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Transgender Issues

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In This Issue

Canada's transgender community needs and deserves full human rights protection.

Feature: Transgender Issues

Special Report: Canada's Judiciary

By David Butt

Justice Robin Camp is now facing discipline from the Canadian Judicial Council for sexist remarks he made during a sexual assault trial in Alberta. But this high-profile case also raises a much broader issue: How should our outdated judicial discipline system be realigned to fit contemporary values and expectations?

We should start by recognizing that judges are professionals providing important public services, no less nor more important than teachers, doctors, police officers, nurses, etc. We should therefore look to best practices in those fields of professional discipline, adapting what works well into the judicial context.

Well chosen members of the public, or law professors for example, could make excellent participants, along with jusdges, on jusdicail discipline panels.

Professional discipline exists to address misconduct, but also to restore and maintain public trust in the profession. Nobody trusts a process that works under cover of darkness. Therefore, judicial discipline must be publicly accessible from beginning to end – unlike the secretive review now under way over another disturbingly ill-informed sexual-assault acquittal, this time by Alberta judge Justice Michael Savaryn.

Canadian judges have a stellar history of ensuring Canadian courtrooms are as open as possible, no matter how difficult that may be for all the litigants and witnesses. That commitment to open justice must be equally strong when the white-hot critical spotlight turns back on the judge. Furthermore, openness is more than just allowing spectators. It must also include meaningful participation by those affected.

Other professional disciplines recognize they cannot monopolize the process of judging their peers. Perceptions of clubbiness, and odours of favouritism, real or imagined, quickly become overwhelming when only teachers judge teachers, only nurses judge nurses, and so on. Judicial discipline should benefit from a healthy injection of participation from decision makers who are not judges. Well chosen members of the public, or law professors for example, could make excellent participants, along with judges, on judicial discipline panels.

Judges often make final decisions in nasty disputes, so it's not surprising that judicial complaint in-boxes are routinely stuffed with meritless accusations from angry losers. Those who do such difficult work deserve protection from such complaints, which is accomplished by vigorous but transparent vetting of complaints by panels that include members from outside the judiciary.

Decades of experience with civilian oversight of policing has shown that because people don't like being arrested and charged even when the law says they must, high volumes of meritless complaints pour in regularly. The lesson from police discipline is that thoughtful, impartial vetting is essential to ensure that discipline processes for those making unpopular but necessary decisions is fair and manageable.
Finally, those sitting in judgment of judges need a broad spectrum of remedies and penalties to respond to the particular acts of misconduct they see. Currently, the discipline options for judges are only the two extreme end points of the spectrum: fire the judge, or do nothing. This is archaic. Professional misconduct exists in infinitely varying shades of seriousness. And it can be rooted in a wide variety of shortcomings, from basic unfitness for the job, to stress, addictions, ignorance, and many more.

Astute professional regulation of judicial misconduct will require those judging judges to first carefully calibrate the quality of the misconduct and the impact it has had on the public, then consider the personal circumstances of the judge to place the misconduct in its proper context. Once this important work is done, there must be a wide range of available options to tailor the response closely to the finely tuned understanding of what the judge did wrong, and how best to fix things.

Our judges are generally held in high regard in legal circles around the world. To maintain this solid reputation, we need a world-class judicial discipline process.

David Butt is a Toronto-based criminal lawyer. This article was first published in the Globe and Mail and is reprinted with the permission of the author.

By Teresa Mitchell

1. Intolerable Delay, 5 Years: Case 1

Barrett Jordan was charged with a criminal offence in 2008 and his trial ended with his conviction in 2013. He alleged that his *Charter* right to trial within a reasonable time had been breached and the Supreme Court of Canada agreed. It set out a new standard for unreasonable delay: a ceiling of 18 months for cases tried in provincial court and 30 months for cases in superior courts such as Queen's Bench. The ceiling is presumptive, meaning that it can be set aside in exceptional circumstances. Also, delays caused or waived by the defence do not count in measuring the time. "Exceptional circumstances" mean matters that lie outside the control of the Crown in that they are reasonably unforeseen or avoidable, and they cannot be easily remedied. The majority of five justices issued a rebuke to all parties in the judicial system. "All the parties were operating within a culture of complacency towards delay that has pervaded the justice system in recent years. Broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these efforts. Timely trials are possible. More than that, they are constitutionally required." They ordered that Mr. Jordan's convictions be set aside and entered a stay of proceedings against him.

However, a minority group of four judges disagreed with the majority decision and wrote a rather stinging rebuke of their own to their colleagues. Noting that creating fixed ceilings is a task better left to Parliament, they concluded: "Ultimately, the majority's new framework casts aside three decades of the Court's jurisprudence when no participant in the appeal called for such a wholesale change, has not been the subject of adversarial scrutiny or debate, and risks thousands of judicial stays. In short, the new framework is wrong in principle and unwise in practice."

R v. Jordan, 2016 SCC 26 (CanLII)

2. Intolerable Delay, 131 Years: Case 2

Between 1885 and 1889 the Government of Canada unilaterally withheld $5.00 per person in Treaty 6 annuities from members of the Beardy's and Okemasis Band in what is now Saskatchewan. This was because it deemed them to have been disloyal to Canada during the North-West Rebellion. The Specific Claims Tribunal, which settles legal disputes between First Nations and the federal government, ruled in 2015 that the federal government was wrong to do so, and ordered it to pay equitable compensation. In December 2016 the Tribunal met again to determine the amount of compensation. It stated that equitable compensation means a remedy applied by courts when there has been a breach of fiduciary duty. It aims to restore the beneficiaries to the position they would have been in had the breach not occurred. This assessment is made at the time of the trial, not at the time of the breach. After considering arguments from both sides, the Tribunal set the compensation to the band members at $4.5 million – 131 years after the event that triggered the legal action.

> Beardy's & Okemasis Band #96 and #97 v. Her Majesty the Queen in Right of Canada, 2015 SCTC 3 (CanLII)

3. Demeaning, Malicious, Hostile

A gay Toronto man convicted of aggravated sexual assault and forcible confinement took his convictions to the Ontario Court of Appeal. One of his grounds for appeal was that the jury foreman's conduct gave rise to an appearance of unfairness. While the trial was underway, the jury foreman was a guest on a "shock-jock" radio show. He and the show's hosts made derogatory comments about sexual activity between men and made fun of the juror's oath. The jury foreman appeared on the same show after the accused was convicted and, again, laughed at the participants in the trial and made derisive comments about the lifestyles of the participants. The Crown alleged that a reasonable person would know that the juror was just joking. Madame Justice Benotto retorted: "This submission presumes that jokes of this type are innocuous. They are not. They have a destructive side. They target marginalized groups often based on race, gender, gender identity or sexual orientation. They promote – and risk normalizing – negative stereotyping. They are demeaning, malicious, hostile and encourage prejudice." The Court set aside the convictions and ordered a new trial.

> *R v. Dowholis*, 2016 ONCA 801 (CanLII)

4. No Custody Orders For Pets

Justice R. Danyliuk of the Saskatchewan Court of Queen's Bench was asked to take a "custody approach" in a hearing about a divorcing couple's two dogs. He declined to do so. He cited a previous decision where the judge wrote "A dog is a dog. Any application of principles that a court might normally apply to the determination of custody of children are completely inapplicable to the disposition of a pet as family property. Any temptation to draw parallels between the court's approach in this case to the principles applied to settle child custody disputes must be rejected." Justice Danyliuk noted the differences between how we treat our pets and our children:

- In Canada, we tend not to purchase our children from breeders;
- We tend not to breed our children with other humans to ensure good bloodlines, nor do we charge for such services;
- When our children are seriously ill, we generally do not engage in an economic cost/ benefit analysis to see whether the children are to receive medical treatment, receive nothing or even to have their lives ended to prevent suffering;
- When our children act improperly, even seriously and violently, we generally do not muzzle them or even put them to death for repeated transgressions.

He concluded that he would not make what amounts to a custody order for dogs and that such an application should not even be put before the court. He dismissed the application for interim exclusive possession of the dogs and urged the parties to move along.

Henderson v. Henderson, 2016 SKQB 282 (CanLII)

SEE ALSO: LawNow's Family Law columns on "Dealing with Pets after Separation" written by our family law columnist John-Paul Boyd:

1. http://www.lawnow.org/dealing-with-pets-after-separation-part-1-understanding-the-law-on-personal-property/
2. http://www.lawnow.org/dealing-pets-separation-part-2-going-court/

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It's Time to Enshrine the Rights and Protections of Transgender Canadians

By Senator Grant Mitchell

Diversity, inclusion, acceptance and understanding are core Canadian values. We believe that they define who we are, and we are very proud that they do. And yet, in what we all hold to be a remarkably open and inclusive society, transgender people face an extreme level of exclusion, discrimination, prejudice and violence.

Research projects by the Ontario Trans PULSE Project and by Egale, and the 2015 report *Being Safe, Being Me*, provide stark and startling evidence of what trans people face in Canada today. These studies found that, of those transgender people surveyed with respect to employment barriers and economic marginalization, 13 per cent had been fired for being trans; 18 per cent were turned down for jobs because they are trans; over 70 per cent are earning less than $30,000 per year; and their median income is $15,000 per year. This is despite the fact that they are highly educated: 70 per cent have some form of post-secondary education, and 44 per cent have post-secondary undergraduate and graduate degrees.

The third amendment to the Criminal Code will establish that hatred on the basiss of gender identity or gender expression is an aggravating factor in sentencing for a criminal offence, along with othere listed categories like race, colour and religion.

- With respect to discrimination in medical care: of those people surveyed, 10 per cent who had accessed an emergency room were refused care because they were trans; 21 per cent avoided emergency at one time or another specifically due to being trans; and 40 per cent experienced discriminatory behaviour from a family doctor.
- With respect to bullying and violence: of those studied, 20 per cent had been physically or sexually assaulted; 34 per cent had been verbally threatened or harassed; and 24 per cent reported being harassed by police.

- With respect to mental health and suicide: of those studied, more than 50 per cent presented symptoms consistent with clinical depression; 77 per cent reported that they had considered suicide; 43 per cent had actually attempted suicide and — this is striking and startling — of those, 70 per cent had done so at 19 years of age or younger.
- With respect to youth, of those studied: 90 per cent reported being subjected to transphobic comments frequently, often daily; 23 per cent of students reported that teachers directed transphobic comments at them; 25 per cent of students reported physical harassment; 36 per cent had been physically threatened or injured in the past year; 9 per cent had been threatened or injured with a weapon; 33 per cent said they had been bullied through the Internet in the past year; and trans youth are more than twice as likely as their non-trans counterparts to consider suicide.

...if a trans person applies for a bank account or a passport, they should receive the same level of respectful service as any other Canadian.

Among the many frustrations experienced by transgender people, their families and their supporters are the seemingly endless delays in getting their rights and protections enshrined in legislation. It has not been for lack of trying.

MP Bill Siksay introduced a bill dealing with trans rights in the House of Commons in 2005 and then again in 2009. His Bill C- 389 was passed by the House of Commons in February 2011. It then arrived in the Senate, where it died on the Order Paper without coming to a vote.

In September 2011, over five years ago, MP Randall Garrison developed and presented Bill C-279 in the House of Commons. In 2013 this Bill was passed in the House of Commons with Liberal, New Democrat and some Conservative MP support. Over the subsequent two years, it advanced to third reading twice in the Senate. Both times it died there, without even being allowed to come to a vote.

This past November, the House of Commons passed Bill C-16 *An Act to amend the Canadian Human Rights Act and the Criminal Code*. This Bill is designed to support and facilitate the inclusion of transgender and other gender-diverse people in Canadian society and to provide them with enhanced protection against criminal aggression. It passed third reading with Liberal and New Democrat support, and support from a very significant cadre of Conservative MPs.

Now Bill C-16 is before the Senate of Canada. I am pleased to be the sponsor of this legislation in the Senate and will be working to advance it through the legislative process.

Why is Bill C-16 so important? The Ontario Human Rights Commission notes that there are arguably few groups in society today who are as disadvantaged and disenfranchised as the transgender community. Transgender people suffer profound alienation and discrimination in their daily lives. They live in fear of frequent, often brutally violent, physical and verbal bullying. They live in fear of sexual assault. They suffer significant economic discrimination and discrimination in housing and medical care. Their circumstances have led to extreme levels of suicide and suicide attempts. They need our help.

A transgender person simply knows they are of a gender different from the one assigned to them at birth, the one indicated by the physical and physiological features of their body.

Before describing what the Bill will do, it is important to understand key terms used within it. The term "gender identity" refers to an individual's internal and personal experience of gender — their sense of being a man or woman, both, or neither. "Gender identity" refers to who a person is in their very soul.

For most people, the sense of self as being a man or woman aligns with their anatomical and biological characteristics. For others, it does not. These people are referred to as transgender or trans people.

"Gender expression" refers to how people publicly present their gender, through behaviour and outward appearance such as clothing, hair, body language and chosen name.

A transgender person simply knows they are of a gender different from the one assigned to them at birth, the one indicated by the physical and physiological features of their body. They cannot live honestly or comfortably in their birth- assigned gender, where they are literally and profoundly uncomfortable in their own skins. If they can overcome their fear, they transition to their true gender identity. To do otherwise is to live in a continuous, often agonizing, confounding and alienating condition. In some sense, it is to live a lie. No one should ever have to do that.

The Ontario Human Rights Commission notes that there are arguably few groups in society today who are as disadvantaged and disenfranchised as the transgender community.

What does this bill do? Bill C-16 will make a number of changes to the *Canadian Human Rights Act* and the *Criminal Code* designed to protect transgender people.

To begin, the *Canadian Human Rights Act* applies to the federal government in its role as employer and service provider to Crown corporations, the postal service and the federally regulated private sector, including telecommunications companies and charter banks. Bill C-16 will amend the *Canadian Human Rights Act* to add two prohibited grounds of discrimination: gender identity and gender expression. As a result, it will be explicitly discriminatory to disadvantage people because of their gender identity or expression in any workplace, in hiring and promoting, and in the provision of goods, services, facilities and accommodation by or in entities under federal jurisdiction.

If the grounds "gender identity or expression" were added, this would mean that a trans person working for the federal government, or one of the federally-regulated employers, could not be passed over for a job or promotion simply because they are trans. It would also be unacceptable to harass a trans person because of their gender identity or expression, turning their workplace into a hostile and poisoned environment for reasons that have nothing to do with their skills or ability to do their job.

Similarly, if a trans person applies for a bank account or a passport, they should receive the same level of respectful service as any other Canadian.

The bill will also amend the *Criminal Code* in three ways. It will expand the list of identifiable groups that are protected from hate propaganda by adding "gender identity" and "gender expression" to the list.

Second, there are three crimes of hate propaganda in the *Criminal Code*. Their purpose is to eliminate extreme and dangerous speech that could incite others to violence against groups listed in the *Code*. The amendment proposed by Bill C-16 would add gender identity and gender expression to this list.

The third amendment to the *Criminal Code* will establish that hatred on the basis of gender identity or gender expression is an aggravating factor in sentencing for a criminal offence, along with other listed categories like race, colour and religion.

Among the many frustrations experienced by transgender people, their families and their supporters are the seemingly endless delays in getting their rights and protections enshrined in legislation. It has not been for lack of trying.

The aggravated sentencing provision in the *Criminal Code* will therefore allow judges to:

- recognize and denounce crimes against trans people motivated by bias, prejudice or hate;
- condemn these hate crimes as being against a group of people who are more vulnerable to crime simply because they are identifiable as trans;
- send a special message of deterrence for these crimes; and;
- encourage prosecutors and law enforcement offers to be aware of the particular vulnerability of trans people.

Passing this bill will send an important, powerful and hopeful message of inclusion and acceptance to a group of Canadians who experience alienation and discrimination that most of us cannot even imagine. It will elevate awareness of the plight of transgender people and inspire Canadians' compassion.

Senator Grant Mitchell represents Alberta in the Senate of Canada.

Equality Rights For Transgender Individuals In Canada

By Peter Bowal and Sydney Smith

Introduction

The most recent personal attributes added to the list of prohibited grounds of discrimination in Canadian human rights are "gender identity" and "gender expression." This is generally viewed as facilitating gender diversity and, in particular, establishing legal rights and protections for transgender persons, who are also described as gender non-conforming.

Alberta is the latest province to add these prohibited grounds of discrimination to the legislation to protect individuals in employment, residential accommodation, the provision of facilities and services, contracts, and in public advertising and signage. "Gender identity and gender expression" were added by Bill 7, the *Alberta Human Rights Amendment Act* which received royal assent in 2015.

This article will describe what these prohibited grounds mean and how the fourteen various jurisdictions in the country have legislated with respect to the issue.

Definitions

The terms "gender identity" and "gender expression" are consistently used in the human rights realm. However, they are terms of recent vintage and are not widely understood or distinguished.

Human rights legislation does not define "gender identity" and "gender expression". However, such legislation (as in Alberta) does at least partially define other prohibited grounds, such as age, family status, marital status, mental disability, physical disability, religious beliefs and source of income. The interpretation of these terms will ultimately fall to judges.

In the meantime, some human rights tribunals themselves have administratively offered definitions according to which they will operate. For example, the Ontario Human Rights Commission issued a non-legally binding interpretation bulletin (http://www.ohrc.on.ca/en/gender-identity-and-gender-expression-brochure) that defines "gender identity" and "gender expression" as follows:

The current federal Bill C-16 would also amend the *Criminal Code* to include "gender identity" and "gender expression" as grounds for hate crimes.

> ***Gender identity*** *is each person's internal and individual experience of gender. It is their sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex. Gender identity is fundamentally different from a person's sexual orientation.*
>
> ***Gender expression*** *is how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender.*

An Ontario Human Rights Tribunal held in 2012 that genital surgery was not required for someone to be legally recognized as the other gender.

Existing Legal Protection Without the New Amendments

Most Canadian provinces and territories have held that anyone whose gender identity or expression is different than their birth-assigned gender has always been protected under the "gender" or "sex" prohibited ground of discrimination rubric. This is in the same way that sexual harassment has been understood to be encompassed, without specific language indicating so, as discrimination on the basis of gender or sex. For example, the Alberta Human Rights Complaint form and guide states that discrimination regarding gender "includes the state of being female, man, transgender or two spirited" (http://www.albertahumanrights.ab.ca/complaintform-guide.pdf).

Other legislative amendments have also been passed as a result of *Charter* challenges.

On the other hand, gender or sex is a broader category than "gender identity" and "gender expression". As the Ontario Human Rights Tribunal definition points out, sexual orientation is a completely independent protected human attribute in the same legislation.

Why would a legislature specifically enumerate "gender identity" and "gender expression" when they are already attributes encompassed by protection against discrimination on the basis of gender or sex, which is found in all Canadian human rights legislation? The legislators in each jurisdiction will have their own reasons for legislating the specific alongside the general. It may be due to a contemporary desire to enact clear and explicit safeguards for the gender non-conforming community.

"Gender identity and gender expression" were added by Bill 7, the Alberta Human Rights Amendment Act which received royal assent in 2015.

Canadian Legal Landscape For Transgender Equality Rights

Several Canadian jurisdictions have chosen not to specifically add "gender identity" and "gender expression" to their human rights legislation. These are British Columbia, New Brunswick, Nunavut, Quebec and Yukon. Others – Saskatchewan, Manitoba and Northwest Territories – have added "gender identity" only. Alberta, Ontario, Nova Scotia, Newfoundland and Labrador and Prince Edward Island are the five provinces who have

added both "gender identity" and "gender expression" to their legislation. At the federal level, the House of Commons has passed Bill C-16. At the time of this writing, this Bill had passed Second Reading in the Senate. (See Senator Grant Mitchell's article in this issue for further information about Bill C-16).

Several Canadian jurisdictions have chosen not to specifically add "gender identity" and "gender expression" to their human rights legislation.

Other legislative amendments have also been passed as a result of *Charter* challenges. In *C.F. v. Alberta* [2014 ABQB 237 http://canlii.ca/t/g6ll9] the transgendered applicant was unable to have her new gender reflected in her birth certificate and other government identification because she had not undergone sex change surgery. The Court of Queen's Bench concluded that the Alberta *Vital Statistics Act* violated the applicant's *Charter of Rights* protections and was, to that extent, of no force or effect. The judge ordered the government to issue a birth certificate in her preferred gender within 30 days. A consequential update to the *Vital Statistics Act* and the corresponding Information *Regulation* followed in February 2015, which now ensures transgender individuals will have their gender identity reflected on their government-issued ID cards, driver's licences and birth certificates.

The current federal Bill C-16 would also amend the *Criminal Code* to include "gender identity" and "gender expression" as grounds for hate crimes.

The Table below sets out the nature of the legislation in each Canadian jurisdiction as it relates to equality rights for "gender identity" and "gender expression".

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Sydney Smith is a student at the University of Calgary.

Jurisdiction	Gender Identity and Expression	Gender Identity Only	Rights protected under existing grounds of "sex" and "sexual orientation"
Federal Canada	Currently passed 2nd Reading in Senate - Bill C-16:		
	http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C16&Parl=42&Ses=1		
British Columbia			Human Rights Commission has held that transgendered people are protected under the grounds of "sex".
Alberta	*Human Rights Act*, sections 4 to 9		
Saskatchewan		*Human Rights Code*, section 2(1) (m.01)(xv)	
Manitoba		*Human Rights Code*, section 9 (2)(g)	
Ontario	*Human Rights Code*, sectionas 1, 2(1), 2(2), 3, 5(1) and (2), 6, 7(1), 7(2)		
Nova Scotia	*Human Rights Act* lilsts "gender identity" in section 5(1) (na) and (nb)		
New Brunswick			Human Rights Commission has held that transgendered people are protected under the grounds of "sex".
Newfoundland and Labrador	*Human Rights Act* section 9(1)		
Prince Edward Island	*Human Rights Act* section 1 (d)		
Quebec			la Commission des droits de la personne et des droits de la jeunesse states that people are protected under the grounds of "sex".
North West Territories		*Human Rights Act*, section 5(1)	
Nunavut			Human Rights Act, Nu 2003, c12, section 7, no discrimination on basis of "sex".
Yukon			Legislature declined to add these grounds. May be protected under other grounds.

Supporting Transgender People in the Workplace

By Melissa Luhtanen J.D.

The *Alberta Human Rights Act* (Act), RSA 2000, c. A-25.5, protects people from discrimination in employment based on gender identity and gender expression under section 7 of the *AHR Act*:

> *7 (1) No employer shall*
>
> *(a) refuse to employ or refuse to continue to employ any person, or*
>
> *(b) discriminate against any person with regard to employment or any term or condition of employment, because of the …gender identity, gender expression … of that person or of any other person.*

What are the responsibilities of employers regarding gender identity in the workplace? While there is no definition of "gender identity" in the Act, it is generally understood to include transgender and transsexual people, and may over time develop in law to include non-binary genders. The Alberta Human Rights Commission has indeed accepted complaints from transgender people for a number of years under the ground of "gender," but it was in 2015 that the *Alberta Human Rights Amendment Act* (Bill 7) officially added in the words "gender identity" to protect transgender people. Alberta Hansard, December 1, 2015 includes a good explanation and one definition that may be useful in understanding what these terms mean.

The key to understanding what transgender means is understanding the difference between sex and gender. Sex refers to the physical characteristics that are associated with being male or female, including primary sex characteristics such as genitals and secondary sex characteristics such as breasts. Gender refers to the social presentation of masculinity and femininity. Many cultures have strict rules about how to perform masculinity and femininity. Rigid masculine and feminine gender roles are referred to as the gender binary. However, ideas about gender are not static. They change across time and place, within one society, and between different cultures.

For a transgender person who is coming out within the workplace, there will come a time where colleagues and staff need to be informed or find out.

Transgender individuals do not identify with the sex that they were assigned at birth and present their gender in a way that reflects their true selves. Some transgender persons choose to have gender-affirming surgery so that their physical characteristics reflect their gender identity, and some do not. Gender identity does not relate to sexual orientation. Transgender and gender-variant people may identify as straight, gay, lesbian, bisexual, pansexual, or any other sexual orientation.

Under the Act, transgender people are protected from discrimination and harassment, not only in employment, but also in publications, services, tenancy, and unions. Employers must protect against discrimination and harassment based on gender identity. For instance, an employer may provide an education session to its employees to ensure that there is no discrimination or harassment on any ground, including for a transgender person who is coming out. Supervisors should be made aware that hiring and promotions should not take gender identity into account. An employer must also accept and properly investigate complaints from a transgender employee that his/her human rights have been violated. If the employer finds that there has been harassment or some other form of discrimination in the workplace, it should take appropriate steps to remedy the discrimination, such as reprimanding or suspending the offender, or changing a discriminatory policy.

Some workplaces are incorporating unisex washrooms or single stall washrooms that address not only the need for gender-neutral spaces, but also accessibility and privacy.

Employers may want to review their own human rights policies to update them and include the new grounds of gender identity and gender expression, as well as the other 13 grounds (i.e., sexual orientation, race, etc.) that are in the Act. However, even if an employer's own policy does not include gender identity or any other ground, an employer, in Alberta, is still legally bound by the provisions of the Act.

For instance, a transgender person who needs time-off work for medical reasons, such as surgery or recovery from surgery should be treated the same as any other employee needing accommodation for a medical issue. Sometimes, accommodating an employee will involve increased costs to the employer. The employer has a duty to accommodate an employee to the point of "undue hardship". The Alberta Human Rights Commission has more information on the general duty to accommodate on its website: www.albertahumanrights.ab.ca. *("Employment: Duty to Accommodate" Online: Alberta Human Rights Commission)*

...a transgender person who needs time-off work for medical reasons, such as surgery or recovery from surgery should be treated the same as any other employee needing accomodation for a medical issue.

Employees also have duties regarding accommodation, such as:

- informing the employer of the need for an accommodation;
- a doctor's note for medical issues;
- discussing potential accommodations that would work for both the employer and employee; and
- keeping the employer informed of accommodations that are not working.

Revealing Gender Identity To Other Employees

For a transgender person who is coming out within the workplace, there will come a time where colleagues and staff need to be informed or find out. Involving the transgender employee in a discussion of how to do this respectfully and effectively is the best way to address this process. The employer must be cautious not to release medical information or private information to general employees or others who do not need to know this information. Many transgender people have successfully come out at work, and continued to stay in the same workplace.

A transgender person has no obligation to reveal to the employer that they are considering coming out. Once the employee begins to make plans, such as having surgeries that will involve absences from work, the employee must then inform the employer of a need for accommodation. Both employer and employee are wise to get medical documentation to support any needed medical leaves of absence. Coming out as a transgender man or woman involves many emotional and physical stages. An employee who does not share private information with an employer immediately is not being untruthful, but is simply protecting his or her privacy until the need arises to have an honest discussion or request an accommodation.

Bathrooms In The Workplace

Employers must protect against discrimination and harassment based on gender identity.

A transgender employee will use the bathroom that corresponds with his or her identified gender. There have been some cases (see: *Ferris v Office and Technical Employees Union, Local 15,* [1999] BCHRTD No 55. *Sheridan v Sanctuary Investments Ltd*, [1999] BCHRTD No 43), that have addressed the use of gendered washrooms. These cases have notably said that using the appropriate washroom is "significant" in the identity of a transgender person. Refusing to protect an employee's rights regarding the use of a washroom that matches his/her gender identity has been found to be discriminatory.

Some workplaces are incorporating unisex washrooms or single stall washrooms that address not only the need for gender-neutral spaces, but also accessibility and privacy. For instance, employers can design a bathroom that has a series of single-stall washrooms, each with floor to ceiling walls, and a common gender-neutral sink area.

It is not only a legal responsibility but also a respectful practice to protect employees' rights to privacy.

Respecting Employee Privacy

It is not only a legal responsibility, but also a respectful practice to protect employees' rights to privacy. This will mean keeping the gender that is marked on an employee's identity documents private if it does not match the person's presenting identity (i.e., when the person's documents say male, but she is female and presenting as such in the workplace). Other documents may also reveal a person's gender, such as police record checks and other background checks.

There are some very real hurdles involved in amending one's gender on identity documents. These are beyond the scope of this article, but more information can be found under sections 16.1 to 16.5 of the *Vital Statistics Information Regulation*, AR 3/2012. Protecting the privacy of a transgender employee by not revealing the gender shown on incorrect documents promotes a positive work environment, recognizes that the law is evolving and acknowledges that it takes time to amend identity documents.

While the law is still developing in the area of human rights and transgender status, employers will be well positioned for the future when they work to combat discrimination and harassment against any and all employees.

The key to understanding what transgender means is understanding the difference between sex and gender.

Amended version based upon the original tri-fold: *Employer's Guide: Transgender people in the workplace*, Alberta Civil Liberties Research Centre.

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Transgender Inclusion in Sport

By Rachel Corbett

historians might wonder about today's preoccupation with gender, suggesting that gender divisions might dissolve away.

In mid-November, I participated in a literary event in Toronto hosted by Carol Off, a well-known CBC personality and the co-host of *As It Happens*, a nightly radio program. She was interviewing three authors of historical fiction. An audience member asked the question, "*A hundred years from now, when future authors are writing historical fiction about our lives today, how do you think they will portray us?*" The host offered up her view that a century from now,

> **Women should not have to fill out a "femininity card" to participate in elite sport...**

I found this remark insightful and startling – in a good way! This is because I have advocated for many years that to maximize its huge benefits to individuals, families, communities and societies, sport must be inclusive. Gender has stood out, over history, as the area of sport that is decidedly exclusive and restrictive, and for which sport has much explaining to do.

I have written in this magazine previously about the issue of gender and sport (link). I have also written extensively on my own website, www.sportlaw.ca. Organized sport has long maintained a delivery model predicated on gender polarity and chronological age categories. Sport is also, by its nature, highly rule-driven, and it exists as a legally-sanctioned monopoly in all jurisdictions of the world. It is safe to say that it is one of the last domains to soften ever so slightly under the pressures brought by the transgender community, which has been very active in recent years asserting the rights of gender-diverse people in society.

Today, there are many people and organizations doing excellent work to foster more positive and inclusive experiences for LGBT (lesbian, gay, bisexual and transgender) people in sport. Many leading sport organizations have welcomed LGBT members, participants and fans. The CFL (Canadian Football League) recently partnered in an official Grey Cup party at a gay sports bar in Toronto. For years, the Blue Jays (and other Major League Baseball teams) having hosted "gay days" at the ballpark. The NCAA (National Collegiate Athletic Association) and one of its counterparts in Canada, the CCAA (Canadian Colleges Athletic

Association), along with the Coaching Association of Canada have published resources and policy tools to promote the inclusion of LGBT athletes and coaches. The international Gay Games have been going strong for nearly 30 years, and the international OutGames for over a decade.

The administration of hormones as a component of gender transition will, in most cases, contravene the *World Anti Doping Code*.

At this point, in Canada at least, efforts to promote inclusion of LG and B people into sport have been highly successful. The inclusion of T people (transgender) has been more challenging however, because of the historic regimentation of sport along gender binary lines, and because of the distinct competitive advantage of …. ironically, T (or testosterone). Physiologically, it is testosterone that makes men and women different, and it is the existence of testosterone that renders male athletic performances superior to those of females in almost all cases.

Here is a bit of history to create some context for the discussion of transgender inclusion in sport. pport has a sorry history of its treatment of women, from the earliest days when women were excluded from participation in sport entirely. It may be surprising to some readers that women were not permitted in the Olympic marathon until 1984, based on the belief that the event would be too hard on their bodies. Today, there are uplifting moments, such as when the International Weightlifting Federation recently expanded the number of weight classes for women to put them on even par with men. But also today, the IOC (International Olympic Committee), with the support of the ICF (International Canoe Federation) does not allow women to race canoes in the Olympics. At Rio in 2016, there were 12 canoe/kayak events: eight for men and just four for women. And women did not compete in Olympic ski jumping until 2014, and that was only after a protracted legal battle.

Sex testing remains sport's dirtiest, misogynistic 'non-secret'. Started in the 1960s by the IAAF (International Amateur Athletics Federation, as it was known then), it was adopted by the IOC shortly thereafter after and continued until the 2000 Sydney Olympics. Through this period all female athletes competing at the Olympics were required to undergo a "sex test" to confirm that they were, in fact, female. These tests were initially visual inspections but later were chromosome tests involving swabs of genetic material. Women who did not pass the test (mostly intersex individuals, meaning individuals who naturally and often unknowingly have atypical chromosomes) would be ejected from competition. In 1996, for example, it was reported that eight women failed the sex test, although none were removed from those Games.

Sex testing remains sport's dirtiest, misogynistic 'non-secret'.

Under the glare of harsh public scrutiny, sex testing was discontinued in 2002 and shortly thereafter the IOC implemented an eligibility policy for transgender athletes, called the "Stockholm Consensus". It was onerous and required that an athlete have surgery, undergo hormone treatment, obtain legal recognition in their home jurisdiction (even though most countries in the world did not offer legal recognition at the time), as well as submit a full medical file for review. This restrictive approach became the norm for the next decade.

Then, in 2011 the IAAF introduced a new policy on "hyperandrogenism" in women, criticized by many as being renewed sex testing, just under another guise. Under this policy, any female athlete believed to have testosterone levels outside the normal female range would have to submit to examination and could, as a result, be required to medicate or undergo surgery to reduce natural testosterone levels. This policy was primarily a response to the 2009 high profile case of South African runner Caster Semenya. The policy was also applied to young Indian sprinter, Dutee Chand, who was prevented from competing at the 2014 Commonwealth Games in Glasgow.

According to news reports, more than 30 women have been deemed ineligible to compete under the IAAF's hyperandrogenism policy. However, Chand was able to enlist support from Canadian advocates and a *pro bono* Canadian lawyer, who challenged the policy to the International Court of Arbitration for Sport, or CAS. CAS upheld Chand's case in 2015 and suspended the IAAF policy for two years. To paraphrase reporting from the Globe and Mail newspaper at the time, the Court said "*the requirement that an athlete's natural testosterone fall within parameters arbitrarily determined to be normal for women was discriminatory (gender verification is never applied to male athletes, who can have any level of testosterone) and could not be justified, even in the interest of fair play*". Should the IAAF wish to implement a same or similar policy in the future, it may do so only after two years and must satisfy the Court that any such policy is reasonable, supported by scientific research, and non-discriminatory. Whether the IAAF can satisfy this high burden remains to be seen.

This leaves us with two separate, yet related, issues arising from the topic of transgender inclusion in sport. First, there is the question of how to accommodate transgender individuals who have transitioned from one gender to another. The controversy is not associated with

Gender has stood out, over history, as the area of sport that is decidedly exclusive and restrictive, and for which sport has much explaining to do.

biologically born females who transition to males (it is widely accepted that they will never have a commanding competitive advantage, even with the administration of synthetic testosterone, because nature has given these athletes narrower shoulders, broader hips, shorter and thinner bones, smaller muscles, as well as (generally) less vertical height and smaller feet and hands). Rather the controversy is associated with biologically born males who transition to females, because it is widely perceived that they will be at an advantage due to the natural features they were born with (listed above) even though their testosterone levels will be suppressed through hormone treatment.

This is the conventional wisdom anyway, although none of it has been proven scientifically. We do know from scientific studies that elevated testosterone will increase sport performances by up to 12 percent, depending on the sport. This is why most track and field world records for women established in the 1980s will never be broken – as these athletes from Eastern Bloc countries are now known to have been doping with steroids (testosterone) when they set these records.

Earlier this year, the IOC softened its strict position in the Stockholm Consensus by eliminating the requirement for surgery, allowing female to male transgender athletes to compete without restriction, and reducing the minimum period of hormone treatment from two years to one year for male to female transitioned athletes. This is a great step forward for sport's highest and most influential governing body.

Under the glare of harsh public scrutiny, sex testing was discontinued in 2002 and shortly thereafter the IOC implemented an eligibility policy for transgender athletes, called the "Stockholm Consensus".

Around the same time that the IOC was reconsidering its position, the Canadian Centre for Ethics in Sport published its long-awaited document, *Creating Inclusive Environments for Trans Participants in Canadian Sport: Guidance for Sport Organizations*. The document contains policy prescriptions but is also a comprehensive educational piece. It builds on a series of discussion documents and other materials prepared within the Canadian sport system over the last ten years.

This guidance document distinguishes between two general levels of sport: *developmental and recreational* (which represents that vast majority of sport activity in Canada) and *high performance*. The overall philosophy for developmental and recreational sport is one of full inclusion. In high performance sport, while inclusion is desired, it may be tempered by the application of international federation rules which will tend to be more restrictive than Canadian rules.

The CCES guidance document contains four broad policy recommendations:

1. Athletes in developmental and recreational sport should be able to participate in the gender category in which they identify, without any need for disclosure of information or other requirements. The same policy of inclusion would apply to high performance athletes up until the point where they must comply with international federation rules (which may state differently and will likely be along the lines of the new IOC consensus)
2. Hormone therapy should not be required for an athlete to participate in high performance sport (up to the point where international federation rules would take effect), unless the sport organization can demonstrate that hormone therapy is a reasonable requirement.
3. There should be no requirement for an athlete to disclose their transgender identity or history to compete in high performance sport (up to the point where international federation rules would take effect) unless there is a justified reason for them to do so.
4. Surgical intervention should never be required for a transgender athlete to participate in high performance sport.

Keep in mind that high performance athletes are a tiny minority of all individuals participating in sport in Canada. Most sport participants fall into the first category (developmental and recreational) and in this sector of sport, the recommended approach is very clear and very simple: there should be no restrictions on the participation of transgender individuals. They should be free to participate in the gender of their choice.

However, at the high performance end of the sport spectrum, things do get more complicated. Firstly, an elite athlete will bump up against policies and regulations of their international federation, which will trump any domestic policies and regulations. As well, many of these athletes are in the Registered Testing Pool for the Canadian Anti-Doping Program and are thus subject to anti-doping testing. The administration of hormones as a component of gender transition will, in most cases, contravene the *World Anti Doping Code*. Thus, such athletes would need to request and obtain Therapeutic Use Exemptions (TUEs) in order to train and compete in a manner consistent with prevailing anti-doping rules.

That is the first issue. The second issue is the treatment of female athletes having naturally high testosterone levels, such as Caster Semenya, Dutee Chand and many others. From 2009 to 2016 the IAAF successfully imposed its policy on hyperandrogenism, affecting approximately 30 female athletes. That policy has now been suspended – for a time. People like me are waiting to see what will come forward in 2017 from international sport bodies in terms of replacing the policy with something else.

My personal view (and this is not the view of the Sport Law & Strategy Group, or the view of Brock University where I teach, or the view of the Canadian Centre for Ethics in Sport where I serve as a part-time Doping Control Officer) is that it is discriminatory to continue to challenge females on their femaleness and not similarly challenge males. Women should not have to fill out a "femininity card" to participate in elite sport. I have stated in public many times that most athletes who achieve the pinnacle of their sport are "freaks" to begin with, and I say that in a complimentary way. Yao Ming is a great basketball player because he is 7 ft. 6 in. tall. Michael Phelps, arguably the best swimmer in the world, has a torso length far out of proportion to the length of his legs. Many shooters and biathletes have an unnatural ability to slow and even stop their heartbeat when they pull the trigger to shoot at targets. Great rowers have an arm-span significantly longer than their height. If we are going to say that Dutee Chand must artificially reduce her body's naturally-produced testosterone, then we should also say that basketball players over 7 feet tall should reduce their height by cutting off their feet, and swimmers should not be able to have a shoe size greater than 13.

In closing, the CCES guidance document is refreshing and will hopefully inspire sport bodies to take a more inclusive approach to gender diverse athletes, rather than simply defaulting to the IOC position (which is still somewhat restrictive relative to the Canadian view on this issue). Numerous sport organizations in Canada, ranging from soccer to volleyball to school and college sports, are looking for help in this area, and many are now implementing fair, inclusive and non-discriminatory rules. This is heartening to see. The unknown at this point is what will come forward as we approach the two-year suspension of the IAAF policy to regulate the femaleness of females. I, and others, await this with interest!

Rachel Corbett is the co-founder of the Sport Law & Strategy Group (formerly the Centre for Sport and Law) and is also a Lecturer in Sport Management at Brock University in Niagara. She is a part-time Doping Control Officer under Canada's anti-doping program and is a member of the Governance Committee of U Sport (formerly Canadian Interuniversity Sport).

Scrutinizing the Bench: Judicial Appointments in Canada and England and Wales

By Marjun Parcasio

When judges are sworn in to judicial office in Canada and England and Wales, they recite a common oath of office. A judge promises "to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will." Alluded to in this shared oath is the principle of judicial independence, the notion that judges should be free to make decisions fairly and impartially in accordance with the law, without interference from the State.

Historically, members of the senior judiciary in both countries were simply selected by the executive and appointed by the monarch. The process raised legitimate questions about political involvement in the selection process and its potential impact on judicial independence (or at the very least, the perception of independence). Reforms to address these concerns have been enacted in both countries along similar lines, although there remain some important differences.

Scrutiny of the judicial selection process should continue to be of general public concern. The rigour of the selection process and the caliber of the individuals selected under that process is a reflection of the quality of justice and the role the judiciary plays in each country's constitutional framework.

The JACs system was recently changed in October 2016. Reversing the changes introduced by the Conservative government in 2006, the government under Prime Minister Trudeau revised their composition and mandate.

Appointment of judges in England and Wales

When the judicial selection process in England and Wales was changed in 2005, it was intended to address the opacity and secrecy which characterized a system whereby judges were chosen by receiving the proverbial "tap on the shoulder" by the Lord Chancellor (the member of Cabinet responsible for the Ministry of Justice). The changes brought about by the *Constitutional Reform Act 2005 (CRA)* were sweeping. The Act established the Judicial Appointments Commission (JAC), an independent body which would select candidates for senior judicial office. The JAC is composed of fifteen Commissioners (the Chairman, six judicial members, two professional members, one non-legally qualified judicial member, and five lay members). Under s. 63(2) of the Act, selection must be solely on "merit", the meaning of which is not expounded in the legislation but has been interpreted by the JAC as including qualities such as intellectual capacity, communication skills, and leadership.

Court, gender, ethnic and social diversity continue to be issues for the U.K. judiciary. Canada faces similar challenges.

Although the JAC chooses a candidate for appointment, the Lord Chancellor retains the ability to accept, reject, or ask the JAC to reconsider the nomination for senior judicial positions. Once a name has been accepted, the recommendation is sent to the Queen, who makes the formal appointment. The selection of justices for the Supreme Court of the United Kingdom differs slightly with a specifically constituted commission for that purpose and requires the Lord Chancellor to consult certain senior judges, but the process is broadly similar.

he modern process for selection of judges in England and Wales differs markedly from its predecessor. The Lord Chancellor now plays a limited role. Parliament's role is equally restricted; although the Lord Chancellor is accountable to Parliament for the appointments process, there are no parliamentary appointment hearings, nor do parliamentarians sit on the selection panels. The JAC has become the primary body responsible for judicial selection, a nod towards the need for greater accountability and fairness in the appointments process.

The Canadian Approach

Canada, too, has had a coloured history of judicial selection. Prior to 1989, patronage and partisanship were rampant in the making of appointments to the superior and federal courts. In 1989, reforms initiated by Prime Minister Mulroney established the basis of the modern selection system. Although sharing the same acronym, instead of a singular Judicial Appointments Commission as in the United Kingdom, multiple Judicial Advisory Committees

(JACs) were established in Canada. The JACs, of which there are seventeen with at least one representing each province and territory, assess applicants on the basis of published assessment criteria which include factors like professional competence and personal characteristics.

The JACs system was recently changed in October 2016. Reversing the changes introduced by the Conservative government in 2006, the government under Prime Minister Trudeau revised their composition and mandate. JACs now consist of seven members, consisting of representatives of the bar, bench, and the general public. The law enforcement representative was removed, and voting rights were restored to the judicial members. In addition, JACs would use the pre-2006 categories of "highly recommended," "recommended," or "not recommended" when reporting to the Minister of Justice, who would then make a recommendation to Cabinet. The Governor General, acting on advice of the Cabinet, would then finalize the appointment.

In August 2016, the government also introduced a new selection process for Justices of the Supreme Court of Canada.

The modern process for selection of judges in England and Wales differs makedly from its predecessor. The Lord Chancellor now plays a limited role. Parliament's role is equally restricted.

A seven-member independent Advisory Board will review applicants for the country's highest court and unlike in the United Kingdom, the nominee would appear before a parliamentary committee to respond to questions prior to their appointment.

Challenges And Opportunities

There is no doubt that the changes to the judicial selection process in both Canada and England and Wales have had a positive impact, especially in respect of judicial independence. However, although excellent candidates continue to join the bench, further work is needed to promote judicial diversity.

A cursory look at the composition of the U.K. Supreme Court reveals obvious deficiencies, perhaps best illustrated by Lord Neuberger, President of the Supreme Court, in a speech before the Bar Council in November 2016: "we have one white woman and 10 white men, and, although two of the 11 were not privately educated, none of us come from disadvantaged backgrounds." Although the figures are not quite as stark for the Court of Appeal or the High Court, gender, ethnic and social diversity continue to be issues for

Historically, members of the senior judiciary in both countries were simply selected by the executive and appointed by the monarch.

the U.K. judiciary. Canada faces similar challenges. Although certain JACs have made great strides in this respect, there are regional disparities, and on the whole there remains a dearth of aboriginal and ethnic minority judges who are represented on the bench.

There are pending opportunities to redress the balance. The U.K. Supreme Court is due to have five judges retire by the end of 2018. Numerous vacancies in superior courts across Canada are also available and need to be filled urgently to address the delays being faced by litigants in a number of provinces. Although merit will (and should) continue to be central in selecting judges to fill those roles, the selection process must also account for the increasingly diverse legal profession in Canada and England and Wales if it is to remain suitable for the modern era.

Marjun Parcasio is a trainee solicitor with the firm of Hogan Lovells International LLP in London, England.

The Work of the National Judicial Institute

By Adele Kent

The Right Honourable Beverly McLachlin, P.C., Chief Justice of Canada and the Chair of the Board of Governors of the National Judicial Institute said about judicial education:

As the landscape of judges becomes ever more complex through technological, environmental and socioeconomic changes, judges require a firm dedication to lifelong learning.

The National Judicial Institute (NJI) is a not-for profit organization that provides the majority of continuing education for Canadian judges. NJI is founded on 20 principles of judicial education which provide that the education for judges will be judge-led, in accordance with the principle of judicial independence and based upon good adult education pedagogy.

Canadian judges and Canada's justice system are respected around the world.

There are three dimension to the education offered to judges– substantive law, skills and social context. Education in substantive law is the most obvious area of education. Even though Canadian judges have been lawyers for several years before their appointment, the law changes so that regular updates on the law is required. Judicial skills are skills that are unique to the judicial role. These include communicating effectively in the courtroom, analyzing and applying judicial ethical principles and applying legal principles to a specific set of facts. The ability to be skillful in these areas does not come naturally once a lawyer becomes a judge. These skills must be learned and practiced. The third dimension is education in the context of the people that the judges serve. The people that come into Canadian courtrooms are unique and bring with them the experiences of their culture, race, economic situation, gender and so on. Judges need to understand the backgrounds of poverty, race, culture, disability and other kinds of disadvantage so that they can judge the cases, not only impartially but fairly and in accordance with our fundamental value of equality.

The NJI employs good adult education pedagogy in designing and delivering its courses. Judges come to the bench and to judicial education with experience. They also are practical. Given the demands of the job, judicial education must be relevant to what the

judges are doing in their courtrooms. Judges learn best from other judges. This means that for the most part, education for judges is planned and delivered by judges and is interactive. Judges will often work on hypothetical problems that reflect the kind of issues that they may confront in their courtrooms.

After more than a decade of international work in many countries across the globe, NJI has learned important lessons in international justice and reform.

The principles of judicial education for Canadian judges have also been applied in the NJI's international work. The principles set out above including judge-led education, the need to protect judicial education, and the desire on the part of participants for practical education apply universally.

NJI has for many years worked in a variety of countries, sharing the experiences and techniques employed in the design and delivery of good judicial education. Our work has been done in three areas. First, we work with the judicial institute in the country to assist them in employing the principles of adult education. Second, we do offer some teaching in new judicial techniques or laws that have been recently introduced into the country. Finally, NJI assists in the strengthening of judicial education and the judicial institute. An example of each of these kinds of education initiatives follows.

NJI is in the last year of a large project in Ukraine with the National School of Judges. The project, Judicial Education of Economic Growth, was funded by Global Affairs Canada. NJI staff and several Canadian judges worked with staff from the National School and with Ukrainian judges developing a number of courses for Ukrainian judges based upon the model used at the NJI. The process for the development of each course was similar. Canadian and Ukrainian judges and educators worked together to define the specific needs of the judges and then developed courses to address those needs. Sometimes, the courses centered on a particular judicial skill like effective management of the courtroom. Other times, specific legal topics like land law or evidence were tackled. In cases like this, Canadian judges do not know the local law, so their job is to assist in the design of the program, once their Ukrainian colleagues identify the challenges involved for judges in that particular area of the law.

A project that NJI completed a few years ago in Ghana also illustrates the way in which Canadian judges assist while leaving the content to the local judges. Offshore oil had been discovered. Ghana was preparing for the benefits of building an oil industry. With those benefits come

Even though Canadian judges have been lawyers for several years before their appointment, the law changes so that regular updates on the law is required.

challenges, and the Ghanaian judiciary recognized that they needed to be trained in a variety of issues that may arise, from the effects of large-scale development on small towns, potential environmental problems and ethical issues that can arise when there is a large influx of money into an economy. Canadian judges are familiar with some of these issues given our thriving mining and oil and gas industries. On another plane, however, the legal issues would be purely local because the economy of Ghana is much different. As a result, the design of the education was truly collaborative, with Canadian judges assisting in designing modules on courtroom management and ethics, while the Ghanaian judges led the team on structuring modules on the law and regulations that would govern the industry.

An example of a different kind of collaboration is the work that NJI does with the Centro de Estudios de Justicia de las Americas (CEJA), an organization whose objectives include studying the systems of justice in Latin America and creating opportunities for cooperation amongst these countries in considering judicial reform. Currently, they are working on reform in civil law. One of the areas of interest across Latin America is the introduction of class action legislation in countries where there is no such legislation and the improvement of such legislation and practice in countries that currently have class actions. CEJA asked NJI to organize a seminar put on by Canadian judges on the Canadian experience in class actions from a judicial perspectives. Canadian judges provided three days of education on our class actions. This permitted the participants in the seminar to consider what of our experience would be useful to consider in the reform of their system.

Judges need to understand the backgrounds of poverty, race, culture, disability and other kinds of disadvantage so that they can judge the cases, not only impatially but fairly and in accordance with our fundamental value of equality.

After more than a decade of international work in many countries across the globe, NJI has learned important lessons in international justice and reform. Most of them hold true in Canada too with the education of Canadian judges.

First, for best results, we use a truly collaborative model as we have described. Collaboration means local ownership and that, in turn, means that not only is the judicial education and reform that is produced much better, but it is also sustainable and in use long after NJI is gone.

Second is the importance of high level commitment from national judiciaries. In Canada, we are fortunate to have the support of the Chief Justice of Canada as well as Chief Justices from courts across Canada. In other countries, the support of the Chief Justices in their jurisdictions is essential to demonstrate to all judges and indeed the Justice sector as a whole, the importance of the education and reform that is being undertaken.

A third lesson is the need for international initiatives to remain responsive to our partners. In most of the jurisdictions where we work, justice systems are being fundamentally reformed and change is constant. The laws change, our partners' mandates change and the judges who we work with change. NJI has had to learn to be flexible and current.

Finally, NJI has learned that the reputation of the Canadian judiciary precedes us everywhere we work. Canadian judges and Canada's justice system are respected around the world. In our most recent work in Ukraine, skills-based judicial education has become known as 'the Canadian methodology'. Our host countries believe that we have a judicial system that is not without problems, but is fair, accountable and independent; and a judiciary that has integrity and competence.

NJI is in the last year of a large project in Ukraine with the National School of Judges.

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The Honourable Justice C. Adèle Kent is Executive Director of the National Judicial Institute. Based in Ottawa, the National Judicial Institute (NJI) is an independent, not-for-profit institution committed to building better justice through leadership in the education of judges in Canada and internationally.

The Appointment of Justice Rowe

By Drew Yewchuk

On October 17, 2016 Prime Minister Trudeau nominated Justice Malcolm Rowe for appointment to the Supreme Court of Canada. Justice Rowe was a trial judge in Newfoundland and Labrador for two years before being appointed to the Court of Appeal of Newfoundland and Labrador in 2001.

The first section of this article describes the recent changes to the Supreme Court appointment process, as Justice Rowe is the first nomination under the new process. The second section reviews Justice Rowe's application for the position. The third discusses the public hearing, which I attended in Ottawa on 25 October 2016.

The Appointment Process For Supreme Court Justices

The *Supreme Court Act*, RSC 1985, c S-26, s 4(2) gives the power to appoint Supreme Court justices to the Governor-in-Council but does not describe any process for how to do so. Prior to 2004, any consultation that took place was confidential and informal. A new process was adopted by the Liberal government in 2004 that was *ad hoc* and quickly organized. The 2004 committee had only one day's notice as to who the two nominees were before speaking to them, and no part in the selection process. This process resulted in the appointment of Justices Abella and Charron to the Supreme Court.

The question and answer session seems to be relevant to the Supreme Court Justice selection process primarily as it builds confidence in the nominee prior to their official appointment to the Court.

The 2005 committee – also struck by the Liberals – participated in the selection process by narrowing the short list of six names (chosen by the Minister) down to three names. The committee included representatives of each political party. The Liberals were defeated in an election before completing the process and the Conservatives completed the

nomination process. This was the first year that there was a public interview process between parliamentarians and the nominee, and it led to the appointment of Justice Rothstein in 2006. In 2008 the Conservatives were in power, and a vacancy occurred during an election, so no selection process or hearing was applied when Justice Cromwell was appointed. The process has been inconsistent in recent years – both Justice Gascon and Justice Côté were appointed in 2014 without any public hearings and the same was true of Justice Brown's appointment in 2015.

The new process was announced August 2nd, 2016. First, an independent advisory board was established. The Prime Minister appointed The Right Honourable Kim Campbell as chairperson and two other members to the board (with two of the Prime Minister's nominees being non-lawyers). Four independent professional organizations: the Canadian Judicial Council; the Canadian Bar Association; the Federation of Law Societies of Canada; and the Council of Canadian Law Deans were invited to nominate a member each. There was a notable effort to de-politicize the advisory board. Unlike previous committees used to select Supreme Court justices, the board includes no sitting members of Parliament or the Senate.

...so unless something was discovered about Justice Rowe during the session that would give Prime Minister Trudeau some reason to reconsider his selection, Justice Rowe could expect to be appointed to the Court. I won't keep you in suspense, nothing of the sort came up.

From August 2nd to August 24th the board accepted applications from judges and lawyers who met the requirements of the *Supreme Court Act* and who were functionally bilingual. The board was also mandated to seek out qualified applicants to encourage them to apply. It then created a short list of applicants that it presented to the cabinet, and, following a consultation period between the Minister of Justice, the Chief Justice of the Supreme Court, and other stakeholders, made recommendations to the Prime Minister. The Prime Minister then selected Justice Rowe as the nominee, although the short list was not binding on the discretion of the Prime Minister.

On October 24th, Minister of Justice Wilson-Raybauld and the Chairperson of the Advisory Board went before the House of Commons Standing Committee on Justice and Human Rights to explain the choice of nominee, and on October 25th, the nominee took part in a question and answer period before the House of Commons Standing Committee on Justice and Human Rights, the Standing Senate Committee on Legal and Constitutional Affairs, and representatives from major political parties lacking representation on those committees.

The new process is not entrenched in law – there is still nothing that compels Prime Ministers selecting Supreme Court Justices in the future to follow this procedure.

Some Comments On The Application Of Justice Rowe

Although there is a convention to have one Justice from Atlantic Canada on the Supreme Court, the government said that it would not necessarily follow this tradition. This caused a bit of an uproar in the Atlantic Provinces. While Trudeau's government did not officially back down from its position, it did ultimately select a judge from an Atlantic Province – Justice Rowe is actually the first Supreme Court Justice from Newfoundland and Labrador.

Some portions of the application document submitted by Justice Rowe are available on-line, and they make for interesting reading. The application included a questionnaire that asked for five examples of writing demonstrating the legal reasoning and writing of the applicant.

Questions on the development of Aboriginal rights in Canadian law brought out some of Justice Rowe's most interesting answers.

The final section asks about "reconciliation of the need to provide guidance on legal questions of importance to the legal system as a whole with the specific facts of a case which might appear to lead to an unjust result for a party?" Justice Rowe's reply is a good example of answering a question in a manner those with legal training would likely consider 'judicious' and those without such training would probably describe as 'self-contradictory' or at least confusing:

> "The Supreme Court maintains and develops the structure of law in Canada. Stability and predictability are important to maintain that structure. But, adaptation to changes in society, including changes in shared goals, is critical to the law's development. It is important to operate from first principles, while also considering practical results. It is no less important to eschew ideological positions. Should the Court lead or mirror a shared sense of justice? The answer is, of course, both. Generally, it should lead when the time is ripe to do so, having regard to the needs and aspirations of Canadians."

The Question And Answer Session

I had the pleasure of being one of the law students selected to attend the Question and Answer session. Each questioner had a fixed five minutes to ask questions and receive answers, meaning that no more than two questions could be effectively asked and answered. The Parliamentarians had no ability to block the Prime Minister's selection– so unless something was discovered about Justice Rowe during the session that would give Prime Minister Trudeau some reason to reconsider his selection, Justice Rowe could expect to be appointed to the Court. I won't keep you in suspense, nothing of the sort came up. The session lived up to the description given to it by moderator and law professor Daniel Jutras: "a chance to glimpse into the mind of a great jurist."

In addition to the absence of decision-making authority by the questioners, the question and answer session had another constraint: Justice Rowe could not be asked to answer any questions that may come before the courts, to explain his reasoning on past judgments he has made, or to describe his position on past Supreme Court decisions. It would damage judicial independence and the finality of judgments to allow a Supreme Court nominee to commit themselves to any such positions. This limitation made the forming of questions a considerable challenge – the most obvious questions could not be asked. The inquirers tried to skirt the rule in a number of ways: using hypotheticals (which were thinly veiled attempts to ask about future potential cases), and attempts to describe the 'process' of making a past judgment – which is not always distinct from elaborating on the reasons given. At times it seemed the more challenging part of the session was to be on the asking end.

I had the pleasure of being one of the law students selected to attend the Question and Answer session.

The structuring of questions seemed to require walking a fine line. No question could refer to a specific case; for example a question about a sexual assault case currently before the Supreme Court on which Justice Rowe heard the appeal. A question that was too general received an impeccably correct but non-specific answer that could have been obtained by consulting a law textbook. Notwithstanding these challenges, some of the questions led to interesting answers.

One issue that came up in two different ways was the representation of minority groups on the Supreme Court – an important question, but also an odd one for Justice Rowe. He had been selected for the Supreme Court, but he did not do the selecting (as he reminded the panel). These questions revealed Justice Rowe's belief that Supreme Court Justices do not represent their respective regions' interests on the Court – each Justice is a Justice for all of Canada ("all of the members of the Supreme Court of Canada, in a sense, must speak for the country… there is a common undertaking"). However, he also acknowledged the

importance of judges with different backgrounds, and the importance of understanding the context of the cases the Court hears. The convention for Supreme Court appointments that emphasizes the importance of regional representation, to the extent that it has impeded representation of other minority groups, is perhaps becoming a difficult tradition to justify. However, the issue of what representation to prioritize on the Supreme Court is one for which the Prime Minister is ultimately responsible.

The new process is not entrenched in law - there is still nothing that compels Prime Ministers selecting Supreme Court Justices in the future to follow this procedure.

Two questioners asked Justice Rowe about a claim from his application that "Through the leave to appeal process, the Court chooses areas of the law in which it wishes to make a definitive statement. Thus, the Supreme Court judges ordinarily make law, rather than simply applying it." Justice Rowe's answer was a clear and rapid introduction to the role of courts in Canadian law. The role of the courts is to interpret statutes in accord with the intention of Parliament, and Parliament is free to rewrite statutes where it feels the court has misinterpreted them. The interpretation of the *Charter* is different – it involves the protection of rights given to Canadians from legislatures. Both of these interpretive tasks effectively involve creating new law to answer novel questions. It was odd to see legislators appear to take issue with a statement that seemed like little more than a factual description of the work of the courts.

Questions on the development of Aboriginal rights in Canadian law brought out some of Justice Rowe's most interesting answers. In addition to reviewing the approach to Aboriginal law and Aboriginal title, Justice Rowe offered some thoughts on the role of the Supreme Court on Aboriginal law and the process of reconciliation:

There was a notable effort to depoliticize the advirory board. Unlike previous committees used to select Supreme Court justices, the board includes no sitting members of Parliament or the Senate.

There is an interesting relationship between the courts, particularly the Supreme Court of Canada and governments and indigenous leadership in terms of how much the Court says and when it says it. I think it would be unwise for the Court to get out ahead of a process which I truly hope will be a process of reconciliation…which will come through nation to nation dealings. And in a sense the Court should stand a little apart from that, always, always, bearing in mind that if a First Nation or some group of Indigenous persons wishes to vindicate their

rights before the court they have a right to be heard and to receive a remedy where that is warranted.

The new process is not entrenched in law – there is still nothing that compels Prime Ministers selecting Supreme Court Justices in the future to follow this procedure. The questions brought out some other interesting odds and ends. Justice Rowe spoke in favour of clarity in Supreme Court judgments – especially in the portion of the judgment intended to be a definitive statement of law. He indicated that government references to the Supreme Court involve "existential questions" and that he is "in a sense, relieved that [he] will never be called upon to frame" such questions. He also gave a succinct answer describing the role of a judge "to do right according to law", and stated that his favourite past Supreme Court Justice was Justice Sopinka, who was appointed to the Court directly from practice.

In general, I believe the major function of the question and answer session was to effectively inspire confidence in Justice Rowe. While the session in part reflected what Justice Rowe had written in his application, his demonstration of his ability to think quickly and articulate himself (in both French and English) on a variety of legal matters while keeping in mind the restrictions on what he could say, was not a small feat. The question and answer session seems to be relevant to the Supreme Court Justice selection process primarily as it builds confidence in the nominee prior to their official appointment to the Court. As for the appointment process itself, as I noted above it is not entrenched in law and thus there is no assurance this process will be followed next time.

This post may be cited as: Drew Yewchuk, "The Appointment of Justice Rowe" (26 October, 2016), on-line: ABlawg, *http://ablawg.ca/wp-content/uploads/2016/10/Blog_DY_SCC_Rowe_Oct2016.pdf*

Drew Yewchuk is a research assistant and articling student at the Public Interest Legal Clinic at the University of Calgary.

Aboriginal People are still without Supreme Court Representation

By Matthew Wolfson

Prime Minister Trudeau's selection of Justice Malcolm Rowe to the Supreme Court of Canada marks the first judicial appointment from Newfoundland and Labrador. Prior to this, on August 2, 2016, the Prime Minister announced that an advisory board would recommend a shortlist of candidates based on a new selection process. Any lawyer or judge who met the criteria of the *Supreme Court Act* could apply.

The Prime Minister's aim was to draw candidates who would bring greater representation to the minorities of Canada. One of the ways he was to achieve this end was by requiring candidates to be functionally bilingual. It is curious that with this aim in mind, the Prime Minister appointed a jurist from the east coast rather than appointing the first Aboriginal jurist.

Aboriginal issues are now of great concern in Canadian criminal law. For starters, there is the justice system's failure to respond to Aboriginals' over-representation in prison. This problem has gone largely unabated.

In 1999, the Supreme Court of Canada released its decision in *R. v. Gladue,* instructing the lower courts to take Aboriginal background into consideration when sentencing, exactly as the *Criminal Code* requires. Thirteen years later, in the case of *R. v. Ipeelee,* the Court had to remind everyone that it meant what it said in *R. v. Gladue*, and that it is an error in law to not consider an offender's Aboriginal background.

In *Ipeelee*, Justice LeBel stated for the Supreme Court:

> *Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society . . . To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.*

For most of our existence as a country, the law has guaranteed representation to civil law and to the legal traditions of Quebec. Should similar guarantees not be provided for Canada's Aboriginal roots?

This excerpt should remind us that we still have a long way to go in recognizing the impact that inter-generational trauma has on Aboriginal communities and, in turn, on our criminal justice system. It should remind us that Aboriginals still have reason to be distrustful of that system. After all, our country was founded by a Prime Minister who endorsed a policy for residential schools and stated,

"When the school is on the reserve, the child lives with its parents, who are savages, and though he may learn to read and write, his habits and training mode of thought are Indian. He is simply a savage who can read and write."

It is easy to imagine why many Aboriginal youth would not want to buy into a country that started this way. More Aboriginal persons in positions of power may give them a greater stake in the game. While it is true that the Prime Minister appointed Jody Wilson Raybould as the first Aboriginal Attorney General of Canada, there is still a clear need for an Indigenous person on the Court – to help in choosing the cases that get leave and to bring an Aboriginal perspective to the adjudication.

Canada's highest Court still sits with three Justices from Quebec, another Justice from Atlantic Canada (as per the custom), and no Aboriginal Justices.

Perhaps some priorities in Prime Minister Trudeau's new procedures were misplaced: in particular, the new requirement of candidates that they be "functionally bilingual". While the Prime Minister's new selection process protected language equality, Sen. Murray Sinclair opined that the "functionally bilingual" requirement would unfairly disadvantage Aboriginal candidates.

Acknowledging the fact that French Canadians greatly outnumber the Aboriginal people of Canada, the Quebecois have long enjoyed mandatory representation at the Supreme Court that Aboriginals have never had. Section 6 of the *Supreme Court Act* guarantees three seats in the Court to Justices from Quebec. The wording of this section has remained, in the words of the Supreme Court in *Reference re Supreme Court Act, ss. 5 and 6*, "substantially unchanged since 1875."

For most of our existence as a country, the law has guaranteed representation to civil

law and to the legal traditions of Quebec. Should similar guarantees not be provided for Canada's Aboriginal roots?

Why not do more to incorporate Aboriginal legal culture into our own? Indeed, the Correctional Service of Canada reports that there is a growing interest in the use of sentencing circles in non-Aboriginal communities. This is compatible with the Supreme Court's comment on section 718.2(e) of the *Criminal Code* in *R. v. Wells*, [2000] 1 S.C.R. 207. Justice Lacobucci stated that the provision for restorative justice applies to all offenders. He described it as follows: "Section 718.2(e) has a remedial purpose for all offenders, focusing as it does on the concept of restorative justice, a sentencing approach which seeks to restore the harmony that existed prior to the accused's actions."

While it is true that the Prime Minister appointed Jody Wilson Raybould as the first Aboriginal Attorney General of Canada, there is still a clear need for an Indigenous person on the Court.

Ensuring greater Aboriginal representation on the Court would be a monumental step in better serving a historically under-serviced group in Canadian society. Yet, when the Prime Minister announced his new selection process, most of the news articles raised Atlantic Canada's complaint that it would no longer have the representation it has long enjoyed. As a matter of custom, one seat on the Court has been reserved for the Atlantic Provinces. The Prime Minister's Office confirmed that it might pass on that tradition. Yet, the Prime Minister appointed a Justice from Newfoundland.

The Supreme Court of Canada has never had an Indigenous Judge. The Prime Minister announced a new appointment process to reflect the diversity of Canada, and Canada's highest Court still sits with three Justices from Quebec, another Justice from Atlantic Canada (as per the custom), and no Aboriginal Justices.

Should the Prime Minister have occasion to appoint another Justice, it will be high time to appoint a Justice more likely to give Aboriginal peoples a greater stake in the system.

Matthew Wolfson is an associate lawyer at David Anber's Law Office who handles trial and appellate work. Matthew has appeared before the Ontario Court of Justice and Superior Court of Justice and formerly developed experience working in the Crown Attorney's office. Learn more at www.DavidAnber.com.

ABORIGINAL LAW

New West Lands Reserve: Parts Unknown

By Troy Hunter

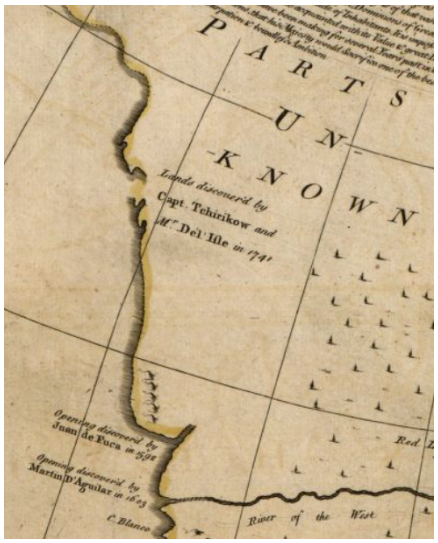

Figure 1:

1763 map by Cartographer Robert Sayer showing Lands discovered in around present day Alaska in the north, as well as the mighty Columbia River in the South, which was labelled, "River of the West".

In 1763, after the Treaty of Paris, a map was published by, Robert Sayer: *A New Map of North America, with the British, French, Spanish, Dutch & Danish Dominions on that great Continent; and the West India Islands, According to the Definitive Treaty concluded at Paris 10th February 1763* .

It's fascinating to look closely at the places that were named, including: New France, New Mexico, New York, New Albion, New Navarr Mexico, New Britain, New Denmark, and New Ultra. The entire Northwest was only labelled, "Parts Un Known" and was devoid of much detail, with exception of the, "River of the West", which was actually the Columbia River and the Juan de Fuca Strait.

An appropriate name for what has become known as British Columbia is "**New West Lands Reserve**", because unceded land is reserved by the *Royal Proclamation of 1763*. The name is plural as there is more than one First Nation in the Province. The reference to "Reserve" connotes a sense of non-permanence, which is the underlying goal of the 1763 *Proclamation*. Moreover, the Iroquois and Metis who guided the European fur traders to the area originally knew the area as the New West Territories, just as Quebec was known as New France. The many place names with the word "New" makes it even more convincing that the name, "New West Lands Reserve" should be used.

Moreover, New West Lands Reserve also honours and commemorates some of the earliest Europeans that came into the land. It was the North West Trading Company that first explored what is now British Columbia under the command of Simon Fraser in 1805. Although Simon Fraser called a region of the province New Caledonia, there is an island in the Pacific Ocean with the same name. Likewise, there already is the North West Territories and there shouldn't be confusion with the lands known as British Columbia, with those territorial lands north of the 60th parallel.

On a similar vein, Rupert's Land was the Hudson's Bay drainage basin, an area of land established under the 1670 *Hudson's Bay Charter*. The *Charter* contemplated that Rupert's Land would be extended to the west coast and the Hudson's Bay Company would seek to find the Northwest Passage. In the 1850s, Sir James Douglas was running the show for the Hudson Bay Company on Vancouver Island, where he was busy making treaties as was required by the *Royal Proclamation of 1763*. The United Kingdom requested that the Hudson's Bay Company sell off its monopoly of Rupert's Land and in return, begin the Colony of British Columbia. Both the Hudson's Bay Company and the Crown were involved in Free Masonry and the word, "Columbia" is important in the world of Free Masons; thus, the term British Columbia was born.

The Royal Proclamation of 1763 created an Indian Reserve in that all unceded land are lands reserved for the Indians and should be properly known as New West Lands Reserve.

The *British North America Act 1867* established Canada as a nation and British Columbia was later added as a province under the *British Columbia Terms of Union* in 1871. Section 109 of the *Constitution Act 1867* provides, "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same". Section 109 of the *Constitution Act 1867* applies in British Columbia, due to s. 10 of the *Terms of Union of British Columbia* which made it a requirement that the lands, mines, minerals or royalties in the Province are "subject to" existing trusts and interests. There is an existing trust and that is the New West Lands Reserve made by the *Royal Proclamation of 1763*. There is, as well the existence of Aboriginal Title and the Indian interest, which are two separate legalities. Indian Reserve and Aboriginal Title are not the same, as the former is derived from statute and the latter is derived from occupation.

The *Royal Proclamation of 1763* created an Indian Reserve in that all unceded land are lands reserved for the Indians and should be properly known as New West Lands Reserve. Lands with the name "British Columbia" should only apply to such lands where treaties have been made in the province, for example, Treaty 8 and Douglas Treaties.

In 1888 the Judicial Committee of the Privy Council on appeal from a judgment of Supreme Court of Canada, recognized that unceded land is an Indian Reserve. The Court stated in the case of *St. Catherine's Milling and Lumber Company v. The Queen*, "The lands reserved

… shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion."

Some will say that the *Royal Proclamation of 1763* doesn't apply in British Columbia because, at the time of the *Proclamation,* the western coastline wasn't fully yet known to the Europeans and that the Indians that inhabited the lands were not connected to the Crown.

In the 1850s, Sir James Douglas was running the show for the Hudson Bay Company on Vancouver Island, where he was busy making treaties as was required by the Royal Proclamation of 1763.

It should now be settled law that the *Royal Proclamation of 1763* applies in British Columbia due to the Supreme Court of Canada split vote in the 1973 *Calder* decision. The split vote created ambiguity as to whether or not the constitutional document known as the *Royal Proclamation of 1763* (a statute recognized in the BC *Interpretation Act*) applied in the Province. In 1983, the Supreme Court of Canada in *Nowegijick v. the Queen* at p. 36, stated, "… treaties and statutes relating to Indians should be construed and doubtful expressions resolved in favour of the Indians". Moreover, the 1990 *Sparrow* decision also by the Supreme Court of Canada determined that "statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians" and in *R. v. Van der Peet* in 1996, the Supreme Court of Canada stated, "doubt or ambiguity must be resolved in favour of aboriginal peoples … a constitutional document, should be interpreted so as to resolve any doubts in favour of the Indians".

The *Royal Proclamation of 1763* is a constitutional document and a statute (see section one of the *British Columbia Interpretation Act*). It is mentioned in s.25 of the *Canadian Charter of Rights and Freedoms.* The document itself and any doubt or ambiguity, must be liberally construed and apply in British Columbia, in favour of the Indians.

The United Kingdom of Great Britain and Northern Ireland, the Hudson's Bay Company, as well as the Colony of British Columbia had no right to take up the lands in what is now known as British Columbia on the basis that the Indian inhabitants (a.k.a. First Nations), did not enter into treaties for the lands. Although some treaties were made, most of the Province remains unceded and should be recognized for what it is, the New West Lands Reserve.

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CRIMINAL LAW

Lockdowns and Liberty: Why Lockdowns in Correctional Facilities are Violating Human Rights, and Costing Tax Payers

By Melody Izadi

Most people have the same attitude when it comes to prisoners being incarcerated: lock em' up and throw away the key. Most people base this opinion on the assumption that everyone in prison is guilty, which means that all prisoners are bad people and deserve to be punished. But the recent case of *Ogiamien and Nguyen v. Ontario (Ministry of Community Safety and Correctional Services) [2016] ONSC 3080* serves as a much needed reminder as to who can actually be incarcerated, and what liberties are violated when they are.

What's common in correctional facilities, and in this case specifically Ontario's Maplehurst Correctional Facility, is the use and practice of what's called a lockdown. A lockdown is exactly how it sounds: inmates are ordered to remain in their cells, sometimes days at a time, and cannot leave them to use the showers or seek medical attention or phone their lawyers or family.

"What many people fail to realize, as the Court quite rightly notes, is that not everyone who is incarcerated has been convicted of a criminal offence.

As the Court acknowledges in *Ogiamien,* sometimes lockdowns or solitary confinement is required for safety or other important reasons. For instance, if a violent incident occurs and a lockdown is needed to ensure the safety of everyone in the facility, then there wouldn't be any violation of rights. However, as the Court heard in *Ogiamien*, most of the lockdowns endured by the inmates in this case occurred due to staff shortages. Even if one officer was unable or unwilling to attend work, the result would be an indefinite lockdown and the inmates would be confined to their small cells, double bunking with their cell mates. The Court found that in one instance, Mr. Ogiamen was locked down for 74 days out of 214 days, of which 68 were due to staff

shortages. During this same period of time Mr. Nguyen was locked down, on a different wing, for 70 days, 66 of which were caused by staff shortages.

Mr. Ogiamien testified that, during a lockdown, prisoners often gang up or use weapons just to use the shower or telephone during a brief and rare 15 minute window of time when they are permitted out of their cells. Mr. Nguyen testified that during a lockdown, sometimes days can go by before they are permitted to shower. Inmates sometimes would pull the water sprinklers in their cells just so they could wash themselves.

The Court in *Ogiamien* found that for 50% of their incarceration, the applicants' were locked down. In addition, the Court made a very important observation that most people do not consider when they are reluctant to sympathize with prisoners:

"It is not to be forgotten that Mr. Nguyen and Mr. Ogiamien are not in Maplehurst because they have been convicted of any offence. Mr. Nguyen has not yet been tried, and is presumed innocent. Mr. Ogiamien has spent three years in Maplehurst, not because he has been convicted of any offence, but because he is being held there at the direction of the Federal immigration authorities."

A lockdown is exactly how it sounds: inmates are ordered to remain in their cells, sometimes days at a time, and cannot leave them to use the showers or seek medical attention or phone their lawyers or family.

What many people fail to realize, as the Court quite rightly notes, is that not everyone who is incarcerated has been convicted of a criminal offence. Indeed, people only *accused* of crimes, but without the resources to have a bail hearing, or those who cannot meet the requisite standards of release when a bail hearing is held, are in custody amongst convicted prisoners. They are also subject to the same lockdowns even though no judge or jury has declared them to be guilty of any offence in Canada. During lockdowns, these individuals are left without the opportunity to contact their lawyers to know how their case is going, or to assist their counsel in organizing a bail hearing. They are unable to speak to their spouses, children or parents:

"The conditions of detention during lockdowns are very close to segregation or solitary confinement. In some ways they are worse. The inmate is holed up with another inmate not of his choosing. The actual periods of confinement for 24 hours a day are entirely arbitrary, and unpredictable, both as to timing and length."

As such, there was a violation of the applicants' Section 12 rights under the *Charter of Rights and Freedoms* to be free from cruel and unusual punishment. Pursuant to Section 24(1), the Court found that the appropriate remedy in this case was compensation for both inmates: $60,000 for Mr. Ogiamien and $25.000 for Mr. Nguyen.

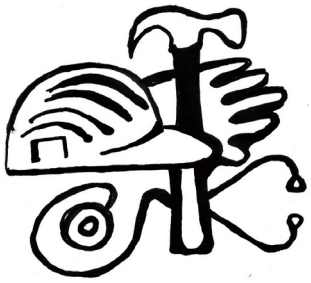
If any outraged Canadian protests the awarding of funds to these two individuals, they can write to their local government, because as of now, taxpayers' money is being used to remedy deplorable conditions in correctional facilities that can and should be fixed. As the Court put it in *Ogiamien*: "the Government of Ontario has had it within its power to fix the problem since at least 2002, at least when the problem was identified by Nordheimer J. in *Jordan*, and has not chosen to invest sufficient resources so that the problem of lockdowns caused by staff shortages can be alleviated."

Melody is a criminal defence lawyer with the firm Caramanna Friedberg LLP, located in Toronto, Ontario.

EMPLOYMENT LAW

Cumulative Cause.1

By Peter Bowal



The workplace "was not a grade five classroom".

– Kim v. International Triathlon Union

Introduction

The workplace is a challenging setting to manage. One must be proficient at dealing with a range of people with all kinds of personalities, backgrounds and styles. The manager in small enterprises often also serves as the Human Resources and Legal Departments. One is expected to know employment and labour law and manage people in precise measure according to the law. Review of those management decisions may come in the form of a lawsuit years later where all the splendid details are intricately laid out with adversarial obsession before the whole world.

Invariably, the small business manager will not have all the facts, perspectives and arguments – not to mention the legal principles, precedents and distinctions – that will be placed before the judge, who is also a latecomer and stranger to the scene that must be managed today. The well laid out ordering, after the fact, of what decisions should have been made are neither easy to predict nor do they readily reflect all workplace realities.

A recent case from British Columbia considered whether the senior communications manager for a sporting organization went too far in muddling her professional and personal commentary on social media. Her personal style and criticisms of her employer attracted most of the attention.

This is the first installment of a two-part article that examines the legal concept of cumulative cause.

This is the first installment of a two-part article that examines the legal concept of cumulative cause. This part sets out the facts and issues. The last part, in the next issue, will describe the outcome and enumerate some lessons to be applied from the case.

Senior Communications Manager Tests Limits Of Communications

Ms. Paula Kim ("Kim"), with a broadcasting journalism degree from Ryerson University, found her dream job working in the field of sports. In her early 30s, she was earning $77,000 per year and was travelling the world. She worked for the International Triathlon Union ("ITU"), the international governing body for the triathlon sports that schedules international triathlons, sets the competition rules and prize money, and certifies officials.

But Kim also was active on her Facebook and Twitter accounts and her blog. There her inner voice was readily expressed to the world. After the ITU world championships ended, she wrote: "2012 ITU season…DONE. Now leave me alone until 2013!!" Some interpreted that she was fed up with her job or felt harassed in it.

A recent case from British Columbia considered whether the senior communications manager for a sporting organization went too far in muddling her professional and personal commentary on social media.

She also posted "surprisingly fun congress after-party last night. Probly [sic] only time I'll see so many Eboard members hungover & lamenting those tequila shots . . . I wonder if other IF congresses have as much propaganda as ours." This tweet came during the important annual Congress, implied that Executive Board members had gotten drunk during the event, and that the international federation of an Olympic sport uses propaganda. She also tweeted, in reference to her employer, "guess we have no values or morals, we just go where ever the money is" and "hey ITU, remember this next time I fly off the deep end … If I didn't care, I wouldn't get mad."

Kim said she was just trying to be funny, and she had an emotional side. She said no one had complained to her.

Others found Kim to be rude, unprofessional and insubordinate. She could be sarcastic, aggressive and grew increasingly negative. She had fallouts with co-workers, and yelled and swore in front of staff. A disagreement arose with her supervisor about vacation compensation. Although the workplace was not amenable to gossip, she took to her blog and, in a nasty, rambling tirade, compared her supervisor to her abusive mother.

Under the title "taking shit" Kim wrote:

> *…I rarely go home and rarely call because deep down I have never forgiven her and because I remember all too well all the beatings I took. my mother is the only person on earth that was so skilled as making me feel like an insignificant bag of shit and made me feel as though I was never good enough, for anything. until today. today for the first time in a long time i felt like that kid all over again; beaten, discouraged, alone and scared, after the most disappointing conversation you could possibly have with your boss. the same horrible, sickly feeling of someone above you kicking you down with lies and senseless put downs and insults and zero reality all flooded back in a horrible, despicable wave of nostalgia. and for the first time in many years i actually sobbed (by myself in the bathroom of course) which i almost never do. and of course she's right, how can I possibly be right when I'm not the authority figure! just like when I was a kid, i don't feel like I've done anything wrong but it doesn't matter because this person that i stupidly thought cared doesn't give a shit and just wants to beat my head in. her perception of reality is so clouded and distorted that all she sees is her own version and not the real version of truth. in the end some people will only believe what they want to believe and and not what's real. these same people will never find fault in their own actions, no matter how wrong and inappropriate it was. my mother never once apologized to me, and i don't ever expect one. in fact she used to say it was my fault that she hit me, that i drove her to such anger. how do you argue with that? you can't, and never will. you can't fight logically with an illogical person. Some relationships will never rebound from such abuse. never. and if i was 9 again I would stupidly ask why, but I'm older and wiser now so i don't bother to ask why, because i already know the answer; sometimes life just isn't fair. sometimes people change for the worst and sometimes people are just evil pieces of shit and just need to bring you down to make themselves feel more powerful or better than you. not being good enough is probably my deepest insecurity, all thanks to my mother. haunted by this feeling as a kid, I broke free of it slowly through university and then most importantly as an adult in the working world. but now thanks to my current boss, it is back in full force. and as my former colleague used to say, the spirit is broken.*

Kim associated her supervisor, the Secretary-General of the International Triathlon Union, with physical and emotional abuse. She dismissed it as facetious, overly dramatic and theatric because she was a passionate person. She said no one told her it was inappropriate and she did not think it was damaging to her supervisor's reputation, although the blog post was read by international colleagues.

In other personal tweets, Kim shared her frank opinions on teams, media, competitors and outcomes. She referred to the ITU, invoked real athletes in a partisan fashion, and used vernacular language such as "holy crap." The British ITU chief wrote a letter starkly critical of

Kim for "showing so little regard for the importance of correct and neutral communications … and worse when that person is responsible for the ITU communications policy." The New Zealand chief wrote and complained about Kim "getting really mad, yelling and picked up a bowl of candy, threw it into the wall" and telling others they could not work in that room.

After this, some 22 months after she was hired, Kim was dismissed with pay in lieu of notice for her unacceptable "communication style". She was paid two weeks salary under provincial legislation and offered a further five weeks of pay if she would sign a release.

She refused to take this package. Instead, she let fly some more disrespectful and insulting tweets regarding a former ITU President, and a former boss. She sued for wrongful dismissal where she claimed over $65,000 by way of damages.

Was There Cause for Dismissal?

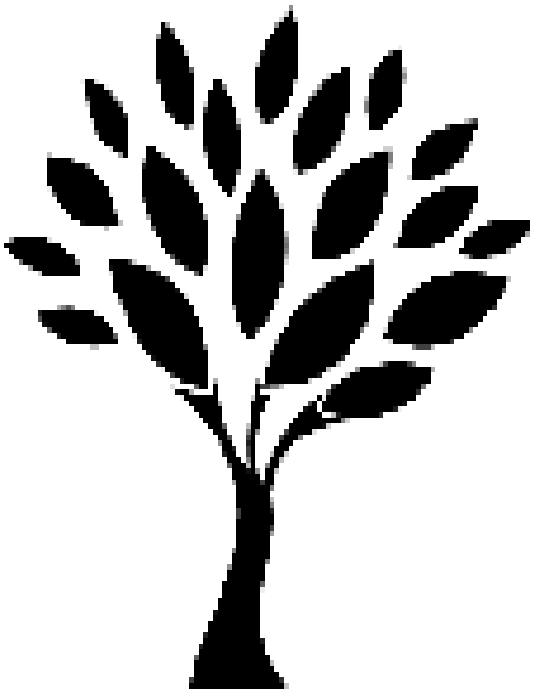
The employer initially took the position that Kim was dismissed without cause to protect her reputation. After she sued for wrongful dismissal, ITU changed its position and alleged that it had sufficient legal cause for dismissing Kim.

What do you think? Was Kim's behaviour leading up to her firing sufficient to legally justify it? Or should ITU pay her damages for firing her? If so, how much money?

The answer to these questions will come in the next issue of ***LawNow***.

Peter Bowal is a Professor of Law at the Haskayne School of Business, University of Calgary in Calgary, Alberta.

ENVIRONMENTAL LAW



What is Environmental Law and Why is it Hard to Understand?

By Jeff Surtees

Carbon taxes. Rules about where and how you can fish. A bylaw saying you can't wash your car on a city street. Provincial rules telling you to keep your "wheels out of the water" when operating your quad or dirt bike. Tax breaks so you can install solar panels on your house. Alberta's Land Use Framework and its seven Regional Plans. International environmental treaties. Rules about the use of harmful things: what you can take to the dump; draining a wetland; saying how closely together oil and gas wells can be drilled; creating National Parks and taking water from streams.

All of these rules and many others like them are environmental laws. A textbook definition is that "[e]nvironmental law is the body of statutes and common law that is and will continue to be used to protect and improve environmental conditions." [P. Muldoon *et al*. An *Introduction to Environmental Law and Policy in Canada* (Toronto: Emond, 2015) 3]

Why do we need environmental laws at all? Canada is a "liberal democracy". The words "liberal" and "liberty" both come from the Latin word meaning "free". Freedom is part of who we are, part of our national identity. But because we must live together in society, most people agree that we will have to have some restrictions on the things we are allowed to do. To restrict people's freedom for the common good, society uses laws. All laws are just restrictions on our ability to do as we please, with the threat of some sort of state enforcement being imposed on us if we don't. While people in our society have different views on the kinds of restrictions that should be put in place, very few people would seriously argue for the outright

It is difficult to think of another area of law where science and critical thinking are more important. Environmental issues can be complex.

destruction of the environment. Disagreements are usually about where the line should be drawn, about how much regulation should be allowed, not about whether there should be a line at all.

Law, as a subject, can be divided up in many ways. The headings of some of the columns in LawNow show some of the categories often used . . . Criminal Law, Family Law, Employment Law, Human Rights, Aboriginal Law, Landlord and Tenant Law. The divisions aren't perfect. Any area of the law created this way will inevitably spill over its boundaries into other areas.

One of the most imperfect categories is that of environmental law. The subject matter of "the environment" is large and almost all human activities have the capacity to impact the environment. An activity (say walking) might be harmless in one situation but harmful in another. We don't normally regulate people's ability to walk where they please other than for safety or to protect private property. But if thousands of people want to walk on the same trail in a national park and that trail happens to be in a sensitive wildlife area, then rules will probably be made to restrict walking.

When we are trying to learn about environmental law and find it challenging, it might be for one of the following reasons:

First, the rules are not located in one place. Environmental rules are a mix of:

- common law handed down through court rulings;
- federal and provincial statutes;
- regulations whose main purpose is environmental protection; and
- environmental protection rules hidden in statutes created for other purposes.

There are also rules contained in management plans, strategies, frameworks, sets of guidelines and standards. Some of these have the force of law (or are treated as if they do), some do not.

Second, responsibility for the environment is constitutionally divided between the federal and provincial governments, but not in a way that is always easy to understand. Jurisdiction over some things overlaps or isn't agreed upon. In other cases, one level of government may have delegated its duties to another by agreement. For example, provinces have recently agreed to take over many of the federal government's responsibilities for protecting fish habitat.

While people in our society have different views on the kinds of restrictions that should be put in place, very few people would seriously argue for the outright destruction of the environment.

Third, it can be hard to know what is true. It is difficult to think of another area of law where science and critical thinking are more important. Environmental issues can be complex. To evaluate whether regulation is appropriate, we must have at least a basic understanding of the science telling us that there is a problem and how we would measure success in combatting it. Developing that understanding takes effort, and that effort is made more difficult by the sheer volume of information and misinformation published, especially online, about major environmental issues. Sometimes what is written about an issue is honest, well informed and based on science. At other times it isn't. Worse, sometimes it is hard, even impossible, to tell the difference. Regulation which affects economic interests can attract a sophisticated marketing effort to convince people that no regulation is needed.

Finally, it is now critical to understand how aboriginal law, a complex subject in its own right, interacts with environmental law. Section 35 of our Constitution protects "existing aboriginal and treaty rights". A series of Supreme Court of Canada decisions beginning in the 1970s interpreted what is meant by aboriginal rights and title, the tests for how they are proven, how they can change over time and what the duties of the Crown are when a rule (including a permit) might infringe on them. They confirm that the Crown has a special kind of duty toward aboriginal people which it must always honour. Honouring the Crown's duty will almost always require consultation with aboriginal people when their rights or title are affected. More recently, the Supreme Court has ruled that where aboriginal title has been proven, the Crown must go beyond consultation and actually obtain consent. This requirement will have significant impacts for environmental law, especially in areas such as pipeline approvals.

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FAMILY LAW

Obtaining Evidence in High Conflict Parenting Disputes, Part 3: Views of the Child Reports and Parenting Assessments

By John-Paul Boyd

In Part 1 of this series, Sarah Dargatz wrote about the use of children's lawyers in high conflict family law disputes in Alberta. Sarah said that hiring a lawyer to represent a child can be an effective way to get information about the child's views and preferences when the parents cannot agree. In Part 2, Sarah described two special processes that are sometimes used in high conflict cases in Alberta: interventions under Practice Note 7 that are designed to get information about a child or a parent to the court, or to help the parents work together more effectively; and, assessments under Practice Note 8 about the parenting arrangements that are best for a child. Sarah pointed out that, although these processes are often very useful, neither interventions nor assessments are free and both can take many months to complete. In this part of the series, I will talk about how views of the child reports and parenting assessments are used in other parts of Canada.

Views Of The Child Reports

Parenting assessments involve one or more interviews with each parent and the child, some observations of each parent engaged with the child and usually some degree of psychological testing.

Views of the child reports, also called "Hear the Child" reports and "Voice of the Child" reports, are also used in British Columbia, Saskatchewan, Manitoba, Ontario and Nova Scotia, as well as in parts of the United Kingdom and the United States. These reports are used to get the child's perspective on parenting disputes affecting their interests, as the United Nations Convention on the Rights of the Child requires, and are either evaluative or non-evaluative; the views of the child reports Sarah described in Part 2 are evaluative reports.

Views of the child reports are written reports describing the child's views and preferences for the benefit of the child's parents and the court, and are prepared following one or more interviews with the child. Evaluative reports are prepared by mental health professionals, such as counsellors, social workers and psychologists, and include the interviewers' opinions about the strength and consistency of the child's views, or about the likelihood that the child's expressed views reflect the child's actual views. Non-evaluative reports are prepared by lawyers and mental health professionals, and others with special training speaking to children, and report the child's views without offering an opinion about what the child has said.

Views of the child reports are most useful for older children who are able to express themselves and discuss their feelings and wishes. While they're not a substitute for parenting assessments, they can be very helpful when the issue the court is dealing with is fairly narrow, like a decision about the child's school or extracurricular activities, changes to the child's residence or parenting schedule or, sometimes, the meaning or accuracy of something the child has said. These reports can also be used when a family law dispute is being resolved out of court, through mediation, collaborative settlement processes or arbitration.

There is, however, no practice or process for the completion of views of the child reports that is common throughout Canada. A study conducted by myself, Professor Nick Bala and Dr. Rachel Birnbaum in 2014 found that lawyers are commonly retained to prepare non-evaluative reports in some provinces, including British Columbia and Ontario, while views of the child reports, evaluative and non-evaluative, are primarily prepared by mental health professionals in other provinces, including Alberta, Saskatchewan and Manitoba. Lawyers and mental health professionals are equally likely to be hired to prepare these reports by the parents' agreement, while mental health professionals are more likely than lawyers to be hired by court order.

The same study found that the cost of a report on the views of one child ranged from $250 to $1,250. Views of the child reports are relatively affordable and they can also be completed fairly quickly. Most of the time, and depending on the availability of the interviewer, views of the child reports can be completed British Columbia, Alberta and Saskatchewan, and from $750 to more than $1,500 in Ontario. In my practice, I charged my normal hourly rate to prepare views of the child reports for parents involved in litigation in the superior court, but offered a special flat rate of $500 for one child, plus $250 for each additional child, to parents in the provincial court.

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Lawyers, who perform no testing of the child and offer no opinions on the child's statements, may be able to produce a finished report more quickly. In British Columbia, it is not uncommon for a report to be completed the same day when a court hearing is underway; I've been contacted by a judge at the morning break and asked to interview the child and deliver a report by the afternoon break.

Parenting Assessments

Parenting assessments, also called custody and access evaluations and bilateral reports, are only prepared by mental health professionals. These reports are used throughout Canada to provide the court with an expert opinion on the parenting arrangements that are most likely to be in the best interests of the child. They can provide critical assistance to judges dealing with family law disputes, who usually know no more about the child than what the parents have volunteered in their evidence.

Parenting assessments involve one or more interviews with each parent and the child, some observations of each parent engaged with the child and usually some degree of psychological testing. Assessors will review information related to the family, such as reports from school counsellors, medical or psychiatric opinions and the results of educational evaluations, and will often interview other people who might have special knowledge of the family, such as new partners and spouses, family members, neighbours, teachers and coaches. While views of the child reports typically run from 4 to 8 pages in length, parenting assessments are frequently longer than 25 pages and are sometimes much, much longer. I've seen assessments that are longer than 100 pages.

Because of the degree of detail and analysis involved, parenting assessments can take a long time to complete and cost a lot of money. In Alberta, the code of ethics and standards of practice applicable to members of the College of Psychologists are often interpreted as requiring a painstaking investigation of each case, which might include verifying the truth of statements made by a parent, or another witness the assessor has spoken to, double-checking facts and taking other steps to make sure that no stone has been left unturned. Assessors in other provinces are of course subject to similarly high standards but aren't required to take an investigative approach or go into such depth.

There is, however, no practice or process for the completion of views of the child reports that is common throughout Canada.

Perhaps as a result, parenting assessments in Alberta can cost between $20,000 and $40,000 and take from 8 to 12 months or longer to complete. In British Columbia and Ontario, however, parenting assessments usually cost between $6,000 and $15,000 and can be finished in three to eight months, depending on the complexity of the family's circumstances and whether

any travel is required. The cost and length of time required by these reports probably has an impact on how often they are used. A recent study by Zoe Suche of the Canadian Research Institute for Law and the Family looking at court judgments from trials and applications to change final orders found that, in 2014, parenting assessments were considered in 43 judgments from British Columbia, in 38 from Ontario and in only 3 from Alberta. In 2015, parenting assessments were considered in 55 judgments from British Columbia, in 35 from Ontario and in 5 cases from Alberta.

Unlike views of the child reports, parenting assessments are suitable for disputes involving children of all ages. They can be useful in family law cases being decided by the court as well as in disputes being resolved out of court, and often have a significant impact on the outcome of a case. Zoe's study found that, in 2015, the court adopted the assessor's recommendation in 63.6% of British Columbia judgments, in 57.1% of Ontario judgments and in 60% of Alberta judgments. They are, however, significantly more expensive than views of the child reports, particularly in Alberta.

Parenting Coordination

In the next part of this series, I'll write about how parenting coordinators can be used in high conflict family law disputes to help parents implement orders and agreements on parenting arrangements.

John-Paul Boyd presently serves as the director of the Canadian Research Institute for Law and the Family, prior to which he practiced family law in Vancouver for fourteen years.

FAMOUS CASES: WHATEVER HAPPENED TO...

The Story of Linda Gibbons

By Kaiden McIntyre and Peter Bowal

Everyone who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or an offence punishable on summary conviction.

– Criminal Code of Canada, section 127 (1)

Introduction

The 2012 Supreme Court of Canada case of *R. v. Gibbons*, http://canlii.ca/t/frmhd asked what law enforcement and the legal system should do with Linda Gibbons, a quiet but persistent abortion protester. Is her disobedience of court orders a matter for the criminal law or the common law?

The Facts

Does the excessive incarceration of devout, conscience-bound individuals such as Gibbons beyond what some murderers and bank robbers serve for sentences bring the administration of justice into disrepute?

Linda Gibbons was born in Whitehorse, Yukon almost 70 years ago. She moved to Toronto where she picketed abortion clinics. In 1994, the Ontario Court issued an injunction prohibiting Gibbons from displaying protest signs within 60 feet of certain abortion clinics. A devout Christian, she quietly prays and protests inside that bubble. She is a peaceful protester who holds a sign and occasionally asks patrons of the abortion clinics to think twice about the abortion. For those principles, and after numerous arrests, she has served a total of some 11 years in jail.

In 2008, Gibbons was charged under section 127 of the *Criminal Code* for breaching the 1994 civil injunction to not protest inside the bubble. The *Criminal Code* makes it an offence to disobey a court order. The question on an appeal in 2012 was whether section 127 of the *Criminal Code* or the *Ontario Rules of Civil Procedure* applied to contempt of court orders. Another way of understanding this is that the Supreme Court of Canada needed to determine whether Gibbons should be dealt with by private or common law or by the more serious criminal law.

The Supreme Court of Canada Decision

Eight of the nine judges in the top court concluded that the Ontario procedural rules regarding contempt of court did *not* over-ride or displace section 127 of the *Criminal Code*. Accordingly, the criminal charge could proceed. Quiet protest anywhere within the 60 foot cordon could be prosecuted as a crime. This result followed the decision in a 1981 case called *Clement,* which made it far more serious for peaceful protesters to ignore injunctions because those violations might be prosecuted as criminal offences.

What Happened?

As a result of the Supreme Court of Canada decision which was issued on June 8, 2012, a criminal trial was set for the fall of 2013. On September 11, 2013, Gibbons was sentenced to six months in prison. Less time served, she had to serve 29 more days. She was released on October 10, 2013.

Conclusion

This case raises important social and legal issues. Should a non-violent anti-abortion protester have the full force of the criminal law power of detention applied against her? Hardened criminals serve much less time for committing serious crimes than Gibbons has served for her peaceful protests.

What about her freedoms of expression, conscience and religion in the *Charter of Rights*? How can a private abortion clinic enlist the formidable powers of the provincial Attorney General's department to protect what is a private business? If other private businesses face protesters, they have to deal with that themselves or hire private security.

The *Gibbons* case before the Supreme Court of Canada appeared to be approached and answered on technical statutory interpretation grounds. In Canada, there are other chronic offenders of laws, some by intentional protest such as Gibbons and others perhaps less intentionally. The question arises as to what to do with these offenders who are not violent and for whom years in jail seems cruel.

Is there something morally wrong with repeatedly sending Gibbons to jail for her simple protests and technical breaches of the injunction based on her deeply-held religious views, especially where her constitutional freedoms of expression, religion and conscience have not been explored? Criminal law follows the venerable limiting principles of proportionality and global reasonableness in sentencing. Does the excessive incarceration of devout, conscience-bound individuals such as Gibbons beyond what some murderers and bank robbers serve for sentences bring the administration of justice into disrepute? Is the legal system so blunt an instrument that it cannot handle the Gibbons problem differently?

Hardened criminals serve much less time for committing serious crimes than Gibbons has served for her peaceful protests.

Can Gibbons and others with strong Christian convictions be made to suffer jail so long at the hands of the state in the modern era? That sounds more like something that would have happened in Charles Dickens' day.

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HUMAN RIGHTS LAW

Human Rights and A Poisoned Work Environment

By Linda McKay-Panos

There have been several recent news stories about harassment issues in Canadian workplaces. For example, a 2013 review of the Calgary Police Services workplace was recently released, containing detailed allegations of sexual harassment, intimidation, bullying and even sexual assault within the force. Another example occurred when a class-action lawsuit was launched alleging discrimination and harassment within the RCMP. The lawsuit was settled in 2016, resulting in an apology and a potential $100 million in payouts.

What does Canadian human rights law have to say about situations where there is a work environment that is poisoned by harassment and discrimination? The law recognizes that workplace harassment that is based on a ground that is covered by human rights law, such as gender, disability, race or sexual orientation, is discrimination. Discrimination is covered in both federal and provincial human rights legislation across the country. Harassment can include physical conduct (e.g., unwelcome touching), verbal behaviour involving comments (e.g., name-calling) and non-verbal behaviour (e.g., pictures, gestures). The Alberta Human Rights Commission has stated:

"A poisoned work environment is created when a workplace is hostile or unwelcoming because of insulting or degrading comments or offensive actions aimed at an employee or others."

The two situations involving police forces cited above provide examples of workplaces that could be described as hostile. Once it has been established that there has been discrimination (harassment) that amounts to a poisoned work environment, there are a few legal considerations and options available.

It is possible to sue in the courts for a remedy for harassment and discrimination, but there is no recognized tort of discrimination.

It is always hoped that the organization becoming aware of a problem that appears to be widespread can take action to develop internal harassment and discrimination policies and remedies. Education of all staff about their rights and responsibilities is critical. However, even if the employer seeks to remedy the situation with these efforts, sometimes the problems continue. Employees may be forced to take legal action to obtain a remedy. One such approach is a human rights complaint. If the complaint is successful, the Human Rights Commission can order:

- an apology:
- human rights education;
- re-instatement of an individual who has been fired or has had to resign due to the working conditions;
- damages paid to the complainant for hurt feelings; and
- the development of an internal complaints procedure among other remedies.

There are some limitations to this approach, however. Complaints must be made within the statutory limitation period (e.g., in Alberta, within one year of the last incidence of discrimination). If the complainant has realized too late that there is a possible complaint available, the Commission cannot hear it, even if it otherwise has merit. In addition, it may be quite difficult to prove an allegation of harassment if there are no witnesses or if witnesses are reluctant to come forward to corroborate allegations of discrimination. Third, re-instatement may not be feasible if the people or person who was harassing the employee will still work in close proximity to the complainant.

Finally, and perhaps most significantly for the Calgary Police Service situation, the *Alberta Human Rights Act* does not have jurisdiction to accept complaints of systemic discrimination. The Commission can take an individual complaint of systemic discrimination or may group together individual complaints about the same workplace. It can then use the information the complainant(s) provides about systemic discrimination to make a remedy for that individual complainant, which may indeed apply to the whole workplace.

The Commission does not have jurisdiction to investigate a situation without a complaint; nor does it have jurisdiction to resolve group or systemic complaints. This is not necessarily the situation across Canada: the Canadian Human Rights Commission, Ontario Human Rights Commission, and Manitoba Human Rights Commission can investigate complaints

of systemic discrimination. Complaints may be filed on behalf of a group of people or an individual. Once the complaint is heard and systemic discrimination is found, the remedies can address the entire workplace.

The situation of the RCMP could have been the subject of a complaint to the Canadian Human Rights Commission, but a different legal course was pursued.

What does Canadian human rights law have to say about situations where there is a work environment that is poisoned by harassment and discrimination?

It is possible to sue in the courts for a remedy for harassment and discrimination, but there is no recognized tort of discrimination. In the 1981 *Bhadauria v. Seneca College* case, the Supreme Court of Canada ruled that an individual or group in a class action suit cannot sue directly for discrimination, as this is not recognized as a legal cause of action. However, it is possible to sue for damages for the intentional infliction of emotional suffering (a recognized tort), caused by discriminatory behaviour. The remedy is money damages. When there is a large group of potential claimants, it can make sense financially to launch a class action suit, as together they can bear the costs of a lawsuit. Individuals can opt in and demonstrate that they are members of the class of litigants (e.g., they are a victim of harassment and discrimination in that workplace and they suffered damages from the emotional suffering they experienced). However, individual plaintiffs/complainants often cannot afford to launch a lawsuit and thus choose to complain to the human rights commission, which is a relatively inexpensive process.

There are some differences that can influence the decision to pursue a lawsuit rather than a human rights complaint when there is systemic discrimination. A lawsuit may cost more, but the amount of money awarded in a successful lawsuit can be higher than the hurt feelings monies awarded by human rights commissions. On the other hand, the remedies available from human rights commissions can include education and policy implementation, as well as reinstatement, remedies not generally available from tort or contract cases launched in courts.

The two above-noted instances of allegations of workplace harassment and discrimination certainly demonstrate heightened awareness of the problem of systemic discrimination, which often occurs in workplaces where the majority of employees are traditionally from one gender. It can be challenging to address the cultural changes that occur in a workplace once members of the opposite gender are introduced. This is why education about discrimination, workplace policies, sexual harassment and implementation of anti-harassment and discrimination policies are critical in all workplaces. Not only can allowing this illegal behaviour result in expensive settlements for the employer, the human emotional costs are immeasurable.

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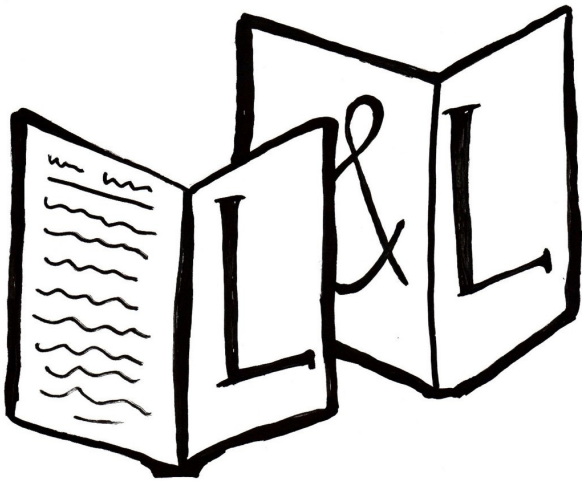
LAW AND LITERATURE

A Long Way From Plato

By Rob Normey



Canada is in the process of following the lead of other nations like Britain and Germany which have committed to pardoning and /or apologizing to large numbers of men who were criminally convicted in past decades for engaging in homosexual acts. The German government has determined that it will pardon 50,000 men and offer some form of compensation where appropriate. Britain is preparing a bill called the *Alan Turing Law*, named after the brilliant World War II code-breaker and mathematician extraordinaire. Turing was convicted of engaging in a homosexual act and subjected to chemical castration as a term of his treatment imposed by the court; the whole ordeal leading to his suicide in 1954. The 1950s were a particularly bleak decade for Britain, as a zealous search and destroy mission was ordained by the Home Secretary of the day, David Maxwell-Fyfe, and carried out with the full approval of the Director of Public Prosecutions. The current British government plans to make amends for the harsh and punitive stance of the law over many years. The Trudeau government promises a legislative program that may prove to be at least as extensive as the British plans. Edmonton MP Randy Boissonnault has been appointed special adviser on the LGBTQ2 issues that his government will address.

In the year prior to Turing's humiliation and conviction, a brave exception to the atmosphere of repression and silence respecting gay lives came in the form of a novel, *The Charioteer*, by Mary Renault. Renault had been a nurse prior to turning to writing full-time, and had risked her career when she began a relationship with a fellow nurse who would eventually become her life-long partner. One evening in her partner's room at the Radcliffe Infirmary she was required to hide under the covers when the head nurse checked up on the staff members during nightly inspections. I found an account by Renault's biographer of the damning response by critics and the tabloid press to one of Renault's earlier novels, published in 1939.

"The matron told a *Sunday Referee* reporter: "This book will obviously sell, and the majority of readers will think it is true. But in my experience it is not. I have been matron at this hospital for 25 years, and during that period I have only once come across a case of sexual abnormality between nurses."

The novel *Purposes of Love* did contain some descriptions of lesbian love-making but it was less open than the first post-war novel Renault offered to her publisher, *The Charioteer*. It offers a vivid sense of what gay men like Turing confronted in the era. It is rather astonishing that Renault chose to write such a frank and sensitive portrait of gay men in the most repressive decade for gays in that century and furthermore, that her British publisher took a chance with publication. (It could have been the subject of a trial for obscenity and indeed, her American publisher declined the novel, clearly on the grounds that prosecution was a genuine possibility).

It is rather astonishing that Renault chose to write such a frank and sensitive portrait of gay men in the most repressive decade for gays in that century and furthermore, that her British publisher took a chance with publication.

The *Charioteer* depicts the growing sexual and psychological awareness of the protagonist, Laurie Odell. Odell is introduced in the opening chapter as a child experiencing sadness and bewilderment. He has come upon his father packing a large suitcase to leave home. The boy senses something ominous and seeks an explanation, but his mother comes upon the scene and rebukes her husband, commanding his silence. The two are incompatible and the chapter ends with the child being read a favorite story, of St George slaying the dragon, in the comforting embrace of his mother. The chapter ends poignantly: "He never saw his father again." The chapter introduces a key theme in the work: the immense difficulty Laurie will experience in truly understanding the motivations and actions of others, both in his family and circle and in the dangerous world beyond, with its harsh unrelenting condemnation of those who choose to act on their homosexual desires.

Laurie will have to do battle with a number of dragons in the course of the plot and acquire a proper education in the ways of his society, an education that, of course, cannot be learned at the elite public school he attends. There, he encounters a slightly older student, a supremely confident prefect, Ralph Lanyon, who will figure prominently in the plot. Lanyon, we will gradually come to understand, is "sent down" from the school for an indiscretion – an improper sexual encounter with a younger student. Before he leaves, he hands Laurie one of Plato's' most interesting dialogues, *Phaedrus*. The book will serve as a talisman as Laurie later serves in the Navy in the Second World War.

Much of the action is set in the hospital where Laurie is convalescing after a serious wound suffered in the retreat from Dunkirk. Perhaps, his outsider status is a reason he is drawn to a different type of outsider, the hospital orderly Andrew Raynes, a pacifist and a conscientious objector. Renault provides a subtle irony in her handling of one scene where a straight friend of Laurie's warns him about too close a contact with Andrew. Laurie comes to learn that this is not because his friend has figured out the risks of an "abnormal sexual relationship". It is because Andrew may seduce him – that is, seduce him away from his allegiance to Her Majesty and the war effort and into a stance of pacifism. The law would take a very dim view of any such disloyalty.

In the year prior to Turing's humiliation and conviction, a brave exception to the atmosphere of repression and silence respecting gay lives came in the form of a novel, The Charioteer, by Mary Renault.

While *The Charioteer* focuses primarily on the personal, and the difficulty in achieving a mature and rewarding relationship for two committed gay men, the wider society is depicted with skill and insight as well. When Ralph re-enters Laurie's life, the latter is introduced to a new social scene, and encounters a mixed group, some of whom are fairly camp and at times outrageous. Laurie becomes aware of the tensions and dangers associated with attempting a gay lifestyle. One obstacle to achieving a normal and philosophically coherent manner of living is, of course, the law. Given that homosexual behaviour was viewed as a major crime, blackmail was an ever-present sword hanging over all of these characters. Two friends engage in a debate over the necessity of succumbing to blackmail. One, Alec, adamantly maintains that self-respect is the most valuable quality a man can possess and under no circumstances would he sympathize with those who allow themselves to be blackmailed.

The high-minded position of Alec leads Ralph to turn to Laurie and ask his help in remembering a figure from ancient Greece who was an exemplary citizen. Ralph makes the case that homosexuality and bisexuality seemed to have been fully accepted in ancient Greece, and many who were bisexual were leaders in politics and the arts. They provided their fellow citizens with many reasons to accept their sexual orientation, given the excellence and virtue they displayed in other areas of life. Ralph longs for a time when this will be possible in contemporary Britain.

The novel ends with a final quote from Plato's *Phaedrus*. This book, so much a source of vision and potential wisdom for the main characters, develops the symbolic ride of a charioteer

who must properly guide a discordant pair of horses. One is black, rough and untamed; the other pure and white and more orderly. An essential quest in life is to find a way to assert the right degree of control, learning the skills necessary to bring harmony and a proper sense of direction. Following Plato's lead, it is a challenge but also a necessity to engage in the ongoing educational project of assessing one's qualities and acquiring the maturity to live a full, intelligent life. By implication, a society that makes that such an unnecessarily difficult assignment has a lot to answer for.

Rob Normey is a lawyer who has practised in Edmonton for many years and is a long-standing member of several human rights organizations.

NOT-FOR-PROFIT LAW

Keeping at Arm's Length

By Peter Broder

Recent events, particularly the controversy in Alberta over the dealings of Trinity Christian School Association and various people and organizations connected with the Association, make a review of the question of charities and non-arm's length transactions timely. So that's the subject of this column.

The Trinity Christian School Association matter surfaced in the context of the funding Alberta's Ministry of Education provided to the organization as part of its programming to support home schooling initiatives. It is alleged that aspects of the use of those funds was improper. Some of the players involved are registered charities, others are not. Among the concerns was that certain transactions were among people or entities who were not "at arm's length". If true, that can be a problem not just in regard to use of public funds, but also with respect to charity law.

Followers of the recent American election campaign may recall the concerns raised over some of the dealings of Donald Trump's Foundation, which are alleged to have benefited his businesses or him personally rather than advancing charitable ends.

Suggestions of "pay to play", such as those made about the Clinton Global Initiative or the Trudeau Foundation, turn partly on whether the dealings are non-arm's length, but can also involve additional legal considerations (for example, laws governing the conduct of officeholders). Both Justin Trudeau and Hillary Clinton asserted, in response to claims of impropriety, that they had severed their ties with their respective organizations.

All this shows the variety of circumstances and how often non-arm's-length questions can arise.

Whether in Canada or the United States, there are strict rules around a charity having transactions with entities over which, owing to family or business ties, individuals associated with the charity have control legally or in practice or with people with close ties to the charity. The broad policy concern in the charity realm is to preclude monies raised or

generated for charitable purposes being diverted to non-charitable uses. So, when the conduct involves entities or persons that do not have registered charity status in Canada, or the equivalent tax-exempt status in the United States, apprehensions are heightened.

The variety of family or business relationships that can exist between different entities and the individuals who control or manage those entities can never be fully captured in a law or regulation.

The Americans address issues with non-arm's-length conduct by, among other measures, placing a wide ban on "self-dealing". This ban applies to a range of transactions that cannot be engaged in by those who fall in the category of a "disqualified person". They also impose penalties on "Excess Benefit Transactions". In Canada, provisions to deal with such conduct include prohibitions against gifting to a "non-qualified donee", and intermediate sanctions for gifting to a "non-qualified donee" and for conferring undue benefits on someone not acting at arm's length from a charity. In both countries, if the infractions are numerous or egregious enough, a charity may lose its tax-privileged status.

These rules prevent someone establishing a charity, then retaining a governance role as a director or trustee while becoming a paid employee of the organization. They also preclude founding a group, then joining the staff while passing along the majority of governance responsibilities to persons who are not sufficiently independent from you or other founders (such as close relatives).

In Canada, the "Charities and giving glossary" (http://www.cra-arc.gc.ca/chrts-gvng/chrts/glssry-eng.html) on the website of the Canada Revenue Agency may be the best place to start to determine if your situation is apt to lead to trouble.

That said, all charities have day-to-day dealings in the marketplace. Particularly in rural or small communities, the circle of those engaged with charities may be limited. Conducting business in such circumstances need not always be problematic. So long as transactions are at "fair market value" (technically, therefore, not constituting a "gift"), in Canada the regulator typically will not take issue with the relationship. The same applies for Canadian charities when they are transacting business with entities or individuals that are not their beneficiaries, other charities or groups given "qualified donee" status under the *Income Tax Act*. If the dealing is at fair market value, it doesn't generally raise concerns.

The variety of family or business relationships that can exist between different entities and the individuals who control or manage those entities can never be fully captured in a law or regulation. Therefore, provisions in this area have to be worded generally or feature a catch-all element that captures problematic conduct that is not specifically named. Generally, it is easier to identify specific relatives in setting out prohibitions in the rules, while problematic business relationships are less well defined. In any event, the measures leave both the charitable sector and the regulator considerable leeway in how they do things.

Because the courts decide questions of whether a situation is arm's-length or not on a case by case, fact-driven basis, they don't provide much additional guidance.

In Canada, the "Charities and giving glossary" (http://www.cra-arc.gc.ca/chrts-gvng/chrts/glssry-eng.html) on the website of the Canada Revenue Agency may be the best place to start to determine if your situation is apt to lead to trouble. For the term "at arm's length" the glossary states the following:

> [It] describes a relationship where persons act independently of each other or who are not related. The term "not at arm's length" means persons acting in concert without separate interests or who are related.

The same document also provides a helpful definition of "Fair Market Value":

> Fair market value is usually the highest dollar value you can get for your property in an open and unrestricted market and between a willing buyer and a willing seller who are knowledgeable, informed, and acting independently of each other.

Whether the Trinity Christian School Association was onside or offside the non-arm's-length rules is as yet uncertain, but other Canadian registered charities are well-advised to exercise due diligence to avoid situations where the kinds of questions now facing the Association arise.

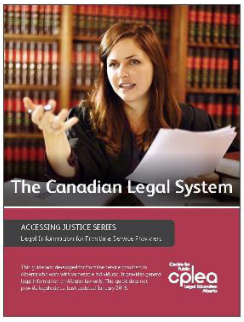
Peter Broder is Policy Analyst and General Counsel at The Muttart Foundation in Edmonton, Alberta. The views expressed do not necessarily reflect those of the Foundation.

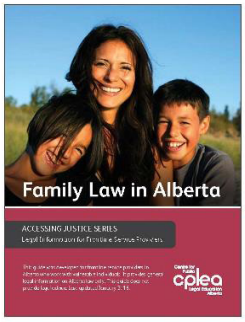
NEW RESOURCES AT CPLEA

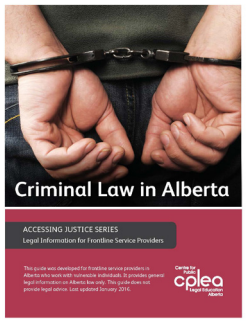
By Teresa Mitchell

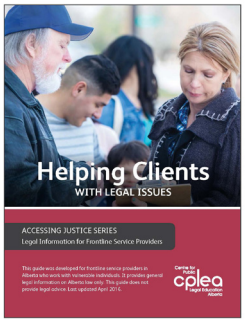
LawNow is pleased to announce the creation of a new Department, called New Resources at CPLEA, which will be a permanent addition to each issue. Each post will highlight new materials at CPLEA. All resources are free and available for download. We hope that this will raise awareness of the many resources 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

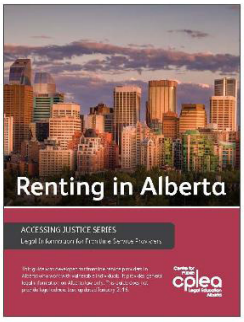
CPLEA has created a series of resources for frontline service providers working with vulnerable individuals. The five booklet series includes:











Each of these booklets gives information about the law and the legal system in clear, concise language, gives practical suggestions for how service providers can help their clients with legal issues, and lists further resources that might be helpful.

Users can view and download these publications for free or they can be ordered in booklet form by visiting www.cplea.ca/publications/.