they were doing will not have a defence to the charge. He or she is likely to be found guilty.

Another common fact situation is where the complainant appeared to be giving consent even though he or she later claims to have no recollection of doing so. Anyone with a history of drinking large amounts of alcohol has probably experienced “black outs” – periods of time when they have no recollection of things they did or said, or events going on around them. However, persons in this condition often do not appear to be unconscious. While it is clear they have been drinking, they seem to other people around them to still be possessed of their faculties and generally in control of their behaviour. In many sexual assault situations there is evidence of the complainant appearing to be willing to take part in sexual activity with the accused, even though he or she claims later to have no memory of having behaved in this way. These are the kinds of cases where there may be doubt about whether the complainant really did not consent and where, even if the complainant was not consenting, the accused had a valid mistaken belief in consent. Although perhaps while sober the complainant would not have consented to sexual contact, if there is evidence of conduct on the part of the complainant which indicates a willingness to take part in sexual activity, a court is more likely to conclude that the accused was operating under a mistaken belief about consent, and to find him or her not guilty.

Again, Canadian law requires consideration of the circumstances in order to determine the validity of the accused’s mistaken belief. If the evidence is that, upon the accused saying or doing something to suggest he or she wanted sexual contact, the complainant only murmured unintelligibly in response, or snuggled closer to the accused, or did anything else of a somewhat ambiguous and unclear nature, the accused will not likely be able to later argue “mistaken belief in consent.” Rather, this is the kind of situation where the accused would be expected to take reasonable steps to ensure the complainant

actually is consenting.

On the other hand, where there is evidence that the two parties went together into a bedroom and disrobed one another, kissing throughout, the accused is more likely to be found not guilty of committing a sexual assault even if the complainant later claims that he or she did not realize what was going on and did not consent to having sexual contact due to being "blacked out". This is the kind of situation where, in light of the complainant's apparent willing participation as suggested by the physical actions, the accused person is likely not to be expected to take additional steps to determine if the complainant was actually consenting; all the outward signs and indications were that he or she clearly was doing so.

Another common fact pattern is where complainants later changes their minds about wanting to have sexual contact. If this takes place while the activity is on-going, there is no consent. The accused will likely be found guilty if he or she continues even as the complainant asks or tells the accused to stop, or signals a withdrawal of consent by a physical action – pulling away, or pushing the other person away, or some other similar conduct. But where the change of heart takes place after the act has ended, there has been no sexual assault committed and the accused should be found not guilty. "Regret does not vitiate consent".

To summarize, the law in this area is complicated and sometimes confusing. Some sexual assault cases are relatively clear and straightforward: having sexual contact with a sleeping or unconscious person is, for example, simply against the law and will be punished. But other situations involve ambiguity, uncertainty, or "mixed signals". that can be misinterpreted as indications of willingness to take part in intimate activities. It can all perhaps be reduced to a couple of straightforward concepts:

- first, everyone has the right to decide what happens to their bodies and this includes the right to agree, or refuse, to take part in sexual contact with other persons; and
- second, be clear (and seek clarity) in order to be sure the other person involved in the situation really does want that kind of contact

If there is no clear and voluntary consent, everyone must keep their hands (and all other parts of their bodies) to themselves!

Understanding the Criminal Trial Process

By Caroline Wawzonek

Some 20 years ago, a sexual offender broke into a series of homes in downtown Vancouver. Several of the victims visually identified Ivan Henry as the perpetrator based on an in-person line up, a photographic line up or when he was sitting as the accused in court. Given the similarities between the cases, Henry was convicted of ten sexual assaults, declared a dangerous offender and sentenced to an indeterminate jail sentence – *literally* life.

Years later, a Crown prosecutor saw the same similarities in new sexual assault files. With further investigation, DNA evidence linked a new suspect to the old crimes. Twenty-seven years later, Ivan Henry was acquitted and freed.

The women who testified against Henry were not liars. They were tragically mistaken in the context of traumatic events. Of note, they were not professionally cross-examined during the trial because Mr. Henry wound up representing himself.

How far can – and should – the criminal justice system go in testing the evidence of someone who is, or at the very least believes themselves to be, a sexual assault survivor?

The Nature of a Criminal Trial

Lawyers are required to follow established Codes of Conduct which say this about the role of lawyers as advocates:

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.

For survivor advocates, this quote may seem to ignore the reality of the harm caused by sexual violence. That is not the harm the criminal trial process is intended to address. It is a misconception that criminal trials are about witnesses. A criminal trial is not *for* victims.

The criminal trial process is centered on preventing the horrifying tragedy of locking up an innocent person in jail for 27 years. It is designed to ensure that if the most extreme power of the state – a denial of freedom and branding as a criminal – is used against a citizen, it is done only where we have used a process that is as fair as possible.

If the trial process determines a person guilty, the justice system, through sentencing, considers the effects of a crime on victims and society in general. At this stage victims can provide personal details through Victim Impact Statements and the Crown speaks for the public about the impacts of the offence. At the same time, the fact that there is a unique individual being sentenced remains central to ensure that a sentence is just and not focused exclusively on retribution or revenge.

Procedural Rights and Protections worth Fighting For

An accused person has protected rights at trial because there has been a deliberate migration away from a Dickensian time where people could find themselves in jail for being on the wrong side of those in power. Our constitutionally protected package of criminal justice rights grew out of a system where an accusation by the wrong person was as good as a conviction. The word of a priest, sheriff or politician was often taken at greater value than that of a baker or cobbler, let alone that of a debtor or a woman. A presumption of truth in favour of any one class of person or group is not justice.

The presumption of innocence and the burden of proof on the state protects us from state persecution by placing an obligation on the state to gather adequate evidence for impartial evaluation. The requirement for the state to prove a charge that it (not a witness) has laid on the high standard of proof beyond a reasonable doubt eliminates the opportunity for persons of power or stature to dictate who can be imprisoned. The standard of beyond a reasonable doubt does not demand certainty, which would often be impossible, but it is much closer to certainty than probability.

The purpose of a criminal trial is for an impartial judge to decide whether a Crown prosecutor has presented sufficient evidence, legally collected, to leave them with no reasonable doubt that a person otherwise presumed innocent is guilty of a crime.

There are other protections for complainants in a sexual assault trial. First, the definition of consent is based on the subjective perception of the complainant. When a witness says that in his or her mind she did not consent to an act, then that is evidence of non-consent. Second, witnesses may have the option to give their evidence outside the courtroom via closed circuit television, behind a screen or with a support person sitting beside them.

Of note, given the public destruction that can result from a sexual assault accusation, a great many accused would like nothing more than a non-public courtroom. The history of open courtrooms was meant to prevent the harm of such powerful decisions being done without the opportunity for public scrutiny.

The Role of the Defence

A defence lawyer plays a key role in this system. The defence lawyer is often the only person standing beside a person accused. That person has been detained, arrested, charged, often interrogated, sometimes deprived of their freedom and is facing an accusation supported by a police force who have gathered evidence against him or her and the powers of the Crown to prosecute. It has been my experience that most accused, including well-educated and outwardly sophisticated individuals, are overwhelmed and intimidated.

The individual accused is not left to advocate. The defence assists in explaining and preserving the rights of all citizens. The defence is critical in testing the prosecution's evidence in order to ensure that only evidence gathered fairly according to law is used in a criminal trial. The defence works to ensure that only where the evidence meets the burden of *beyond a reasonable doubt* will a person be convicted.

Lies or Mistakes

Failing to meet the standard of beyond a reasonable doubt does not necessarily mean that a witness was lying. It may mean that there is too great a possibility that a witness was mistaken. Or it may mean that although a witness appears sincere, there is too great a possibility that their memory or perception is not sufficiently reliable to meet the standard.

What is more contentious is the extent to which a lawyer can pursue questioning of a complainant while remaining courteous in the courtroom.Another common outcome in a sexual assault trial is that the judge does not know who to believe. Again, that is very different from saying that she or he does not believe a victim. All we are able to discern is what each person credibly believes about what occurred. This is surely unsatisfying for a victim who feels violated. It is also not a basis on which to convict someone of a serious criminal offence.

But why does the accused get to sit in court and answer nothing? Recall that a trial is not about a witness. It is about the prosecution of the accused. In that context, the accused's right to silence tries to level the tremendous power imbalance between an individual citizen and the powers of the state. We do not demand that citizens prosecute or incriminate themselves.

Whacking the Complainant

Defence lawyers are required by our Code of Conduct to be more than advocates without restraint. We must advocate by "fair and honourable means, without illegality" while "maintaining dignity, decorum and courtesy."

This includes advocating within the bounds of the laws that evolved to remove erroneous stereotypes about gender and sexuality. For example, defence counsel cannot ask a complainant about any sexual activity, consensual or otherwise, with the accused or anyone else, without prior permission from the court. That permission will not be granted if the defence lawyer's only purpose is to suggest that the complainant is inherently less credible or presumptively more likely to consent because of some sexual activity other than the incident at issue.

Lawyers must challenge a complainant with their client's core defence. Lawyers are required by law to give every witness a fair opportunity to respond to the basic premise on which their evidence is being challenged. If the accused's defence is one of consent, a defence lawyer is *obliged* to put this to the complainant. If the defence is a denial, then similarly, a defence lawyer is *required* to suggest to the complainant that what they have said is false or completely mistaken. The rationale is that it allows the other side to provide a response. In practice, this confrontation will be, at best, uncomfortable.

What is more contentious is the extent to which a lawyer can pursue questioning of a complainant while remaining courteous in the courtroom. Some lawyers, like people in any interpersonal context, use vinegar while others use honey to achieve strategic purposes. The Crown can, and does, object when questions become irrelevant, which might include questions clearly meant only to demean a witness. It is also the role of a judge to control the decorum in a courtroom.

Like any -rganized and -un system, our criminal justice system is subject to continuing improvements. To the extent that society's views on gender and sexuality evolve, so too should our justice system. Similarly, as our understanding of human perception and memory improve, our ability to evaluate memory will become better attuned. This will ensure that people who have been victimized get effective support and only those society is certain are responsible for a crime are convicted.

Solitary Confinement: “Abandon Every Hope, Ye who Enter”

By Stephanie Jansen

“Abandon every hope, ye who enter”
DANTE

In 2003, an artist named Jackie Sumell created a project that rebuilt an Angola inmate’s tiny 6×9 foot cell where he spent 41 years in solitary confinement. The cell toured the United States for the sole purpose of raising awareness about solitary confinement. Herman’s case became an example of a not-so-unusual practice in American prisons; inmates were spending reprehensible amounts of time in solitary confinement. An immediate and somewhat stereotypical reaction is to suggest that this is a predictable punishment characteristic of the United States, and naturally, Canada would never permit such inhumane conditions for our prisoners.

Think again.

Canada’s record is becoming increasingly tarnished, and if we care at all about human rights, our collective focus ought to shift to face this concern. Just as the death penalty became untenable in Canada, solitary confinement is becoming an issue of deep moral and ethical concern.

To support this, the United Nations Committee Against Torture, which is an international commission responsible for confirming compliance with the *UN Convention Against Torture,* has unequivocally singled out and condemned Canada’s use of solitary confinement. It specifically instructed Canada to limit the use of solitary confinement and abolish the use of solitary confinement for persons with serious or acute mental illness. Considering that the United Nations has declared solitary confinement to

be an actual method of torture, we ought to all be sitting up in attention and considering how and why it is used in our prisons.

The use of solitary confinement and the lack of regulatory oversight is a primary concern for many Canadian prison advocates. They recognize it as the most severe and depriving form of incarceration that the state can legally administer in Canada. They warn that it is significantly overused, primarily to manage mentally ill, suicidal and self-injurious inmates. More often than ever, solitary confinement is being used to handle prisoners with mental health problems, and the number of inmates experiencing this is growing at a very concerning rate. Additionally, Aboriginal prisoners are placed in segregation at a rate that is unbalanced to the general prison population. In women's prisons, most of the women who experience long periods of segregation are Aboriginal.

The use of segregation in Canada is multi-faceted, but can be reduced to two primary methods:

Disciplinary Segregation, which is used as punishment when a prisoner is found guilty of committing a serious disciplinary offence within the prison. The prisoner is "sentenced" to a period of disciplinary segregation after a hearing before an independent adjudicative body. Disciplinary segregation is limited to 30 days unless there are multiple convictions, when it is then capped at 45 consecutive days.

Administrative Segregation, is used to separate a prisoner from the general prison population for safety or security reasons. With administrative segregation, there is no hearing before an independent body. An individual is placed into solitary confinement based solely on the finding of the "institutional head" that the prisoner's presence in the general prison population is a risk to security or safety. Risk to safety can mean both the risk posed by the prisoner, and risk to the prisoner's own safety. Significantly, there is no limit on the amount of time a prisoner may be held in administrative segregation.

The limits surrounding punishment once a person becomes an inmate are troublesome because the limits operate on a continuum, with little to no oversight. Unfortunately, solitary confinement as a punishment becomes a prison within a prison. In its most extreme cases, some conditions and policies include:

- confinement behind a solid steel door for 22 to 24 hours a day;
- severely limited contact with other human beings;
- infrequent phone calls and rare non-contact family visits;
- extremely limited access to rehabilitative or educational programming;
- grossly inadequate medical and mental health treatment;
- restricted reading material and personal property;
- physical torture such as hog-tying, restraint chairs, forced cell extraction;
- "no-touch torture," such as sensory deprivation, permanent bright lighting, extreme temperatures, and forced insomnia;
- chemical torture, such as stun grenades and stun guns; and

- sexual intimidation and other forms of brutality and humiliation.

“Administrative Segregation” in particular, raises concerns. The nexus of disciplinary and administrative powers that are granted to correctional officers is problematic. With little to no oversight, prison administrations are able to act as independent bodies, running their own fiefdoms. With no supervision governing decisions and the use of discretionary powers, administrations are able to contravene what outsiders might would consider to be reasonable limits. This can result in inappropriate and perhaps borderline immoral actions against inmates.

In 2012 an essay entitled, “The Ten Masks of Administrative Evil” was published. The premise was that there are two primary definitions of Administrative Evil. The first: “when an organization needs individuals to accept lower ethical standards rather than higher standards,” and the second: “instances in which humans knowingly and deliberately inflict pain and suffering on other human beings.”

It could be argued that both types of evils inform the realm of whom to segregate and for how long. Examples where lower ethical standards diminish self-reflection could be applied to the correctional system’s disregard for the human rights of prisoners. There are procedures in place to facilitate the process of placing someone in solitary confinement, but the availability of clear, explicit drafting of administrative guidelines is largely absent, and generally secretive. The use of discretionary powers can be arbitrary, broad and vague. Once people enter into correctional authority, rights disappear, and practices that would otherwise be improper become the norm. Segregation becomes a permissible tactic in spite of its obvious problems.

Society may feel that punishment has no limits once a person is in jail, serving a sentence, but should there be open-ended and largely veiled powers from within that operate with impunity?

Prison administrations work on the perspective that segregation is a calculated solution to a specific problem, which is poor inmate behaviour. The cost of this perspective is that the use of discretionary and arbitrary powers can lead to extremely damaging results.If we are isolating people who are already suffering, consider some of the outcomes of segregation:

- visual and auditory hallucinations;
- hypersensitivity to noise and touch;
- insomnia and paranoia;
- uncontrollable feelings of rage and fear;
- distortions of time and perception;
- increased risk of suicide; and
- post-traumatic stress disorder (PTSD)

Correctional discretionary powers are particularly problematical because of the nature of law enforcement culture and the values that inform its decision-making. In essence, this creates the

quintessential bubble that knows no external penetration. But from outside of this bubble, the use of administrative segregation by Canada's correctional services offends our perception of justice.

It is time for an intervention. Certainly, the United Nations Committee against Torture thinks so. And, fortunately, the Correctional Investigator of Canada is strongly advocating for legislative changes to be put in place to protect our most vulnerable inmates. Hopefully, we will see some profound changes in the near future, and as a result, Canada can seize the opportunity for reform.

Looking at Mental Health Courts: Should Alberta Pursue Them?

By Nicole Trach and Dr. Austin Mardon

The case of Donald Kushniruk was a tragedy, and it was a tragedy that could have been avoided with due diligence by the proper authorities. A man with no criminal record who had committed a minor crime, which ultimately led to a sentence of just seven days, spent more than two years in jail waiting for trial. Mr. Kushniruk opted to represent himself, and while the court appointed a lawyer to help him, it further compounded the problems. Neither he nor his lawyer applied for bail. His trial was afflicted with many difficulties, and delays were encountered throughout, serving only to prolong it. Sometime after he had served his seven days in custody and was released, he got into a disagreement with his probation officer and was remanded back into custody. Two weeks later he committed suicide. His story is a prominent example of why Alberta's criminal justice system needs to look into how better to handle cases involving accused persons who are mentally ill.

A myriad of reasons exist as to why Alberta should be looking into alternatives to the traditional criminal justice system when it comes to accused persons with mental illness. The facts are obvious when we assess how overburdened the criminal courts are. Court professionals, as well as mental health professionals, have commented on how the current court process and incarceration facilities are not equipped to offer support that is adequate for persons with mental health needs. There has also been the argument of an upward trend of criminalizing the mentally ill which may be in part due to de-institutionalization of mental health care. The alternative that has captured the most attention because of its explosion of popularity all over the United States and Canada are the mental health courts. There are many arguments both for and against these specialized courts that have surfaced over their considerably short lifespan since their establishment elsewhere.

Alberta is one of the few places left in Canada where there is no specialized court or diversionary process. There are currently eight provinces or territories in Canada that operate some version of mental health court or at least a diversionary program. Newfoundland, Nova Scotia, Quebec, Ontario, Manitoba, Saskatchewan, Yukon, and the Northwest Territories all have some form of court diversion for accused persons with mental health issues. New Brunswick had a mental health court from 2003 to

2013, and it is looking into reopening it. It stands to reason that if so many places in Canada already operate them, some for over a decade such as Ontario, that there must be a solid principle behind them.

The mental health courts represent a way to significantly benefit all of the involved parties. The accused person is given far more autonomy and respect from the mental health court processes and the court professionals by way of having more of a voice for themselves. They also deal with staff who have the specialized training necessary to facilitate a better understanding of their needs. Through this, they are also given the freedom of choice between the specialized court or the criminal courts in how they would like to proceed with their case. The accused also gets more responsibility in the mental health court in that they assume more control over their rehabilitation and treatment when they work together with professionals to create a plan for moving forward. It has been suggested that their engagement in treatment planning leads to more positive outcomes as well.

Through mental health courts, individuals with mental health issues are able to be connected with better access to mental health services and treatments if they are to come into contact with the criminal justice system instead of simply being punished and not being able to get the help that they may desperately need.

Perhaps they may be given treatment that is more effective or accessible than what their options had been prior to coming into contact with the courts. Some treatment options may not have been known to the person before they had the help of a mental health specialist through mental health courts.

The collaborative nature of mental health courts is also beneficial to the accused person in that it promotes a focus on treatment rather than punishment. It takes out the adversarial nature of traditional courts and instead, all parties involved work towards getting the individual help for their mental illnesses. In this way, it is easy to infer that mental health courts seek to better individuals on a big-picture basis, instead of narrowing it down to the criminal case before them.

Looking at the apprehensions surrounding mental health courts is also important when weighing in on the issue. There have been concerns raised that the nature of the courts doesn't give the defence counsel sufficient time to properly prepare and inform clients of the legal implications and what exactly they are agreeing to in exchange for taking part in the programs. It should be of utmost importance that agreement is reached through informed consent in the interest of ethics and transparency.

This also leads into the debate of whether or not participation in these courts is truly voluntary. When the choice comes down to risking the traditional trial and sentencing procedures versus taking part in the program of the mental health courts, it likely doesn't come across as a real choice for some individuals. Additionally, by agreeing to take part in the program, the accused person is also agreeing to whatever treatment the court decides without objection. These courts are also not an option for those who want to contest their charges.

Part of the aim of mental health courts is to reduce the stigma, visibility and criminalization of the mentally ill. If there is an entirely separate court devoted to that, it may not actually address these issues. it could potentially end up doing the opposite by targeting that specific population and thereby labelling them as being separate from the general population.

It should also be considered that some may see the mental health courts and their programs and treatment options as the best, if not the only, way to receive proper care in some instances. If that idea were to perpetuate, it would create a slippery slope in a belief that coming into contact with the criminal justice system and subsequent diversion into mental health courts is an option to take to get help.

The main problem when it comes to the mental health courts is that there still does not seem to be enough data on their effectiveness. In the cases where they are seemingly working, there hasn't been much investigation into why they are successful. This allows for questioning if they work because treating mental health needs reduces the recidivism rates, which is defined as a relapse into criminal behavior, or whether there is some other explanation involved.

There is also the issue of proportionality. Do the accused persons spend an equal amount of time in the programs of the specialized courts comparative to what a criminal court would sentence? Maybe it should be entertained that instead of creating separate court systems of specialists, we gradually work to ensure that everyone within the traditional courts receive the training to properly handle any case that comes before them. This would ensure that all courts have the support measures in place for any accused who may qualify.

With all of this in mind, mental health courts are an opportunity for people who come into contact with the criminal justice system to better their lives and make a difference going forward. They can reduce the chances of accused persons with mental health issues possibly continuing along the same path that brought them there in the first place. The potential drawbacks may seem daunting, but it is important to note that they are mostly hypothetical issues, while the benefits to the participants in mental health courts have already been tangibly observed.

Legalizing Marijuana Use in Canada: Some Concerns

By Hasna Shireen

The possession of marijuana in Canada is unlawful under the *Controlled Drugs and Substances Act*, SC 1996, c 19 (*CDSA*), but the use of marijuana is legalized for medical purposes under the *Marijuana for Medical Purposes Regulations*, SOR/2013-119 ("*MMPR*"). However, as far back as 2013, Canada's Liberal Party expressed its intention to legalize marijuana use for recreational purposes. After winning the election in 2015, the current federal government has stated that it intends to legalize marijuana use for recreational purposes within the next year. This article discusses the main potential concerns regarding the decision to broaden the legalized use of marijuana.

Decriminalization of the possession of marijuana

The possession of marijuana in Canada is currently unlawful under the *CDSA*. The Canadian government is expected to introduce legislation to legalize it next spring, but has no plans to decriminalize the drug before the new regulatory regime replaces the existing laws. This can become a delicate territory because a person can be criminally charged for possessing a small quantity of marijuana if there is no exception made within the law as it now exists. NDP Member of Parliament Murray Rankin observed that "the legalization of marijuana could take two years to come into effect, leaving many Canadians — especially young adults — at risk of criminal records for something the government does not believe should be a crime". But former Toronto Police Chief and Parliamentary Secretary to the Minister of Justice Bill Blair has stated that the federal government does not intend to decriminalize the possession of marijuana in advance of a new law.

The government, along with many politicians, interest groups and experts, raised two major concerns regarding the decriminalization of marijuana:

- preventing access by minors; and
- ensuring the quality of marijuana products.

Mr. Blair has stated that decriminalization would "create opportunities for organized crime and put our children at risk'' Attorney General Jody Wilson-Raybould voiced similar concerns on potential rise of organized crime, noting that decriminalization would result in giving: "a green light to dealers and criminal organizations to continue to sell unregulated and unsafe marijuana to Canadians". But the most vulnerable group in this situation is the fairly large number of young adults who may encounter criminal charges for possession of marijuana. The federal government should be aware of this issue and develop mechanisms to address it within the existing law.

The fear of legalizing recreational marijuana use is not unprecedented. When Colorado was undergoing the process of legalization, opponents anticipated serious health consequences for recreational users. David Blake and Jack Finlaw, in a *Harvard Law and Policy Review* article entitled "Marijuana Legalization in Colorado: Learned Lessons" noted that opponents to legalization argued that it would result in increased consumption, higher addiction rates, and increased treatment and societal costs, including the need for drug treatment and prevention programs, emergency room visits, increased crime, health care, traffic accidents, school dropout rates, etc. Opponents also claimed that marijuana is a gateway drug, and suggested that Colorado would witness increased use of more dangerous substances, especially within the youth population. They worried that regular marijuana use by school-aged children would negatively affect their school attendance, concentration, and brain development, thus impairing their academic achievement. Colorado's experience with legalizing marijuana should be cautiously examined by Canada's federal government so that Canada can avoid some of these potential problems.

The production and sale of legal Marijuana

The *MMPR* has very strict provisions on the production and distribution of medical marijuana. These stringent regulations make it difficult, especially for small companies, to enter the production market. Cost is one of the main hurdles to accessing the medical marijuana market. In recognition of the cost challenges, the Federal Court of Appeal in *Canada v Allard*, 2014 FCA 298 (CanLII) ("*Allard*"), ruled that patients should have the right to grow their own medical marijuana. The *MMPR* was declared invalid to the extent that they unjustifiably prevented patients from growing their own marijuana, thereby infringing their liberty and security interests under Section 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The *Allard* case reassured many Canadians of fair access to medical marijuana.

According to Andrea Hill, writing in the *Globe and Mail*, Licensed Producers (LPs) require tens to a hundred million dollars to set up a market for marijuana sale, while the number of authorized medical users of marijuana in Canada is only sixty thousand or so. The vast investment of capital required is inconsistent with the available purchasing power of those qualified to buy marijuana for medical use. Hill notes that: "the disconnect between the market size and capitalization only makes sense when an exponentially larger purchasing power—such as a public market for recreational marijuana— is assumed to be imminent and licensed producers are thought to be the frontrunners to supply it." She continues: "the market has anticipated from day one that medical patients were not the ultimate destination" (*The Globe and Mail*, Andrea Hill, "Allard decision sets the stage for the future of legal marijuana" online:

http://www.theglobeandmail.com/opinion/allard-decision-sets-the-stage-for-the-future-of-legal-marijuana/article28902163/?ord=1).

Paul Lewin in "The Fight for Cannabis (2016) 41:2 *Law Matters*) argues that in crafting a new marijuana regime, the federal government should be careful to balance the interests of both the patients, and the LPs who intend to make profits with their large capital investment. The LPs are expected to lobby the federal government for a distribution model that only permits them to sell and grow cannabis The Federal Court of Appeal in *Allard* suggested that the federal government consider permitting home-growing and co-operative growing with reasonable regulations ensuring electrical safety and air quality that are often concerns associated with growing cannabis. Blake and Finlaw note that in Colorado both the caregivers and co-operatives are operating beyond the regulated market and are failing to benefit from testing, labeling, or safety checks. They neither pay taxes nor any fees, nor are suspected of regularly diverting their overgrowth to recreational users paying less than the market value, further undermining legitimate businesses and market participants. The drafters of the new marijuana regime for Canada should be aware of these issues.

The issue of jurisdiction

As jurisdiction over various subject matters is divided in Canada between the federal and provincial governments, the federal government will want to maintain jurisdiction over marijuana legalization. Under the *Constitution*, the federal government has exclusive jurisdiction over criminal law and procedure and provincial governments have jurisdiction over property and civil rights. The federal government will be on safe jurisdictional ground if new legislation can be defended under its criminal law power.

Criminal law legislation must have a valid criminal law purpose backed by a prohibition and a penalty: *Reference re Firearms Act (Can.),* 2000 SCC 31 (CanLII) at para 27 ("*Firearms Reference*"; *Reference re the validity of S.5(a) Dairy Industry Act* [1949] SCR 1 *(Margerine Reference*). A valid criminal law purpose must be directed at prohibiting matters that represent an "evil or injurious or undesirable effect upon the public" (*Margarine Reference)*. Purposes such as peace, order, security, health and morality can be recognized as criminal: *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457. The federal government will be able to use its criminal law power to regulate the production, distribution, and consumption of cannabis in order to protect public health. The constitutionality of federal regulations on legal marijuana may turn on the government's ability to demonstrate that uncontrolled distribution and consumption of cannabis is inherently dangerous. To maintain jurisdiction over legalizing marijuana, it will need to introduce this process as an attempt to better mitigate the harms of cannabis in order to protect public health and safety.

Drugged driving

Legal access to recreational marijuana could lead to an increase in impaired driving. Controversy surrounds the "science" of determining when a driver is actively affected by marijuana while operating a motor vehicle. David Blake and Jack Finlaw note that, for years, drugged driving has been prosecuted

based on the expertise and observations of the patrol officers conducting the vehicle stops. The difficulty with a *per se* uniform limit is that marijuana blood content does not dissipate at a consistent rate in most humans. Additionally, residual marijuana can remain in the human body for extended periods of time. The latter issue, however, can be eliminated by testing only for an active psychotropic isomer of tetrahydrocannabinol (commonly referred to as THC) in a suspect's blood. However, Blake and Finlaw point out that tests to determine the amount of active THC in a driver's blood require blood testing, which is far more invasive than the oral breathalyzer test typically used for blood alcohol content. They also note that the key to any drugged driving case remains the probable cause observed by the police officers and subsequent observations of inebriation. Colorado enacted legislation that gave the state and local law enforcement personnel additional tools to prosecute persons driving under the influence of marijuana and is allocating more money for officer training on best practices and new testing equipment. Blake and Finlaw state that Colorado law now provides that if a driver's blood contains five nanograms or more of active THC per milliliter of whole blood, a jury can be infer that the driver was under the influence of one or more drugs However, there is controversy over whether five nanograms of active THC means a person is "high"—although, of course, this is also a problem with alcohol consumption, which affects different people differently over time.

According to Parliamentary Secretary MP Bill Blair, the federal government is promising to tackle the issue of drug-impaired driving before proceeding with marijuana legalization. In 2013, 97 per cent of accidents in Canada relating to impaired driving were alcohol related. The other three per cent were linked to drug consumption. Mr. Blair, said: "It's very difficult to identify and to prove a level of impairment by marijuana," and "We have good tools for alcohol. We do not currently have good tools for cannabis" (thestar.com, "Liberals promising to deal with marijuana threat to road safety", online: https://www.thestar.com/news/canada/2016/08/11/liberals-promising-to-deal-with-marijuana-threat-to-road-safety.html). The federal government should be cognizant of the concerns related to marijuana-impaired driving and allocate scientific research money to investigate marijuana use and related impaired driving consequences. Training police officials to correctly handle marijuana impaired drivers would be prudent. Colorado's experience with legalizing marijuana should be carefully examined so that Canada can avoid some of the pitfalls and employ some of the best practices that were adopted there.

Legal Responses to the Financial Crisis of 2008 in Canada, the U.K. and the U.S.

By Marjun Parcasio

Stock tickers with downward arrows. Index charts and monitors evincing the value lost by public companies and currencies overnight. These were scenes familiar to those who worked on Wall Street, the City, and other global financial centres in 2007 when the financial crisis began in earnest. But beyond the corporate towers of the business sector, the crisis also had a human impact. The queues at bankruptcy court grew longer as more and more individuals received notices of impending layoffs or faced foreclosure of their homes. The word “recession” became normalized in conversations in boardrooms, at dinner tables, and ultimately, in parliaments as legislators moved to address the resulting uncertainty.

If there’s anything that swells the size of the statute book, it’s a financial crisis. Volumes of primary and secondary legislation were enacted to address its repercussions. A brief look at these laws reveals much about the crisis itself, including its perceived causes and the means by which governments attempted to alleviate its impact on their citizens.

Financial regulatory reform

The financial services sector was subject to sweeping reforms, which was particularly significant for firms headquartered in New York and London. In the United States, the *Dodd-Franck Act* survived through numerous revisions in Congress and became law in 2010. Across the Atlantic in the United Kingdom, Parliament passed various bills which include, amongst others, the *Financial Services Act 2012* and the *Financial Services (Banking Reform) Act 2013*. While the primary legislation in both countries set out the general parameters for reform, an explosion of administrative law instruments setting out the

detail of the changes also took place. The resulting legislative landscape is complex, although there are common themes to the reforms enacted in various jurisdictions.

One fundamental concern was addressing systemic risk. The collapse of banks like Lehman Brothers or Northern Rock illustrated how certain triggers could easily have a contagion effect given the interdependency of the financial sector and the broader economy. One issue was that, prior to the crisis, the supervisory infrastructure had been fragmented and ineffective. Regulators had divided responsibility and authority, and a lack of oversight meant that they failed to read the warning signs. Moreover, the development of certain financial products in the shadow banking sector meant that regulators had a blind spot to risky activities in certain investments, which fuelled the crisis. As a result, legislative reforms sought not only to create new bodies to address these previously unregulated financial activities, but also to consolidate various agencies and encourage further co-operation and communication. In the U.S., an overarching body known as the Financial Stability Oversight Council was established to identify systemic risks. New agencies extended government control over mortgage products, insurance and consumer protection. In the U.K., a restructuring of the supervisory infrastructure led to the creation of the Financial Conduct Authority (FCA), succeeding the Financial Services Authority (FSA). While the change from FSA to FCA may at first glance appear to be merely cosmetic, the new FCA is intended to have greater enforcement and policing powers than its predecessor. In addition, the Prudential Regulation Authority was established as a division of the Bank of England, ensuring that banks held sufficient capital and liquidity and promoting the stability of the financial system.

This expansion of government authority was an acknowledgement that there had been insufficient attention to the risk profile of financial institutions. Years of economic liberalism and financial liberalization had resulted in new, complex investments and greater risk-taking, influenced heavily by favourable macroeconomic factors in the years before the crisis. One proposed solution in the U.K. was the introduction of “ringfencing”, which required banks to separate their investment and retail arms. The rationale was that this separation would protect consumers, as it would lessen the impact on the public should there be a failure of the riskier parts of the business. Similarly, the Volcker Rule in the *Dodd-Franck Act* prevented banks from engaging in the trading of certain asset classes such as securities or derivatives, using the same rationale.

In contrast to these jurisdictions, the Canadian response was much more muted when it came to financial regulatory reform. Canadian financial institutions weathered the storm with greater resilience, partly due to the strength of Canada’s banking system. A central regulator, the Office of the Superintendent of Financial Institutions (OSFI), had primary responsibility for oversight, and Canadian banks were subject to strict regulatory requirements concerning capital adequacy and financial instruments. In addition, Canadian institutions relied on a less risky business model compared to their counterparts elsewhere, meaning they were less exposed to toxic assets like mortgage-backed securities.

Fiscal policy measures

Although legislation sought to address the underlying causes of the crisis, there was also a need to address the immediate issues on the ground. Governments announced varying fiscal measures to address concerns about unemployment, decreased appetite and funds available for investment, and increasing pressure on benefits and other social programmes.

A common response was the start of significant deficit spending to stimulate the economy. For example, the Canadian government's Economic Action Plan allocated funds for infrastructure projects and other investments across the country. This public expenditure also had the added effect of promoting job growth to tackle growing rates of unemployment. Both individual and corporate tax rates were cut, and various credits and incentives developed, in order to encourage spending. Expansion of the social safety net was also common. In the U.S., Congress expanded eligibility and funding for entitlement programmes, including unemployment insurance and Medicaid and Medicare. These changes to fiscal policy were enacted to alleviate the impact on citizens who, despite being far removed from the world of corporate banking and finance, suffered from the adverse results of its collapse during the financial crisis.

Looking ahead

The response to the global financial crisis illustrates the dual utility and flexibility of the law: it can be employed both as a tool to constrain (by means of financial regulatory reform) and encourage (by means of fiscal policy) certain behaviour. However, it is too early to tell whether or not the measures adopted are ultimately successful – in fact, a number of the reforms have yet to come into force. There is criticism that the legal reforms are insufficient to address the underlying risks and that the gaps leave much to be desired. Others are wary of the significant public spending which has accompanied the crisis, suggesting that this may well precipitate a further crisis down the line. While many countries are showing promising signs of growth, global economic recovery still is fragile and vulnerable to further shocks. If events such as the Brexit vote in the U.K. are of any indication, the spectre of further legal reform in cases of economic difficulty is still a topical consideration.

How the Economy Influences Bankruptcy and *Vice Versa*

By J. Doug Hoyes

Individuals file for bankruptcy because they are insolvent. Being insolvent means that they owe more than they own, or do not have the ability to repay their debts as they become due. While the underlying factor is debt, what can cause an individual person to become insolvent is often an unexpected life event like a job loss, illness or relationship breakdown.

These personal life events can occur at any time, and as a result there is a base bankruptcy or insolvency rate among Canadians regardless of how well the economy is performing. Over a lifetime, roughly 1 in 6 adult Canadians will declare bankruptcy or a consumer proposal. This rate will vary from time to time, but overall there will always be an underlying level of bankruptcies in the economy.

The annual consumer insolvency rate in Canada in 2015 was 4.3 persons for every 1,000 Canadians, roughly equivalent to the average rate of insolvency experience in Canada over the past 20 years. There are, however, significant swings in this rate that roughly follow economic cycles.

Bankruptcy and the unemployment rate

Unsurprisingly, a growth in the overall insolvency rate reflects a corresponding increase in the unemployment rate. We saw this with the recent increase in insolvency filings in Alberta and Saskatchewan. All oil-dependent provinces, including provinces who sent significant workers to work in the energy-sector in other provinces, saw an increase in bankruptcies as the oil-based economies experienced a downturn.

Having said that, there is not a direct correlation between unemployment and the number of people filing bankruptcy. To understand this, we once again have to look at the individual level. When individuals lose their jobs, the may initially survive on savings. Eventually that runs out and they turn to credit to make ends meet until they can return to work. Once they find a new job, they now find that their debt levels, old debt combined with new, have risen to an amount that they cannot support on their new pay. It's a cycle that for some can only be broken by filing bankruptcy.

It is for this reason that we often see the number of bankruptcies continuing to rise, even after the economy improves and people return to work. That is why we saw the insolvency rate in Canada peak at 5.8 per 1000 in 2009, after the financial crisis began and it remained well above normal through 2010.

Household debt risk factors

As we noted at the beginning, the reason people file bankruptcy is because they have more debt than they can repay. Household and consumer debt levels in Canada have risen steadily over the past two decades. As of June 2016, the average consumer debt-to-income ratio in Canada was 167.63%. In other words, Canadians owed, on average, $1.68 for every dollar of disposable income they earned. Put in perspective, that number is two times what the rate was in 1990. The level of consumer debt accumulation relative to income dipped slightly after the financial crisis of 2008 but has risen relatively steadily since then.

The Bank of Canada has started to sound the alarm about the increased risk of household debt to the Canadian economy. Currently, 8% of households in Canada have a debt-to-income ratio of more than 350% of their gross income. This is twice the rate that was experienced prior to the 2008 recession. We know that insolvency rates will rise following an economic downturn and increased unemployment. What is of concern is the increased percentage of heavily levered consumers now compared with debt levels pre-1998. It is highly likely, given this added stress factor, that the next major economic downturn in Canada will see an insolvency rate much higher than experienced even following the 2008 crash.

Real estate and mortgages

Depending on who you listen to, increased household debt is either a concern or not. Much of the growth in household debt in recent years has been driven by mortgage growth. A hot real estate market has resulted in higher home prices, and as a result, equity values have increased. However, higher home prices have led to even higher mortgages. A bi-annual study of consumer bankruptcies by my firm, Hoyes Michalos & Associates Inc., consistently shows that a high ratio mortgage is a significant bankruptcy risk factor. The average insolvent homeowner has a mortgage ratio of 90%. Combined with other debt, this becomes a financial burden that cannot be repaid if there is even the slightest change in financial circumstances.

Rapidly rising house prices also have an impact on the types of debt relief options available to debtors. If an insolvent debtor has equity in their home, they are more like to file a consumer proposal. In a consumer proposal, an insolvent debtor makes a settlement offer to their creditors based, in part, on the equity value that may be lost if they were to file for bankruptcy. In the event that their home value rises above their other unsecured debt, debt consolidation through a home equity loan becomes a viable option, temporarily reducing the overall insolvency rate. This cycle is, of course, reversed as housing prices fall. Consumers may now find themselves insolvent as their equity will no longer cover all of their debts. Bankruptcies may rise relative to consumer proposals as homeowners walk away from

homes that are worth less than their mortgages. This is exactly the scenario we saw in the United States in 2008.

Interest rate risk

We have experienced an unprecedented period of low interest rates in Canada, driving much of the growth in consumer credit and mortgage debt. A lower interest rate results in a lower monthly payment, enabling the individual consumer to carry more debt. Again, according to the Bank of Canada, Canadians on average are spending more than 14% of their disposable income on debt payments, including principal. Any slight increase in interest rates will significantly increase this burden. Consider a mortgage of $500,000 at 2.5% with a 20-year amortization. That results in a monthly mortgage payment of roughly $2,646. An increase of just 0.25% increases that payment by $61 per month. The Canadian Payroll Association recently reported that 40% of Canadians admit to spending an amount equal to all or more of their net pay each week. Given this, even a slight increase in interest rates is likely to have a dramatic impact on the number of insolvencies in Canada.

The availability of credit

It is ironic that when you need credit you cannot get credit, and when you do not need credit it's fairly free flowing. That is true not only at the individual level but for the economy as a whole and this is one other economic factor affecting the cycle of consumer bankruptcies.

During an economic downturn, as the unemployment rate rises, individuals turn to credit as an alternative means of support. Credit card debt increases, lines of credit usage rates grow, the use of payday loans rises. However, as the cycle worsens, delinquency rates begin to rise. In reaction, banks and financial institutions tighten credit. No longer able to get credit to keep up with existing debt payments, insolvent debtors file for insolvency and the rate of insolvencies increase.

Bankruptcy as safety valve

Consumer bankruptcy is a necessary safety valve for Canadian society and the economy as a whole. In fact, the underlying principle behind the *Bankruptcy & Insolvency Act* is to provide a fresh start for the honest but unfortunate debtor. Without the bankruptcy process designed to extinguish unpayable debt, individuals would not have the opportunity for a fresh start, and it is that fresh start that allows lenders to lend again to previously insolvent debtors. This renewal is part and parcel of the recovery process needed after each negative period in an economic cycle.

Paying Other People's Taxes

By Hugh Neilson

Keeping up with our tax obligations is challenging when times are good, and even more so when the economy turns. Painful though it is to manage our own tax obligations, becoming liable for taxes actually payable by other people can cause even greater distress.

The Canada Revenue Agency (CRA) has amazingly broad collections powers bestowed upon it by the government, and it is in no way shy about using them.

Directors' Liability

Many of us are asked to serve as directors of incorporated entities, whether for profitable corporations or non-profit entities like charities. Such service does not come without responsibilities, and the wise director will ensure they understand these obligations.

The CRA can collect GST/HST and source deduction arrears from directors where the legal entity they oversee fails to remit them. These are considered "trust funds", in that the organization collects them from third parties (clients or employees) on behalf of the government – they are not the organization's own funds.

Especially in times of financial challenge, it is all too tempting to prioritize payments to other creditors, such as suppliers and staff whose continued goodwill is vital to business continuing. While most business people will recognize that penalty and interest charges can result, the potential for personal liability is often a surprise to directors.

Defending oneself against such a claim can be challenging. Before assessing a director, the CRA is required to execute a Writ of Seizure and Sale against the corporation in court. Some cases have failed because the CRA could not demonstrate this had been done.

Often, the defence for directors is limited to establishing that they exercised due diligence to ensure these amounts were remitted in timely fashion. The courts have set this standard fairly high. For example:

- the belief and intention, however heartfelt, that a shortfall will be made up at a later date will not protect the director. The courts have held (for example, in the *Maxwell* case, 2015 TCC 74) that the director is required to take steps to prevent failure to remit these amounts, not just to make up for shortfalls later in the expectation that funds will become available.
- one director's reliance on another director active in the business is not sufficient, especially when he had previously received correspondence indicating source deductions were in arrears – the court held that a reasonable person would take independent steps to verify remittances were made (*Helgeson,* 2016 TCC 114).
- a director was not liable when he requested financial information and took other steps to ensure the financial health of the corporation, but was intentionally deceived by others involved in the business.(*Thistle*; 2015 TCC 149).
- similarly, a director placing trust in a manager where there is no reason to doubt that person's competence or honesty may be due diligence (*Attia*, 2014 TCC 48, and *Roitelman,* 2014 TCC 139).
- an employee who accepted a directorship under pressure by her employer, but had no power to influence remittances to CRA was not liable (*Qian*, 2013 TCC 386).

The CRA must issue assessments no more than two years after an individual ceases to be a director. The writer has personally experienced a case where a director obtained a copy of the list of directors from corporate registry (including himself), resigned, and obtained a listing, a week later, showing he was no longer a director. While never assessed by CRA, he was contacted and threatened with an assessment.

In some cases, the timing of a resignation is challenging to prove. For example, the bankruptcy of an underlying corporation does not mean a directorship ends. (*Jobin*, 2014 TCC 326). The CRA can revive corporations to issue assessments.

The courts have exonerated individuals who were listed as directors, but never actually accepted the office (*Macdonald*, 2014 TCC 308). By contrast, a formal resignation while continuing to act as a director resulted in the individual remaining liable as a *de facto* director *(McDonald*, 2014 TCC 315).

The courts are unsympathetic to individuals who become directors of organizations for the benefit of others, often family members. For example, in a case where the spouses of the business owners and operators were named as directors on incorporation, but later advised legal counsel they wished to

resign, but did not complete the resignations, they were still liable (*Chriss & Gariepy*, 2016 FCA 236). Similarly, the 23-year-old son of a business principal who took on a directorship was not protected from liability (*Whissell,* 2014 TCC 350).

Directors should be conscious of their obligations, and ensure that their organizations have proper processes to remain current with their GST/HST and employer obligations. Even where the directors were ultimately not liable, they incurred the costs and stress of CRA assessments and court appeals.

Transfers from Non-Arms-Length Parties

Two provisions which provide the CRA with significant collection powers are the *Income Tax Act* Section 160 and the *Excise Tax Act* Section 325. These provisions allow the CRA to collect income taxes and GST/HST from a person to whom the actual tax debtor transfers assets. The taxes must be owing at the time of the transfer, but need not be assessed, so this can apply even where the parties are all unaware that anyone owes taxes.

The rule only applies to transfers between persons not acting at arm's length, which includes all related parties (including parents, children, spouses and siblings). To the extent that the recipient of the property paid less than fair market value for assets received, the transferor's taxes become the recipient's debt.

For example, assume Tony and Tina are married. They own their home, worth $500,000, jointly. Tina owes taxes, and transfers her half-interest in the house to Tony. She has also effectively transferred liability for her taxes, up to the $250,000 value of her half-interest.

If there was a $350,000 mortgage on the house, Tony's assumption of half of the mortgage is partial consideration for Tina's interest, so he only received $75,000 (half of the house, $250,000, minus half the mortgage, $175,000), so he only becomes liable for $75,000 of Tina's taxes.

The breadth of this provision can be frightening. Some examples include:

- a taxpayer's widow was liable for his taxes to the extent of RRSP funds she received on his death (*Kuchta*, 2015 TCC 289).
- A corporation transferred assets to a second corporation, so its tax debt transferred as well. The second corporation paid dividends to a related individual, which also transferred the tax debt to that individual *(Lupien*, 2016 TCC 2).
- A medical doctor directed health care revenues to a joint account from which his wife made payments. She was liable for his taxes. Payment of their joint household expenses did not reduce the transfer, but payment of the husband's business expenses could be a form of consideration, and reduce the amount (*Klundert*, 2016 TCC 160).

- A transfer in settlement of matrimonial property rights is exempt from this liability. However, earlier transfers during the marriage can still attract liability which continues after the parties are divorced (*Sokolowski Romar*, 2013 FCA 10).
- Repaying the transferor does not reverse liability – where an individual allowed her common-law spouse to deposit funds to her bank account, then returned the funds to him, she was still liable for his tax debts up to the amounts deposited (*McDonald;* 2015 TCC 73).
- Similarly, where funds were deposited by a tax debtor to an account owned by a corporation controlled by a business acquaintance, then paid out to the tax debtor, the corporation was liable for the tax debtor`s taxes owing to the extent of funds which had flowed through its bank accounts (*9101-2310 Quebec Inc*., 2013 FCA 241).

Unlike the directors' liability provisions, there is no time deadline for a S. 160 assessment – these assessments are often made many years after the asset transfer.

Put Them Together

As powerful as these collections abilities are separately, they become even more problematic in combination. Where a director was assessed for a corporation's unremitted GST/HST, and then transferred cash and other assets to her husband, she was assessed for directors' liability, after which her husband was assessed under Section 160 (*Benaroch*, 2015 TCC 93). In this case, however, the CRA could not demonstrate it had filed the required Writ, so both assessments were invalid.

What if the Taxes are Wrong?

Several court cases have held that the director or property recipient can challenge the underlying taxes assessed to the person who originally owed the tax. Often, the original taxpayer was insolvent and may not have challenged an excessive assessment. However, this requires obtaining information from the initial taxpayer, which may be challenging depending on how closely connected the parties are. Records may also have been lost or destroyed with the passage of time.

Overall

The CRA's reach as the tax collector for the citizens of Canada is long, and they have powerful collection tools at its disposal. Caution should be exercised to ensure that you, as a director, don't become liable for someone else's tax bills, in addition to your own.

Business Succession Planning is an Investment in the Future

By Mark Borkowski

Canadians are aging and Canadian entrepreneurs are aging even faster. According to the Canadian Venture Capital and Private Equity Association, over the next 12 years, more than half of the country's medium sized business owners are expected to retire. General industry is expected that more than 56% will need to retire in less than nine years.

An estimated trillion dollars in business assets are expected to change hands over the next decade, representing the largest turnover of economic control in generations. This comes at a time when markets are in turmoil and the economy is challenged. Yet, most owner-operators feel that it is too early to plan for business succession. Many mid-market family business owners are underestimating the challenging issues they will have to address, the time it will take to address them, and the emotional decisions they might have to make. The majority of business owners have not even started to discuss their exit plans with their family members, lawyers, accountants or business partners.

Those statistics are unfortunate, and the apparent lack of preparation could backfire on some business owners. Succession planning should be a deliberate process and not a one-time event. Business owners should realize that the best time to plan is when you can afford the time to properly evaluate alternatives and seek input from professional advisors. Owners ideally never want to be forced to accelerate their succession planning.

Business succession planning is an investment in the future of their company for the owners, employees and customers. Planning is the key to future success for everyone whose efforts have helped the business to grow. The existence of a succession plan emphasizes commitment to a company's long-term growth, and creates confidence among shareholders, lenders, employees and suppliers about the future of the business.

So have you been putting off succession planning for your business? There is no time like the present to explore your options. This process will involve asking some tough questions and exploring scenarios that may not please all family members, shareholders, managers or employees.

Do you want to sell the entire company in due course? Do you want to sell some now and complete the rest of your liquidity later? Is it important to you that ownership remain with family members or managers? Do you want them to have control or just minority equity participation alongside a new owner?

The first step should be to have a professional business valuation firm prepare an assessment of the value of your company. It is important for the business owner to be realistic with respect to valuation expectations, or a lot of time will be wasted. Accountants and lawyers should be involved in estate planning and tax matters

Answering these questions posed can be time consuming and should not be rushed. Most owners and, in fact, most businesses are not ready for the sale process to begin immediately. The valuation and business review process often indicate that some issues of management depth, capital structure and profitability should be addressed before proceeding, not only to support valuation expectations, but also to have a more saleable business.

That is why many owners find a gradual exit less alarming than an immediate one. If you can prudently diversify the family net worth by taking some chips off the table now, you can better plan for the sale of the rest of the company, and probably at an improved valuation.
This also generally leads to a smoother transition, and gives the owner a better chance to evaluate next generation managers, to transfer business relationships and responsibilities, and to identify and manage risks that a strategic buyer will consider down the road.

Most family business owners don’t build their businesses with selling them as a top priority, but more should. This involves drafting a written strategic plan for the future priorities and direction of their business, and putting in place next generation management so the business can grow and prosper without them.

Following these steps and starting succession planning early will ensure an effective process, with due consideration given to the range of issues and emotions that family business owners usually face.

Bankruptcy, Insolvency and Receivership
November 4, 2016 By Peter Bowal

Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the Bankruptcy and Insolvency Act. *The* BIA *offers a self-contained legal regime providing for both reorganization and liquidation. It is characterized by a rules-based approach to proceedings. The* BIA *is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the* BIA *contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.*

– *Century Services Inc. v. Canada, 2010 SCC 60 (CanLII)*

Bankruptcy, insolvency, receivership and liquidation are complicated concepts that come to bear during financial distress. They are bound to be confusing, especially since there are different processes for corporations and individuals which can both make proposals and arrangements. Some aspects are contractual, some are common law and yet others are statutory where the applicable legislation can be federal or provincial.

This article provides a short tour through these concepts.

Federal or Provincial Law?

The federal government legislates on "bankruptcy and insolvency". It has done so through two main statutes: the *Bankruptcy and Insolvency Act* ("*Bankruptcy BIA"),* under which debtors can be reorganized or liquidated and see most or all of their debts discharged, and the *Companies' Creditors Arrangement Act* ("*CCAA*") which oversees reorganization of companies with debts over $5,000,000. It is similar to Chapter 11 of the U.S. *Bankruptcy Code.*

Provincial governments have enacted personal property security legislation to deal with the rights of secured creditors. Provincial Rules of Court allow judges to appoint receivers and managers.

Insolvency

Insolvency is a financial state where one is unable to meet one's obligations generally as they become due. This is also called equity insolvency and may reflect an income or cash flow problem. Balance sheet insolvency is where liabilities exceed the value of its assets.

By contrast, receivership and bankruptcy are legal statuses that may flow from insolvency where a receiver or trustee in bankruptcy is appointed to take over one's property which may be sold and the proceeds distributed to creditors. Alternatively, insolvent businesses and individuals may have their debt restructured through an agreed proposal with their creditors.

Receivership

Receivership means being under the control of a receiver. When a business borrows money, it may agree to permit a receiver to be appointed if it defaults on the debt. The lender will demand this security before it will lend the money. The receiver tries to generate value from the assets to pay the secured creditor what it is owed.

Licensed trustees and receivers may be court appointed or privately by the secured creditor. The receiver takes control of the property, oversees the liquidation and distributes the proceeds according to the priorities established by law. The loan documentation allows the receiver to also manage the business or assets to obtain a better financial return.

Privately-appointed receivers serve the secured creditor that appointed them and will deal with assets covered by the loan agreement. Court-appointed receivers are officers of the Court and serve all creditors with powers from the Court order. The costs are much higher and the secured creditor has far less control over the process. Receivers must report to all creditors on what they have done.

Bankruptcy

Bankruptcy is a legal status. Its process may **discharge a debtor** from most **debts**. Honest debtors should get a chance for a fresh start.

There are three different ways to be bankrupt. Insolvent persons may "assign" all their assets for the general benefit of all creditors. One may be **involuntarily "**petitioned" into bankruptcy by a creditor owed more than $1,000.00 unsecured who says the debtor has "committed an act of bankruptcy" such as failure to pay its debts. Or a debtor failed to get consent for, or comply with, a proposal. This is called a "deemed" bankruptcy.

A trustee is automatically appointed to liquidate the assets so the creditors can recover as much as possible of what they are owed in a fair and orderly manner. Possessions that the bankrupt can keep

vary in each province but generally include clothing for the bankrupt and dependents, household furnishings and appliances worth up to $4,000.00, a motor vehicle worth up to $5,000.00, tools worth up to $10,000.00 used to earn income, medical and dental aids used by the family, and very modest equity in the bankrupt's principal residence. Bankrupts can continue to work and earn a living. Corporate bankrupts have no exemptions.

Who has the highest priorities to a bankrupt estate is important because there are not enough assets to go around. The *BIA* creates a super-priority for unpaid suppliers (including farmers and fishers) of goods by allowing suppliers to demand the return of the goods from the trustee if they were delivered within 30 days of the bankruptcy, are in their original state, are not comingled with other goods, and were not sold to an innocent -party purchaser. The federal Crown enjoys priority for source deductions over claims of other creditors. Unpaid employees rank next for up to $2,000 of wages and pension contributions. Secured creditors come next, although they can realize on their securities outside of the bankruptcy.

After that comes a hierarchy of "preferred claims" before unsecured claims. Preferred claims include funeral expenses of the deceased bankrupt, costs of administering the bankrupt estate (trustee's fees, costs, levy payable to the Superintendent of Bankruptcy), maintenance and support payments, municipal taxes, and landlord claims for up to six months of rent. Unsecured claimants share the rest proportionately. Creditors must make a claim against the bankrupt to the trustee in the prescribed proof of claim form.

A corporate bankrupt will only be discharged if its debts are paid in full. Individual bankrupts can be discharged from bankruptcy, which constitutes a legal release from creditors' claims that existed at the date of bankruptcy. Some debts are not discharged, such as fines, civil damage awards for bodily harm or death, alimony, support and maintenance, and student loans**.**

Insolvent debtors can invoke bankruptcy protection to use the time to present a proposal to the creditors. If the creditors accept the compromise proposal, it is legally binding and the bankruptcy is prevented. Insolvent individuals with indebtedness of up to $250,000 (excluding any mortgage debt) may make a consumer proposal. Unless a creditor holding at least 25% of the debt requests a meeting, the proposal passes and court approval is generally not required.

The commercial debtor is allowed to continue with the business, which the creditors may see as offering hope to recover more than if the debtor goes bankrupt. Usually, proposals are made only to unsecured creditors as the secured creditors generally have the right to operate outside this process. However, the success of proposals also depends upon the co-operation of the secured creditors because the debtor's business is integrated.

If the debtor defaults in the performance of any term of the proposal, after it is approved by the court, and if the default is not waived by the creditors or fixed by the debtor, the debtor can be assigned into bankruptcy.

BenchPress – Vol 41-2

By Teresa Mitchell

Judge Restrains Restraint Policy

Newfoundland and Labrador Provincial Court Judge John Joy recently wrote a decision criticizing the police practice of automatically using leg shackles on prisoners. He stated that the practice of restraining prisoners without first determining if it is justified is humiliating, undermines the presumption of innocence, may amount to civil assault leading to damages, and is illegal. He commented "We have slipped into this practice of universal leg shackles on in-custody accused without legal authority, or even argument of any kind".

Judge Joy wrote that "The law clearly states that the issue of restraint of prisoners in the courtroom is within the exclusive jurisdiction of the presiding judge and is subject to his or her discretion."

The Judge set out a 15-point list of the legal principles that apply to the use of handcuffs, leg shackles and other forms of restraint for in-custody accused, beginning with: 1. "Every accused, whether in custody or not, has the right to appear in court free of any restraints" and including: "restraints in the courtroom should be the exception not the rule."

Judge Joy stated that police and sheriff's officers have the responsibility to provide security within courtrooms, but it must be done in accordance with the law. A blanket policy of using restraints cannot replace a plan to provide appropriate levels of security.

> *R v. Kalleo*, 2016 CanLII 7716 (NLPC)
> http://www.canlii.org/en/nl/nlpc/doc/2016/2016canlii7716/2016canlii7716.html

No Legal Basis for Removal of Hijab

Quebec Superior Court Justice Decarie has rebuked a lower court judge for telling Rania El-Alloul that she would not hear her case unless Ms. El-Alloul removed her hijab. The judge said that the courtroom was a secular place where the religious symbols have no place. She told Ms. El-Alloul "In my opinion, you are not suitably dressed. Decorum is important. Hats and sunglasses, for example, are not allowed. And I don't see why scarves on the head would be either."

Justice Decarie rejected that premise, stating "Indeed, the thesis adopted by Judge Marengo that a courtroom is a secular space where the religious rights of a person have no right to be cited has no force of law in Canada." He wrote "The court sympathizes with Ms. El-Alloul and deeply regrets how she was treated."

> *El-Alloul c. Quebec(Procureure generale),* 2016 QCCS 4821 (CanLII)
> http://www.canlii.org/fr/qc/qccs/doc/2016/2016qccs4821/2016qccs4821.html

Brian's Law

The Ontario Court of Appeal recently looked at *Brian's Law (Mental Health Legislative Reform*) an Act passed in 2000 following the murder of well-known Ottawa sportscaster Brian Smith by an individual with untreated schizophrenia. The Act expanded the criteria for the committal of mentally ill persons and created community treatment orders, or CTOs. CTOs allow for community-based treatment and supervision for persons with past psychiatric hospital admissions. An advocacy group for persons with addiction and mental health issues challenged the law under multiple sections of the *Charter of Rights*, sections as well as s. 1, the right to fundamental justice. It and other intervenors argued that:

- the purpose of the law was the protection of the public and that purpose was based on a false link between mental illness and violence; and
- CTOs were an unjustifiable form of compulsory treatment.

The three-judge panel ruled unanimously that the law was constitutional. Justice Sharpe wrote that the law must be seen as an integrated scheme that balances public safety with treatment. "The legislation does not rest upon unproven stereotypes or assumptions about mental health and violence. Its dual purpose of promoting health and public safety is achieved through a carefully balanced scheme that requires a highly specific and individualized assessment of the patient's mental health history, treatment needs and the risk that the individual poses to him or herself and the public at large." He also rejected the argument that CTOs are unjustifiable. He ruled that CTOs under the Act give priority to the patient's views and require an individualized assessment of the patient's capacity to make treatment decisions before the patient's views can be overridden. Patients also receive advice about their rights and the right to retain and instruct counsel before a CTO is issued, including advice about legal options such as a review of finding of incapacity to consent to treatment or involuntary hospital admission.

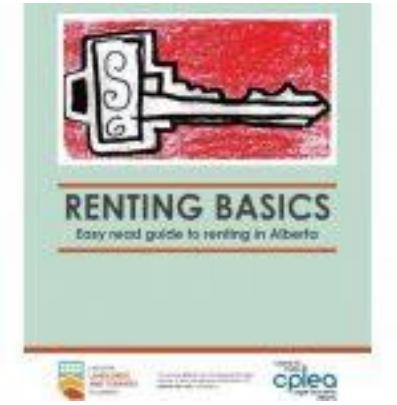
> *Thompson v. Ontario (Attorney General),* 2016 ONCA 676 (CanLII)
> http://www.canlii.org/en/on/onca/doc/2016/2016onca676/2016onca676.html

New Resources at CPLEA – Vol. 41:2

By Teresa Mitchell

LawNow is pleased to announce the creation of a new Department, called New Resources at CPLEA, which will be a permanent addition to each issue. Each post will highlight new materials at CPLEA. All resources are free and available for download. We hope that this will raise awareness of the many resources that CPLEA produces to further our commitment to public legal education in Alberta. For a listing of all CPLEA resources go to: www.cplea.ca/publications

Renting Basics: An easy read guide to renting in Alberta



CPLEA has developed the *Renting Basics Guide*, a new easy read guide to renting in Alberta. You can download the guide for free at www.landlordandtenant.org/resources . Educators, settlement agencies and community organizations are welcome to order print copies of the guide while supplies last. For more information anhttp://www.cplea.ca/wp-content/uploads/2016/08/RentingBasicsGuide.pdfd resources on landlord and tenant matters see: www.landlordandtenant.org

CPLEA's Laws for Landlords and Tenants in Alberta program is generously supported by the Alberta Real Estate Foundation.

Families and the Law: Domestic Violence Series

CPLEA has written a series of 16 Tipsheets about the law and domestic violence. Topics covered include Applying for an Emergency Protection Order; Peace Bonds; Preparing for Court and much more. This collection of family law resources can be viewed and downloaded from our *Willownet: Abuse and the Law in Alberta* site.

Go to: http://www.willownet.ca/just-the-facts/

- Child Custody and Parenting Orders
- Emergency Protection Orders
- Exclusive Possession Orders
- Financial Support Options
- Gathering Evidence of Abuse
- If You're Thinking of Leaving
- Leaving an Abusive Relationship… If you are not a Canadian citizen
- No Contact Orders – Flowchart
- Peace Bonds
- Planning for an Emergency
- Preparing for Court
- Queen's Bench Protection Orders
- Restraining Orders
- Serving Documents on an Abusive Party
- Working with a Family Law Lawyer
- Writing an Affidavit

Obtaining Evidence in High Conflict Parenting Disputes, Part 2: Using Experts in Parenting Disputes

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 may 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.

In Part 1, I discussed the use of lawyers for children. Another method the court may use to obtain reliable information about a child's best interests is to get information from experienced and qualified experts, usually psychologists or someone with a master's degree in social work. In some cases a child may already be seeing a therapist, however, these professionals 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. Their governing bodies usually do not permit experts to take on both roles. The Alberta court has developed best practices for obtaining information from experts for use in family law proceedings. These are set out in Family Law Practice Notes 7 and 8.

Family Law Practice Note 7: Interventions

An Intervention is a forward-looking evaluative or therapeutic process. It can take many forms depending on what concern is to be addressed. The type and terms of the specific Intervention will be set out in the order.

An evaluative Intervention will provide information to the court. A common type of evaluative Intervention is a "voice of the child" report. The expert canvasses the specific needs and, if the child is mature enough, wishes of the child. They usually meet with both parents and meet with the child more

than once. The child's views, often presented with some evaluation by the expert, are set out in a report.

A therapeutic Intervention attempts to work towards resolution, manage conflict, and make changes to an existing family dynamic. It is an attempt to "fix" what is not working within a family so they can move forward. Separated parents may learn how to communicate better, how to make decisions together, and how to refocus their conflict to what is best for their children. The goal of such an Intervention is to reach an agreement about how to resolve their conflict and avoid court altogether. If the Invention is unsuccessful, the expert involved will report back to the court and may provide some explanation for why the process did not work (for example, if one parent did not attend sessions).

With the parents' consent, the court can also direct parents to participate in mediation and arbitration with an expert. This is often referred to as a "parenting co-ordination" and is a growing field. In an arbitration scenario, the expert is empowered to make decisions to which the parents are bound. For example, if the parents cannot decide what school their child will attend, the expert can make the determination rather than having the parents return to court for a judge to make the decision.

Experts working with a family as part of an Intervention do *not* provide an opinion or recommendation about what is best for the children including recommendations about the ideal parenting time or responsibilities. They may recommend further processes that could help the family.

Family Law Practice Note 8: Parenting Time/Parenting Responsibilities Assessments

An Assessment is an objective examination of a family by an expert as a litigation aid to assist the court in determining what is in the best interests of a child. The specific terms of the Assessment will be set out in the order granting it.

The assessor is the court's expert and their duty is to provide the best objective information to the court. The expert will make recommendations and give their opinion to the court. To do this, the expert will generally meet with both parents several times, often in their home, conduct psychological and/or neurological testing, meet with the children with their parents and without, observe the family interacting, consult with professionals such as teachers and doctors, speak with family and friends, review communications between the parties, review police reports and/or child welfare records, and review the materials the parties have filed in the court action. Experts must be careful to treat each parent fairly, giving each side an opportunity to share their views and respond to any allegations made against them.

The expert will prepare a report setting out what steps they took, a summary of the information they collected, relevant research in the area, and their ultimate recommendations. This report may provide insight for the parties to reach an agreement about how to resolve their parenting conflict. In many other cases, the matter goes on to trial and the expert is called to go over their report.

The court is not required to agree with the expert. One, or both parties, can call evidence at a trial contradicting the underlying facts that informed the expert's conclusions, and may call their own expert to provide an alternate view. Justice D.L. Pentelechuk cautioned about the over-use of parenting experts in the case *AJU v. GSU,* 2015 ABQB 6. The ultimate decision about what is in a child's best interests lies with the judge.

Barriers

Cost: Neither Interventions or Assessments are free. The experts who do this work are highly educated and in demand. They will charge a range of hourly rates. Most will require a retainer be paid up front. The court order will set out how much each party is required to pay in the first instance. This amount can be adjusted by a trial judge if the matter is not resolved and a trial proves necessary.

Availability: Most major centres, such as Edmonton and Calgary, have a number of qualified experts to do this work. However, it can be difficult to find experts in rural areas.

Timelines: Interventions and Assessment often take many months to complete. This is partly due to their nature but the timelines can also be extended due to limited expert availability, the availability of the parties and other relevant people, and the complexity of the situation.

Genetic Discrimination is Being Addressed in Canadian Law

By Linda McKay-Panos

With many recent advances in technology, testing can disclose information about people's health that was not available even a few years ago. For example, genetic testing can reveal that a person has a gene mutation that causes or increases the risk of an inherited disorder. This information may be very important to the individual, but may also cause concern if employers or insurance companies obtain that information and make decisions about hiring or coverage based on genetic information.

Genetic testing involves the analysis of person's chromosomes, genes or gene products (i.e., proteins) to identify traits, such as parentage, ancestral origins, genetic conditions or predisposition to genetic diseases (Julian Walker *Genetic Discrimination and Canadian Law* Library of Parliament September 16, 2014 online: http://www.lop.parl.gc.ca/content/lop/ResearchPublications/2014-90-e.html ("Walker"). The information obtained can help people and their caregivers start appropriate treatment or adopt lifestyle changes to minimize the harm of the genetic condition. It may also help to select patients who can undergo gene therapy (Walker).

On the other hand, genetic information may be used to discriminate against someone, especially in the provision of services like insurance and/or in employment. There have been reported incidents of Canadians being discriminated against by insurance companies on the basis that they have the potential to be affected by an inherited genetic condition (Joseph Hall, Study finds genetic discrimination by insurance firms, *The Toronto Star*, 9 June 2009; and CBC, "Genetic Discrimination," *The National*, 12 February 2012 cited in Walker at note 7). The Senate Standing Committee on Human Rights held hearings and released a report in October 2014 and witnesses testified that some medical patients are declining genetic testing because they fear being discriminated against by insurance companies (Walker).

Governments in other countries, such as the United States, Australia, France and the United Kingdom, have passed legislation to specifically address genetic discrimination. Canadian law does have insurance and privacy legislation that seeks to limit improper access to or use of personal information, but Canada has no specific laws to protect against genetic discrimination.

Existing provincial and federal human rights legislation often protects against discrimination based on disability. It is possible to interpret "disability" to include genetic predisposition and to expand coverage for genetic discrimination on this basis. However, rather than relying on a possible interpretation of a term in human rights law, it is considered preferable to have explicit protection for genetic characteristics stated in human rights legislation.

Federal human rights legislation applies to federally regulated entities, such as banks. There have been a number of proposals to amend federal human rights law to include genetic characteristics. In 2010, two private members' bills were introduced proposing to add "genetic characteristics" to the *Canadian Human Rights Act* (*CHRA*), but these both died when the 40th Parliament was dissolved. In the 41st Parliament, Bill C-445 was introduced, again proposing to add "genetic characteristics" to the *CHRA*. This bill also did not pass. At the same time, Bill S-201 (originating in the Senate) was introduced. In addition to adding "genetic characteristics" it also included amendments to the *Canadian Labour Code*, which provided that an employee would not be required to take a genetic test or to disclose results of genetic tests. Finally, Bill C-68, the *Protection Against Genetic Discrimination Act*, was introduced in the 41st Parliament, 2nd Session, but did not become law before the Second Session of Parliament ended in August 2015.

Bill S-201, *An Act to prohibit and prevent genetic discrimination*, was re-introduced and passed by the Senate on April 14, 2016. The Senate can introduce and pass bills, which then must also be passed by Parliament. It received second reading in the House of Commons on September 20, 2016. It is hoped that it will soon be passed into law and come into force.

Bill S-201 has four parts.

First, once passed, it will enact a new statute, the "*Genetic Non-Discrimination Act*", which prohibits requiring someone to take a genetic test or to disclose the results of a genetic test. Further, it prohibits anyone from collecting or using the results of a person's genetic test without the person's written consent as a condition of providing goods or services to the person, entering into or continuing a contract with the person, or offering or continuing particular terms or conditions in a contract with the person. Physicians, pharmacists and other health care practitioners who are providing health services to an individual are exempt from this aspect of the bill, as are medical, pharmaceutical or other scientific researchers about an individual who has participated in the research.

While earlier versions of the bill appeared to focus on the insurance industry, it now focuses on conduct rather than particular industries. The focus on a particular industry (i.e. insurance,) could result in the legislation being found unconstitutional, as it would pertain to property and civil rights, and the authority to pass laws on these topics would fall under provincial legislative power.

Second, the bill would make changes to the *Canada Labour Code* and will prohibit federal employers from taking disciplinary action against an employee because the employee refused the employer's request to take a genetic test or to reveal the results of a previous genetic test.

Third, the bill will amend the *CHRA* to include "genetic characteristics" as a prohibited ground of discrimination.

Fourth, the bill will amend federal privacy legislation to make it clear that "personal information" includes information derived from genetic testing.

Breaking the law could be a hybrid criminal offence, punishable by indictment with a fine of up to $1million, imprisonment for up to five years or both; or a summary conviction offence, punishable by a fine of up to $300,000, imprisonment for up to 12 months or both.

Currently, there are approximately 48,000 genetic tests available. The result of such a test does not necessary mean that the person may develop a disease or condition, only that he or she *might.* However, those individuals can take preventive action, such as actor Angelina Jolie, who had preventative surgery to reduce her chances of developing breast and ovarian cancer. People fearing genetic discrimination and therefore choosing not to undergo testing, will not have the opportunity to take preventive action.

Because the proposed legislation will only apply to federally regulated employers and service providers, it is important that the provinces seriously consider adding genetic characteristics as a protected ground, so that people discriminated against on the ground of genetic characteristics by provincially regulated employers and service providers will also be able to obtain remedies.

Here are Some Things to Consider Before you Host your Holiday Party

By Judy Feng

With the holiday season just around the corner, it's that time of year again for hosting guests. If you are currently renting a property and plan to have guests over, there are several things you need to know. The *Residential Tenancies Act* (*RTA*) is the law that applies to most renting situations in Alberta. However, the law does not cover all aspects of renting. The *RTA* does not address the issue of guests.

Considering that the *RTA* is silent on this issue, you should review your lease. For example, your lease may define what a "guest" is. There may also be other terms regarding whether you can have guests visit you, the length of stay for guests, the number of guests allowed and whether the landlord's permission is required to have guests stay in the property. Some leases may even specify whether there is a fee for having guests stay in the property.

There are also instances where guests can be restricted, regardless of what the lease says or what you and your landlord have agreed to. For example, in a condominium rental situation, the condominium bylaws apply. Bylaws are rules that apply to everyone living in the building. If the condominium bylaws restrict guests on the property, then you are bound by those bylaws. Unless you agreed in your lease that certain people could not visit the property, your landlord cannot typically prevent you from having particular guests visit the property. However, if a guest is, in effect, living in the property or has moved in, your landlord can serve a notice requiring that person to leave. Under the *RTA*, the landlord has the authority to provide any "non-tenant" with a 14-day eviction notice.

Last but not least, you have an obligation under the *RTA* to ensure that:

- the rights of the landlord and other tenants are not interfered with;
- no illegal acts or nuisances are carried out on the property; and
- the property is not damaged in any way.

If you or your guests breach any of these obligations, your landlord can serve you with a notice to end your lease. In addition, you may be responsible for paying for any damage that is done to the property by your guests.

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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Political Activities Update for Charities

By Peter Broder

The much-anticipated work on reviewing the guidance and rules around what political activities Canadian registered charities can undertake has now been begun. The Canada Revenue Agency (CRA) recently announced that it will hold a consultation on that topic. The consultation will be both online and in-person.

The consultation will consider, among other things, awareness of the political activity rules among charities, the challenges experienced with the current CRA guidance in this area and whether that guidance helps or hinders charities in advancing their causes or the interests of their stakeholders. It will also consider potential improvements to the guidance content – including the description of political activity, the description of partisan political activity and information on charities' accountability mechanisms – and the form of the guidance.

The CRA has been moving in recent years toward delivery of guidance by means other than written documents, such as videos and webinars, and the consultation is also seeking input on the ways through which the regulator can most effectively deliver its message with respect to the political activity rules.

Lastly, but perhaps over the long term most importantly, the question of whether there should be changes to the rules governing political activities and, if so, what those changes should be, is being canvassed.

A five-person consultation panel – drawn from sector leaders and allied professionals – has been established as part of the process, and is slated to make recommendations informed by the feedback received online and in-person to the Minister in Spring 2017.

However, the consultation being under the auspices of the CRA and mandated to look primarily at the administrative aspects of the political activity rules may not be a good omen for those hopeful of broader change. Any amendment of legislation would have to be put forward by the Department of Finance, rather than the CRA. So the initiative having been rolled out in this way leaves it uncertain if, or how, the government intends to pursue the broader reform contemplated in the Liberal election platform, which included language on modernizing "the rules governing the charitable and not-for-profit

sectors" and "clarifying the rules governing 'political activity,' and spoke of a resulting "new legislative framework".

These reforms are needed. By happenstance, a matter currently before the courts shows why.

While the consultation process for considering administrative (and, perhaps, legislative) measures to improve the political activity rules for registered charities is underway, it appears we are also poised to have the constitutional validity of those provisions considered in court.

Canada Without Poverty, a registered charity whose mission is the elimination of poverty was recently subject to a CRA audit, and has disclosed that it was told that an unacceptable portion of its work constituted political activity in the view of the regulator. The CRA takes the position that, pursuant to *Income Tax Act* (*ITA*) section 149.1 (6.1) and (6.2), a registered charity can undertake "ancillary and incidental" non-partisan political activities but must devote "substantially all" its resources to charitable purposes (6.1) or charitable activities (6.2.) It interprets "substantially all" as generally meaning 90% or more. Canada Without Poverty was found not to have satisfied that test.

The originating material filed as part of Canada Without Poverty's *Charter* challenge to the 149.1 (6.2) provision raises questions about how the CRA characterizes some of the work done by the organization. In particular, any characterization has to be reconciled with the Supreme Court of Canada (SCC) decision in *Vancouver Society of Immigrant and Visible Minority Women* that an activity in pursuit of a charitable purpose is a charitable activity. From the materials, the CRA does not appear to have been adequately mindful of this rule when it determined what type of activities the organization was carrying out.

Since the enactment of the *ITA* political activity provisions, charities, the regulator and the judiciary have grappled with proper characterization of activities, and tried to reconcile conflicts between the legislation and common law as to how to do so. Although the statement by the SCC might have been expected to settle the matter, it has not – as the Canada Without Poverty materials clearly demonstrate. Instead, the references to 'activity" in the *ITA* are seen as at odds with the Court's holding and as trumping the Court's decision in determining the nature of an activity.

That said, questions of the nature of particular activities are not central to the constitutionality of the measures. Rather, the Ontario Superior Court is being asked to determine if the provisions violate the rights guaranteed by the *Charter*, and particularly the right to freedom of expression and the right to freedom of association.

In the absence of a finding that the provision violates the *Charter*, however, questions of how to characterize an activity are deeply embedded in the current law, and confusing for the regulator and charities alike. Notwithstanding that some minor clarifications or clearer communication from the CRA could potentially result from its consultation, ultimately a change in the law will be needed to rectify this problem.

Which makes one hopeful the CRA consultation is only a first step.

When Sexism Hits the Fan: How Female Defence Counsel Are Put on Trial Because of their Gender

By Melody Izadi

Not one work day goes by where my gender, age and race don't affect my job. If anyone questions how "real" the discrimination is for women in criminal law, specifically for women of colour, and especially for women of colour who are members of the defence bar, I invite you to accompany me to court, or any of my female colleagues. You would be shocked. Or, simply go read all the hate messages posted on social media about Marie Henein after she decided to represent Mr. Ghomeshi.

Sadly, what women in this profession are forced to do, in addition to facing daily obstacles because of their gender, is work twice as hard in every aspect of this job. We have to work twice as hard to make a name for ourselves, to be taken seriously, to be given a legitimate voice in the courtroom, and to be trusted to handle more serious and complex work. At the same time, we're expected to tread carefully down the line of "feminine enough" but all the while ensuring that we are not "too sexy" in the courtroom. Show just enough skin and act (appropriately) feminine so we can still tell that you're a woman, gals!

Fortunately, nothing "newsworthy," (if I can put it that way without minimizing the discrimination that I face daily) has happened to me. My experience has mostly been contained within the confines of remarks by judges, how I'm treated and respected by Crown Attorneys, and the look of disappointment on my client's face when they meet me for this first time: "*She* is handling my trial?" Essentially, my level of intellect and my talent as a barrister are judged before I even speak. And I know this to be true for almost every female colleague I share this information with. And these experiences happen almost daily. Not monthly. Not occasionally.

What is particularly alarming to me is a specific situation that a colleague of mine faced very recently. Unfortunately, the appalling behaviour exhibited by a senior male Crown Attorney that she was subject to has become yet another catalyst in provoking a larger discussion about gender issues in the world of criminal law. What happened to my colleague I wouldn't wish upon anyone. Not even on the Crown

Attorney who once said to me: “Well, shouldn’t your (male) boss be doing this case? I’m surprised your client doesn’t want a man defending him.”

I won that trial. All by myself. Uterus and all.

The incident: A female colleague attends court with the hopes of getting a great plea position for her client. She sits in court all day, patiently waiting for a Crown to look at the file so that she has someone to discuss it with. She politely checks in with the Crown, who continuously advises her that he will look at it when he gets the chance. A few other Crowns attempt to look at the file as she waits, and she has a few brief discussions with some of them. None of them commit to handling the file. She arrived in court at 10:00 a.m. At 1:00 p.m. she’s advised that a Crown will finally look over the file over the lunch break, and that court will resume at 2:15 p.m. She returns at 2:15 p.m. and the Crown advises her that a different and more senior Crown will have to look at the file to decide on a position. She patiently waits for the senior Crown. When he arrives almost an hour later, he approaches the female lawyer and asks her about the nuances of the file. She sighs and begins explaining, and mentions that she’s explained this to several Crowns today. The senior male Crown immediately raises his voice, and begins scolding her in the courtroom, standing only a few centimeters from her face (the Judge was not presiding at this point). He inches closer and puts his finger in her face as he waves it and condemns her for being inconsiderate defence counsel. He roars at her and demands that she respect his time and energy. He has the entire conversation never being more than 10 cm away from her face. He chastised her in the presence of court staff, lawyers, and members of the public who were in the courtroom at the time. All of them eyeing the situation as it unfolded. Not one person intervened. He eventually left without looking at the file.

What is especially troubling about this example is that it’s quite clear that the gender of this lawyer was the reason why she had to endure the experience that she did. Exhaling and letting out an exasperated sigh would certainly not prompt a senior male Crown to discipline a younger male. Rather, it is because of her gender, and because of what her gender signifies to the senior Crown, that he felt comfortable and appropriate in asserting his opinion in that way. He puffed his chest like an angry bird and exhibited behaviour that he believed would *overpower* his opponent. He wanted to shut her down, and shut her up.

I suppose 2016 is still too early to expect equal treatment by our male colleagues in the courtroom.

Stalin The Magician

By Rob Normey

I have been organizing a human rights film series for the past year, and leading discussions with the audience after the showing. For one of these discussions, I had with me (through Skype) the distinguished writer Stephen Heighton, and we talked about his novel *Every Lost Country*, set in Tibet and Nepal. Heighton is a poet, novelist and short story writer, equally adept at all these genres. We advanced possible parallels between the many brave left wing volunteers, who joined the International Brigades to fight Franco's fascist forces during the Spanish Civil War, and the many subsequent victims of the brutal retribution the dictator meted out to citizens who had supported the Republic, with the situation of dissidents described in Heighton's novel.

After our discussion, I sought out another of the author's books, *Stalin's Carnival*.It contains a long poetic sequence – *Ashes on the Earth: Selected Works of Josef Stalin*." These 14 poems take as their starting point the rather shocking fact that Josef Stalin, one of history's most ruthless dictators and a pathological mass murderer, starting out in his early years as a budding poet. Certain biographers claim that Stalin's poetry was fairly banal. Heighton, who should know, takes the view that this fierce revolutionary was, in fact, once a promising poet. One poem is freely translated by the author, who also bases other poems on Stalin's letters and diary entries. It may be that a closer look at the poems can tell us something about the man's unique personality. This Georgian revolutionary was once human! The young Stalin spent his first two decades in Georgia. The very first poem forcefully brings home to us the unimaginable disparity between the young romantic poet, who allows his readers to feel "the harsh grandeur of the Caucasus, /Georgian slopes and orchards" and years later, the new Man of Steel, who "strangled his wife / and slew twenty million others." ("Stalin" – steel, was an assumed name, Jugashvlili being his actual name).

The poems need to be read together to appreciate their cumulative effect. I find *Elegy in Winter* particularly moving. It recounts the experience of the loss of his second wife Nadezha, on the now "great man" and links it to the never-ending fields of snow – "your flesh has proven snow, and like the rest of them? You melt: white cells and singular crystals trampled, muddied by the stiff boots of soldiers in Red Square." In this poem Heighton imaginatively transposes the thoughts the now ruthless and vicious tyrant might have into the language of the poet he might have been. One other poem I feel compelled to comment on is *Testament,* which brilliantly offers up a version of the last testament Stalin might have written. This is a recounting of the life of a tough, decisive political and military strong man

who wrenched his backward country forward, with its heavy industry and Five Year Plans. He felt not the slightest compunction about trampling on the liberty and the very lives of all citizens who could possibly stand in the way. The third section of the poem imagines an encounter he once had with a young poet. Stalin slapped the man and barked at him to get out of his way – "poetry is for dreamers."

The title of the collection, *Stalin's Carnival*, contains the paradoxical idea that Stalin, of all men, could have organized a carnival. Perhaps his reign was indeed a carnival, a grotesque travesty of one, with punishments and violence and laughter on command being its hallmarks. I thought it worth elaborating on that concept with respect to the tragic developments that occurred back in Spain and Moscow in 1936 and '37. In Spain, revolutionaries who were deemed to be no longer loyal supporters of the Communists in the war against Franco were summarily executed after secret trials. In Moscow, a series of show trials took place, which were open to the public. Stalin was able to orchestrate all of these massively unfair trials from behind the scenes while large numbers of progressive thinkers and activists failed to recognize or appreciate what had actually occurred. They accepted on faith that the trials were fair or at least necessary to carry out so that the glorious Russian Revolution. Stalin can certainly be likened to a magician who successfully deceives large numbers of left wing supporters in Western nations. George Orwell was one of the only writers from Britain, for example, who, having actually engaged in military service as part of the international support for the Republic, was able to write a truthful account of the duplicity of Stalin and his henchmen. His *Homage to Catalonia* is a brave and now classic account of the betrayal of the Spanish Republic.

Arthur Koestler is another writer who encapsulates for me the ironies and duplicities associated with the advance of Communism in the 1930s and '40s and the conjuring abilities of the Soviet leader. His great short novel *Darkness At Noon* is a brilliant account of the interrogations of one of the Old Bolsheviks who were put on trial in Moscow in the late 1930s. Rubashov has been arrested for disloyalty and for secretly plotting to over throw the existing regime. In reality, his idealism and his statements advocating moderate reforms and deviations from the autocratic policies of Stalin mean that he must made an example and eliminated. Koestler fictionalized a major conundrum of the Moscow Show Trials – why did long-time, dedicated Communist Party members openly confess in court to a whole series of remarkable crimes against the state? The reader of this tense, thrilling novel quickly understands that Rubashov, like his real-life counterparts, could not possibly be guilty.

Perhaps the most likely explanation is that the accused were tortured or threatened with torture, or told that their families would face severe punishment. Or, these servants of Stalin pled guilty out of weakness, and persuasive efforts by their jailers to convince them that they were somehow responsible for unacceptable deviations from the Party line. Perhaps they came to accept that it was their duty to confess, out of loyalty to the revolutionary goals that impelled them to act in the first place, and the long-term needs of Stalinism. Indeed, we read chapter after chapter depicting the stressful re-evaluation Rubashov undergoes. His jailers do not need to torture him. They succeed in moving him step-by-step towards an acceptance of "intellectual guilt" by playing on the long-time relationship between ends and means that has always been a part of the Soviet enterprise. Rubashov accepts with pain and considerable doubt, that only a guilty plea will meet the insatiable needs of the Revolution. Gletkin, the

old revolutionary's jailer, mercilessly pounces again and again, utilizing the brutal logic of revolutionary justice against the oppressed prisoner. Gletkin sternly tells Rubashov: "Your task… is to make the opposition contemptible, to make the masses understand that opposition is a crime and that the leaders of the opposition are criminals." The poor, mentally beaten functionary is not a leader of any opposition, but he is forced to accept that, on some level, he must renounce his own views and accept that his only duty is to play the role it has assigned him. The novel ends on that bleak note, with his full confession and later execution carried out with no regard for fairness or due process.

Let us return finally to the poems in *Stalin's Carnival*. They are poignant renderings of the way in which Stalin moved from a deep romantic attachment to Georgia to a merciless commitment to radical transformation of his native region and the rest of Russia and the Soviet Union, without regard to civility or any humane values. As Heighton writes: "A dictator is a poet of supreme accomplishments: his words are always heard and he can make them mean whatever he desires." A diabolical magician by any reckoning.

As an update, it has just been announced that Steven Heighton is this year's winner of the Governor General's Award for Poetry for his work *The Waking Comes Late*.