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Legal Milestones

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CANADA 150

Vol. 41-5: Canada at 150

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The Rule of Law: Two Notable Supreme Court Decisions to Celebrate

By Rob Normey

The concept of the rule of law and the need to strictly comply with it is often presented with a flourish in legal and political debates. Canadians know that the rule of law is manifestly a good thing. We might, though, have some difficulty pinning it down. Surely, the growing recognition that the rule of law is a cornerstone of our liberal democracy and part of our proud heritage is something to celebrate on our nation's 150th birthday. It is worth revisiting two decisions of the Supreme Court that explored hitherto hidden parameters of the rule of law, after a brief overview of how it was brought into Canadian law initially.

The rule of law comes to us as a defining feature of the English common law which Canada inherited in our first Constitution, the *British North America Act*. That *Act*, now renamed *The Constitution Act, 1867*, affirms that the nation is a union of the various provinces, "with a Constitution similar in Principle to that of the United Kingdom." One essential aspect of the U.K.'s Constitution that we inherited is the rule of law. This can best be characterized as an underlying constitutional principle and a fundamental aspect of both our legal system and our democratic form of governance. It requires that government be conducted according to law and makes all government officials, including the Prime Minister and other elected politicians, answerable for their acts in the ordinary courts. As an early writer on English law, also a judge, Henry of Bracton declared in 1250: "The King himself however ought not to be under man, but under God and under the law, for the law makes him King." A later scholar, A.C. Dicey, coined the term in 1885, looking back at *Magna Carta* and the *Bill of Rights* of 1689, which affirmed that monarchy was subject to the law. It means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power … excludes wide discretionary power on the part of government." He goes on to state that a man may be punished for a breach of the law, but for nothing else. The eminent scholar contrasts a democratic system underpinned by the rule of law with autocratic and arbitrary form of rule – rule by man as opposed to rule under the law.

In 1947 a formidable challenge concerning the rule of law confronted the brilliant constitutional law scholar Frank Scott, a professor at McGill University. He had been approached by A. L. Stein, who

needed some innovative legal thinking in order to develop a litigation strategy to assist his desperate client, the restaurant owner Frank Roncarelli

Frank Roncarelli was a McGill graduate and a Jehovah's Witness who had successfully run over many years a carriage trade restaurant that he had inherited from his parents. For all of those years he had obtained a liquor licence which enabled his customers to enjoy glasses of wine with their meals. He had always complied with the terms of his licence and sold the liquor in a responsible manner. One can imagine his surprise, then, when on December 4, 1946, during a busy lunch hour, a large number of officers charged into the restaurant, demanding that Mr. Roncarelli produce his liquor licence. The startled owner was told that the licence was now cancelled and his entire liquor store was to be confiscated. At the same time the officers combed the shelves on his walls for any Jehovah's Witness materials.

Scott and Stein faced an uphill battle in challenging the decision by Premier Duplessis directing the Chair of the Quebec Liquor Commission to cancel the liquor licence. Their major obstacle was the discretionary aspect of the granting of the licence, which appeared at first glance to afford the Commissioner complete discretion to grant or withhold a licence.

Scott developed an audacious strategy, involving a direct challenge to the high-handed actions of the all-powerful Premier of Quebec, Maurice Duplessis. Scott thought back to his courses at Oxford University, where the writings of A.C. Dicey played a central part of the lectures he attended. He recalled a statement of Dicey's that "every person from the Prime Minister on down is liable to answer for his wrongs in the ordinary Courts of Law." Scott proceeded to build the principles of fairness underlying the common law tradition and the rule of law into his conception of Canada's legal system based on British parliamentary democracy. While the rule of law certainly existed as an abstract concept up to this point in Canadian law, it had never been mobilized at the service of a coherent and meaningful legal challenge to the actions of a high-ranking politician or public official.

Stein elicited evidence from Duplessis at trial that the Premier had decided to punish Roncarelli for advancing monies on a number of occasions to post bail for his fellow Jehovah's Witnesses who had been arrested for seditious activities while proselytizing for their faith on the streets of Montreal.

The intrepid legal counsel on behalf of Roncarelli successfully argued before the Supreme Court of Canada that cancelling a licence because the Premier considered Roncarelli to be unworthy of holding it, in light of his financial backing of members of his religious order, went beyond the authority he possessed.

There were three different sets of reasons for the majority of six justices at the Supreme Court who decided the appeal in Roncarelli's favour (as against three dissenting justices). However, it is Justice Ivan Rand's judgment that resonated at that time and continues to permeate the thinking of scholars and judges, particularly in his recourse to the core values of our legal and political systems, including the rule of law. Rand impressively reasoned that the rule of law has unmistakeable implications for

administrative decision-making. While the Premier and the head of the Commission possessed discretion to consider a number of factors in deciding about the suspension or non-renewal of a licence, an arbitrary and improper reason crosses the threshold of permissible behaviour. An individual like Mr. Roncarelli who holds a liquor licence is entitled as a citizen to responsible conduct by the decision-makers. As Justice Rand holds: "irrelevant purposes … would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure."

Another important aspect of the rule of law that Frank Scott developed in his argument and Justice Rand explained in his judgment is the connection to the concept of citizenship in a democracy. As with the rule of law, in a liberal democracy there is an ideal of citizenship which guarantees that all individuals are entitled to privileges provided by government in a non-discriminatory manner. Roncarelli's liquor licence was revoked by the Commissioner acting under the stern direction of the Attorney General and Premier Maurice Duplessis. While Justice Rand in his judgment recognizes that the licence granted is a privilege and not a right, nonetheless he goes on to emphasize that the licence itself is intimately connected to a right that Roncarelli possessed. He, like other citizens regardless of religious affiliation, was entitled to pursue a livelihood on equal terms with fellow citizens. The cancellation of the licence due to Roncarelli's religious views and support for the Jehovah's Witnesses was a denial of his status as a citizen. To act in accordance with the rule of law, then, a public official must recognize and honour the equal status of all citizens, even those supporting unpopular organizations. As Roncarelli was not treated equally in this regard, he was entitled to a declaration that the Premier and the Commissioner had acted beyond their public powers and that he was owed damages. The rule of law required no less.

A second case that stands out as a beacon in Canadian law for its declaration of the importance of the rule of law and the role of the judiciary in upholding it is *Mackeigan v. Hickman (1989)*. The Supreme Court of Canada in that case determined that a Royal Commission of Inquiry was not entitled to compel the attendance of justices who had sat on a reference case which had reviewed the conviction of Donald Marshall. The justices would have been asked questions about how they reached their conclusion in the matter. Justice McLachlin in her majority judgment canvassed the important principle of judicial independence, protected by s. 11(d) of the *Charter of Rights,* as a necessary extension of the rule of law. She elaborated on the importance of security of tenure, financial security and institutional independence of the courts as essential components of the rule of law in a liberal democracy. The courts are the protectors of the *Constitution* and the fundamental values embedded in it – the rule of law, fundamental justice and preservation of the democratic process.

Justice McLachlin reached back to the 1692 English case of *Knowles* to investigate the legal protection afforded to judges to be free from being compelled to testify as to the grounds of their decisions. She notes that this immunity principle was maintained in *Knowles* and in the subsequent development of the law, as making up part of the English *Constitution*. Ever since, justices have been clearly entitled to maintain their independence in discharging their responsibilities, free to render their judgments without fear and without needing to account to the King or the Prime Minister. While the Canadian Parliament now possesses the undoubted power to impeach or discipline a federally appointed judge for

dereliction of duty, it has no general power to restrict the powers of judges to deliberate and render their decisions free from all interference.

The *MacKeigan* decision makes clear that justices must be accorded the independence required to uphold the rule of law. The Supreme Court affirmed that an Inquiry cannot require that judges account for their reasons or look into the manner in which the Chief Justice of the Court had assigned particular judges to the matter.

These leading cases and fundamental principles reveal that the rule of law is not a fixed destination point but a continual work in progress, responding to new issues that arise and require scrutiny. Concerted efforts will always be needed to ensure that the rule of law continues to be maintained in a robust and meaningful way.

The Significance of the *Charter* in Canadian Legal History

By Patricia Paradis and Tasneem Karbani

Looking Back

2017 not only marks 150 years since the *British North America Act, 1867* (better known today as the *Constitution Act, 1867)*, came into being, it also marks the 35th anniversary of an important part of our Constitution – the *Canadian Charter of Rights and Freedoms.*

What *is* the *Charter*?

The *Canadian Charter of Rights and Freedoms* is a bill of rights – a statement of rights and freedoms that was added to the Constitution in 1982. It is a powerful legal tool that protects those living in Canada from breaches of specific rights and freedoms by the federal and provincial governments. The *Charter* essentially protects Canadians from the power of the state.

Our *Charter of Rights and Freedoms* is 34 clauses long – relatively short, but mighty! It has changed the legal landscape in Canada since it was entrenched as Part 1 of our Constitution on April 17, 1982.

How did our *Charter of Rights* come to be?

Canada's first *Bill of Rights* was enacted in 1960. The problem with the Bill was that it was not part of the Constitution, which meant it could easily be changed by the government. And it was not used effectively to protect Canadians' rights.

When Pierre Trudeau became Prime Minister in 1968 he was committed to a constitutional bill of rights. He believed that a strong democracy needed the protection of people's rights from the power of the state in its supreme law – the Constitution. As this was just after 1967 – the 100th anniversary of the Constitution – there was talk by the provinces about revisiting and renewing the Constitution. One aspect under discussion was making it possible for Canadians to change the Constitution without asking Britain for permission to do so. This seemed an opportune time, from Trudeau's perspective, to include a bill of rights in a renewed Constitution. Most of the provinces did not agree with Trudeau on including such a bill and years of wrangling between them followed. The contents of the *Charter* were hotly

debated in several meetings and in the meantime, the Canadian public was given the opportunity to have input into its structure and contents.

The patriation battle between Prime Minister Trudeau and the provinces finally culminated with a deal in 1981. In the end, they successfully patriated our Constitution from Britain and added a *Charter of Rights and Freedoms* to it on April 17, 1982. The result of this contentious time in our history is a *Charter* that is used as a model by countries all over the world.

What rights does the *Charter* protect?

The first 24 sections in the *Charter* outline its major protections: fundamental freedoms such as freedom of expression; democratic rights such as the right to vote; mobility rights such as the right to leave and re-enter the country; legal rights such as the right to a lawyer and the rights to life, liberty and security; equality rights such as the right to be free from discrimination on the basis of race, sexual orientation, or marital status; and, language rights such as the right to education in one's language of choice for French and English language minorities.

Including these *Charter* protections in the Constitution, means they are "entrenched" – all laws created by the federal or provincial government have to comply with the rights and freedoms included in the *Charter.* If they do not, a court can decide they are unconstitutional and 'strike them down'. This is what the Supreme Court of Canada did in 2014 when it decided the law prohibiting physician-assisted dying violated section 7, the right to life, liberty and security of the person. It gave the government one year to craft a new law.

Who and what does the *Charter* apply to?

The last 10 sections of the *Charter* deal primarily with its application. Section 32 makes it clear that the *Charter* applies to Parliament, the government of Canada and to the legislatures and governments of each province. This means the *Charter* protects individuals from acts by their governments that are in violation of the rights and freedoms listed. It does not protect rights as between individuals in the private sphere.

Section 25 states that nothing in the *Charter* will affect existing aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. Section 28 states that all rights and freedoms protected in the *Charter* apply equally to male and female persons.

The limits under the *Charter*

Charter rights are not meant to be absolute. In Section 33, a Canadian invention called the 'notwithstanding clause' allows the federal and provincial governments to 'override' *Charter*-protected fundamental freedoms, legal rights or equality rights if they disagree with them. For example, the Saskatchewan government recently announced it will use section 33 to override freedom of religion in a court decision on the right of non-Catholic students to attend Catholic schools.

Section 1, another section of the *Charter* which can be used to limit protected rights, allows the government to argue that certain laws need to exist, even if they do violate *Charter* rights. The criminal law prohibiting hate speech, which violates the freedom of expression, is an example of a law the government has argued needs to exist to protect Canadians, and the courts have agreed.

Giving meaning to the *Charter*: the role of the courts

Introducing the *Charter* into our Constitution inevitably led to greater power and responsibilities for the courts. The court's role shifted from one focused on the division of powers between the federal and provincial governments, namely who was in control of what, to a newfound authority to determine whether laws were consistent with the *Charter*.

Initially, when the *Charter* was a new legal tool, the question was how could it be used? One of the earliest *Charter* cases– *Hunter v Southam* ¬- had its origins in Edmonton and was the first decision on the right to be free against unreasonable search and seizure. A mere two days after the *Charter* came into force, Combines Investigation officers tried to search the offices of the Edmonton Journal and seize information, relying on an authorization certificate they presented. Southam Inc. – which owned the Journal ¬– asked the courts for an injunction, arguing that this search violated the right to be free against unreasonable search and seizure under section 8 of the *Charter*.

The case quickly made its way to the Supreme Court of Canada where the Court agreed that the search violated section 8 of the *Charter* and was therefore not constitutional. The decision was also significant because the Court gave an interpretation to the purpose and meaning of the *Charter*:

"The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action."

Charter analysis is not an easy task for the courts

Even with that purpose in mind, the process of *Charter* analysis is not straightforward. Deciding when laws violate *Charter* rights is often a tough task for the courts. It is not surprising then that even within the courts, different conclusions can be reached by the judges.

For example, another Alberta case that made its way to the Supreme Court of Canada involved the Hutterian Brethren of Wilson Colony who challenged a provincial regulation that required them to have photo identification on their driver's licenses. The Hutterians said this law infringed on their religious belief. The Supreme Court of Canada justices were split about whether the provincial law's requirement for photos justified the violation of their religious freedoms.

The majority of the Court concluded that the law was justified because the negative effect on religious freedom of the Hutterian Colony members did not outweigh the benefits of the security and integrity of

the driver's licensing system. On the other hand, two justices found the harm to the rights of the Hutterians was dramatic, and noted that the impact was not on just their belief system but on the life of the community.

Charter cases often require judges to weigh-in on contentious social issues, something for which the courts have often been criticized.

The impact of the *Charter*

The greatest impact of the *Charter,* by sheer numbers, has been in the area of criminal law. *Charter*-protected legal rights have meant greater safeguards for accused persons, including the right to speak to a lawyer, to not be detained arbitrarily, and to be free against unreasonable search and seizure. With respect to police powers, the courts have also weighed in on the scope of police to search an individual's garbage, the use of sniffer dogs, and their ability to search an individual's cell phone or laptop.

Most recently, the Supreme Court of Canada's decision in *R v Jordan* reinforced how the courts can use the *Charter* to highlight systemic problems in the criminal justice system. Section 11(b) of the *Charter* guarantees that any person charged with an offence has the right to a trial within a reasonable time. In light of lengthy delays to get to trial, the majority of the Supreme Court set out new time limits– meaning, anything above these limits can be considered "delay" (18 months for provincial court trials; 30 months for superior court trials). Following the decision, Crown prosecutors, defence counsel, and departments of justice continue to struggle to address systemic trial delays and to find tangible solutions where, for example, serious charges must be stayed given the Court's new time limits. Outside of the criminal law sphere, the courts have interpreted equality rights as well as the right to life, liberty, and security of the person in the *Charter*. The impact of this interpretation has meant recognition of LGBT rights, protection of women's reproductive rights, and protection for the security of marginalized groups such as sex trade workers.

At the grassroots level, the *Charter* also has also inspired Canadians to mobilize on emerging issues. In February 2017, students at 22 law schools across Canada engaged in an unprecedented research-a-thon for the "Research 4 Refugees" campaign, looking at possible legal challenges to the United States' executive order for extreme vetting of refugees. In their final report, the students relied on the *Charter* to support their conclusions. The *Charter* has become a powerful tool for protecting Canadians' rights and freedoms in its 35 years. Given its track record, there is little doubt that it will continue to be used to ensure that our governments are responding in constitutionally appropriate ways to the changes and challenges of our times.

Post-Script

The Centre for Constitutional Studies hosts regular lectures about sections of the *Charter of Rights and Freedoms* for members of the public in Edmonton's downtown core. These are given by law professors and instructors as part of its "Downtown Charter Series". For more information, visit: http://bit.ly/CCSDCS

The Statute of Westminster: A Stepping Stone towards Canadian Independence

By Marjun Parcasio

British imperial history is replete with examples of declarations of independence, often accompanied by violent uprisings or civil conflict. One of the fundamental documents of Canadian independence was also a declaration, albeit of a different character and issued under very different circumstances. In the early 20th century, the Dominions (at the time comprising of the self-governing colonies of Australia, Canada, the Irish Free State, Newfoundland, New Zealand and South Africa) began to increasingly assert their independence from British control. For Canada, the journey towards full independence was a gradual process, brought about in part by the Balfour Declaration in 1926 and which culminated in the adoption of the *Statute of Westminster* five years later. Today, the *Statute of Westminster* remains an important milestone in Canadian constitutional history.

Although Canada was a self-governing entity following Confederation in 1867, the Imperial Parliament retained the power to legislate in respect of colonial matters. Canada was also part of a single, indivisible Crown, meaning it remained subordinate to the foreign policy of Great Britain. So, when Great Britain declared war on Germany in 1914, the rest of its Dominions were automatically committed to the war effort. But on the battlegrounds of Ypres, Passchendaele and Vimy Ridge, among many others, the separate and extensive contribution of the Canadian military corps was recognized, which accelerated the process towards greater political and legal autonomy. When the First World War ended with the signing of the *Treaty of Paris*, Canada signed the *Treaty* in its own right, and became a founding member of the League of Nations in 1919.

And so Canada began to increasingly assert its position on the international stage. In 1918, the *Halibut Treaty* was signed between Canada and the United States without Great Britain as a counterparty, an act which was symbolic of Canada's growing separation from imperial diplomatic authority. Further on, in 1922 Canadian Prime Minister William Lyon Mackenzie King sent a non-committal response to a British request for military support in the Chanak Affair by indicating that the Canadian Parliament would need to decide on the country's involvement in the conflict.

Notwithstanding this progress, our legal position continued to reflect imperial parliamentary supremacy. At common law and as reflected in the *Colonial Laws Validity Act 1865* (28 & 29 Vict. c. 63), Dominion law was considered void and inoperative if it was "*repugnant to*" a statute of the British Parliament. When Canada chose to abolish appeals to the Judicial Committee of the Privy Council in respect of criminal matters under s. 1025 of the *Criminal Code*, the provision was eventually challenged before the British courts. Delivering its judgment in *Nadan v The King* [1926] UKPC 13, the Privy Council ruled that s. 1025 was *ultra vires* with reference to the *Colonial Laws Validity Act.* This fueled nationalist sentiment in Canada and formed part of the backdrop to further discussions on the relationship between Great Britain and its colonies.

The situation was therefore ripe for change. The Imperial Conference held in London in 1926 discussed this relationship and culminated in the Balfour Declaration, which affirmed that the Dominions were *"autonomous Communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations".*

However, the Balfour Declaration was only a political statement – a political recognition of the independent status of Canada and the other Dominions. Canadian delegations were sent to the 1929 Conference on the Operation of Dominion Legislation and the following Imperial Conference in 1930 with the intention of advancing the ideals espoused by the Balfour Declaration and to make those principles a legal reality. The final result was the *Statute of Westminster*, passed by the British Parliament on 11 December 1931.

The *Statute of Westminster* gave legal recognition to the independence of the British Dominions, repealing the *Colonial Laws Validity Act 1865* and recognizing that "*the Parliament of a Dominion has full power to make laws having extra-territorial application.*" As such, it acknowledged Canada's legislative independence and sovereignty save in certain constitutional matters. On the plane of public international law, the *Statute* clarified the status of Canada and the Dominions as independent states with international legal personality (as opposed to self-governing entities of Great Britain). The *Statute* also enabled the divisibility of the Crown, with the Crown in Right of Canada being separate to the Crown of the United Kingdom and each of the other Commonwealth states. This meant that when Great Britain declared war on Germany on 3 September 1939, Canada was not automatically a belligerent as it was in the First World War. Canada's official entry into the Second World War occurred a week later, on 10 September 1939.

However, full juridical equality between Canada and Great Britain would still take some time to achieve. All appeals to the Privy Council were only abolished in 1949, leaving the Supreme Court of Canada as the court of last resort. In addition, prior to the *Statute's* enactment, the federal government and the provinces could not reach a consensus on the method by which the Constitution could be amended. As a result, amendment of the Canadian Constitution was excluded from the *Statute*'s content, an issue which was only resolved when the *Constitution* was repatriated in 1982.

Although Canada celebrates its national holiday on the 1st of July, the start of Canadian Confederation, that day is not strictly speaking the country's day of independence. In that respect, Canada has multiple landmarks in its road towards independence, with the *Statute of Westminster* featuring as a crucial part of that history.

Temporary Taxation? No End in Sight

By Matthew Peddie

Today, direct taxation is a course of action to build federal funds that has been in place for as long as most Canadians can remember. It has evolved from what was initially a ten-page statute to what is today over 2,500 pages and far too complex for the average Canadian to fully understand. Throughout the development of the *Income Tax Act* and the direct taxation system in Canada, the debt, which is the reason direct taxation was implemented, has also grown. Federal debt in Canada was less than $500 million at the time that the "War Tax Upon Income" bill was implemented and has grown to be over $630 billion and climbing today. Without a doubt, there will be debt and direct taxation as long we live, although this was not the intention at the time the system was implemented.

On August 4, 1914, the United Kingdom declared war on Germany. Canada became involved overseas in the First World War as part of the British Empire. Over the next three years Canadian resources were drained in order to provide support to their allies and to troops overseas. Income tax had been temporarily implemented long before the First World War in both the U.S.A and U.K. and by the start of World War 1, these nations had permanent taxes in place to support their war efforts. At the same time, the Canadian government had no intention of resorting to direct taxation; instead Canada implemented a system of taxes levied on specific goods and services to provide government funding. On July 25, 1917 this all changed. The Minister of Finance, Sir Thomas White, made a proposal for the "War Tax Upon Income" bill to be put in place because the existing tax system was not providing a sufficient level of financial support that was required for the War. The proposal for this bill was to provide a short-term resolution for Canada to aid in the financing of the requirements needed for World War 1. No specific length of time was specified as there was no clear indication of how long the War would last. Sir Thomas White's proposal was to have the bill reviewed within one to two years after the end of the War in order to determine if it was viable and reasonable for Canada moving forward. The bill was not instituted as a permanent resolution to offset the debt of the country and, as such, the bill was named the "War Tax Upon Income" bill.

The initial bill implemented in 1917 taxed a limited portion of the Canadian population. With the end of World War 1 there was no end to direct taxation. At each review of the system, its scope and complexity expanded such that more and more Canadians were subject to the requirement to pay taxes. There were changes over the next fifty years,but the largest tax reform came in 1966 with the Royal Commission on taxation known as the Carter Commission. The Carter Commission essentially stated that

the current taxation system was unfair. It recommended that the Canadian tax system should undergo a significant overhaul to ensure a progressive taxation system in which the rich would not be able to shelter income and use exemptions in order to reduce taxes. Due to major opposition by wealthy individuals and companies, a number of the changes that were presented by the Carter Commission to eliminate special exemptions and incentives and allow the *Income Tax Act* to become a more progressive and fair system have never been put into action. The Carter Commission did allow for partial changes to be implemented that would allow for the system to make a move towards being more equitable within Canada. "A buck is a buck" was the statement that Kenneth Carter used to explain that, no matter how money is earned, it should be included in income in the same way as all other sources or types of income and taxed in a progressive system.

As we celebrate the 150th birthday of Canada, we also celebrate the 100th anniversary of the implementation of direct taxation in Canada. Even with the temporary nature of Sir Thomas White's bill in 1917, the direct taxation that was implemented to help aid in the financing of the First World War continues today. The initiation of the "War Tax Upon Income" bill came at a time when Canada was in need of additional resources, but Sir Thomas White recognized that Canada did not want to be recognized as a country of heavy taxation. It wanted to continue to be inviting to immigration and not have this be a hindrance on the world view of Canada by other countries. One hundred years later, Canada continues to build a strong diverse nation without the burden of heavy taxation affecting its international perception.

The *Income Tax Act* has come a long way from its start as a ten-page short-term solution, but it has never gone away and has established itself as a permanent fixture unlikely to ever be eliminated in the future.

However, income tax is under continuous scrutiny and with the current Liberal government under Justin Trudeau currently evaluating the tax structure, additional changes in an attempt to make the tax system fairer are imminent. With the development of the *Income Tax Act* into the complex legislation it is today, there has also come the natural injection of politics. Political parties in power have introduced 'boutique credits' based on their respective governing strategy. This strategy is subjective in nature and can make taxes increasingly more complex and difficult to manage. It may reduce revenues to the government but, on the other hand, can potentially provide much needed tax credits to specific groups within Canada such as families or educators. These changes are often questioned as to their effectiveness and longevity, but to fully understand the different perspectives of tax reform as a whole, compare Canada's approach to that of our neighbours south of the border. A very different government under Donald Trump is proposing to greatly reduce tax rates. Both countries continue to have massive growing debt, therefore requiring taxes to continue, but the subjective nature of creating an objective tax system is an ongoing issue as long as taxes are alive. There is no end in sight.

The Evolution of Canadian Law

By Charles Davison

With the 150th anniversary of Confederation upon us, it is perhaps appropriate to reflect on the high points of 150 years of legal change in Canada. Such an exercise is always a challenge, of course, because what might be considered significant to some may be seen as minor or less important to others. In this brief review, I will focus first upon "the grand scale": those developments and changes which seem to me to have had the most impact on our national and social evolution over the last 150 years, and then discuss specific areas which likely have the most impact on the daily lives of Canadians.

Canada in 1867 was focused mainly in the centre (what became the provinces of Ontario and Quebec); was predominantly white and was mainly of British extraction and English-speaking. While we think of 1867 as the year we became a new country, many of the powers we now take for granted as a completely sovereign state were still reserved for Britain to exercise on our behalf. Legally, the highest judicial authority in the United Kingdom – in the form of the Judicial Committee of the Privy Council – was also the highest court of appeal for Canada. The legislation which is considered to be our founding document was an Act of the British Parliament – the *British North America Act* (now, *The Constitution Act, 1867*) – and it described the division of powers between the national Parliament and the provincial legislatures. It also set out some basic rules about how we would be governed but many other basic principles remained unwritten and were encompassed by the broad, general statement that our constitution was to be "similar in principle to that of the United Kingdom."

Canada on its 150th birthday is a hugely different place. Constitutionally, we have moved from the status of being "almost still a colony" of Great Britain, to being a completely independent and sovereign entity. While this evolution has, of course, also included major events in other areas (politics, military, and so on) the most important legal steps have been in the form of both statutory and common ("judge-made") law. One of the most significant took place in 1931, with the passage of the *Statute of Westminster*. Until 1931, the British Parliament had retained ultimate authority in most areas of jurisdiction, reserving to the government in London the authority to override or nullify laws passed in Canada (and the other Commonwealth Dominions) as it saw fit. The *Statute of Westminster* removed most of this authority from Great Britain and passed it to the legislative bodies in each country, including Canada. The exception for Canada was in relation to the power to amend our Constitution: by

agreement among the provinces and Ottawa, the United Kingdom Parliament continued to retain this authority.

When it came to legal rulings and decisions, however, the Judicial Committee continued to be our final court of appeal until 1949. That year, Parliament (in Ottawa) amended *The Supreme Court Act* to abolish appeals to the Judicial Committee in London, making the Supreme Court of Canada our ultimate judicial decision-maker.

The final, and perhaps most important, milestone in our constitutional development as an independent country occurred in the early 1980s with the so-called "repatriation" (or transfer) of our final constitutional authority from the United Kingdom to Canada. Prime Minister Pierre Trudeau led the way towards a truly "made in Canada" Constitution which included, for the first time, a written list of our most basic rights and freedoms, as well as a method for changing the Constitution itself. *The Constitution Act, 1982* was signed into law by The Queen in Ottawa on April 17, 1982. The remaining legal ties to Britain were severed and Canada was finally independent.

A significant aspect of the 1982 landmark was the inclusion of a written listing of our most fundamental rights and freedoms, and a way to meaningfully enforce them, in the form of the *Canadian Charter of Rights and Freedoms*. While in 2017 we tend to take "the *Charter*" for granted, it too represents the culmination of 150 years of legal change.

With a few, isolated exceptions, in 1867 – and for decades afterwards – laws were enacted, applied and enforced by white (usually British) men over all others who lived in this country. Women had few rights, and non-white members of society faced many barriers, legal and otherwise, to equality. Aboriginal Canadians were subjected to various regimes of discrimination and racial abuse more usually associated with apartheid South Africa and the darkest days of racial strife in the southern United States.

The steps toward equality and the protection of rights were many and often small. One of the more significant developments along the way towards full legal equality for women was the well-known "*Persons Case*" decided in 1929 by the Judicial Committee of the Privy Council in London. Five women challenged the section of the *British North America Act, 1867* defining the qualifications for membership in Canada's Senate, which had been interpreted so as to restrict the meaning of "persons" to "males". The J.C.P.C. ultimately ruled, however, that the word "persons" had to be read to include *all* persons, of both genders: women were persons too! None of the "Famous Five" who took up this challenge was appointed to the Senate, but about a year after the decision the first female senator was named by the Governor General.

Other court rulings over the years recognized and affirmed the existence of various rights and freedoms for Canadians. A case from Alberta decided in the 1930s advanced the freedom of the press, and a number of decisions originating in Quebec in the 1950s addressed our freedoms of speech, association, and religion – as well as affirming the most fundamental principle for a society ruled by law: that

everyone, from the highest office holder to the lowliest citizen, is equally bound to obey the law of the land, without exception.

Prime Minister John Diefenbaker hoped, when he oversaw enactment of the *Bill of Rights* in 1960, to secure more protection for the rights and freedoms of individual Canadians. However, this legislation was little more than mere symbolism because it *was* only "ordinary" legislation, passed by Parliament like any other statute. It was considered not to be sufficient to assert and enforce the rights it described over any other enactment of Parliament.

What changed with the 1982 *Charter of Rights and Freedoms* was that our essential rights and freedoms were elevated to the status of constitutionally-protected interests, capable of being enforced by applications to the courts. Unlike the situation of the *Bill of Rights,* once the *Charter* became part of our Constitution, any legislation along with any other governmental or state action which infringed upon or violated the enshrined rights of individuals could be struck down and declared invalid. Only where the government could demonstrate a reasonable justification for the limitation of rights in a democracy like ours, would the violation of rights be allowed. Otherwise, the courts were given the task of fashioning an appropriate remedy for persons whose rights or freedoms had been infringed or breached.

The changes in Canadian laws and society flowing from the enactment of the *Charter* in 1982 touch virtually all aspects of our modern lives. Things which we take for granted in 2017 which resulted from enshrining our fundamental rights and freedoms include:

- Sunday shopping (a result of our freedom of religion);
- protection from improper and arbitrary government prying into our private affairs and the requirement for a search warrant before state officials can snoop around our private property (all parts of our rights to be protected from unreasonable search or seizure);
- our right to speak with a lawyer if we are arrested or detained; to know all aspects of the case against us if we are charged with an offence, and to be treated fairly in the court system (all parts of our rights to fair trials);
- the legalization of abortion (the rights of women to decide for themselves what will be done with their bodies); and
- protection of the media from harassment or persecution for investigating and exposing government and political wrong-doing (part of the freedom of the press).

More recent *Charter* developments touching the most basic aspects of life in Canada include the legalization of gay marriage; the introduction of physician-assisted death; and innovations such as supervised injection sites.

To move from these general areas of how we govern ourselves, to more particular areas of law which touch our daily lives, reveals just as many examples of monumental change from 1867 to where we are today.

In the field of criminal law, for example, in 1867 most of our legal provisions were taken from the rulings of English judges, and the British Parliament. In 1892, however, Parliament enacted the first Canadian *Criminal Code*, which continues to be the main source of our criminal law today. Over the years since 1892, the *Code* has been amended often, in order to address new situations not foreseen in earlier years (it now includes computer offences, for example). Other amendments have included the abolition of all forms of physical punishment (flogging and hard labour, for example), and, in 1976, the death penalty.

Family law, and divorce in particular, have also changed immensely since 1867. Until 1968 divorce was mainly governed by provincial laws which differed across the country. Many could only be divorced by an Act of Parliament: Someone wanting out of an abusive or otherwise bad marriage had to seek the assistance and support of their Member of Parliament who would introduce a Private Members Bill in the House of Commons declaring the marriage ended and the parties divorced. However, with the passage of the *Divorce Act* in 1968, the rules and procedures across the country were standardized, and all such matters were placed into the hands of the courts. Divorce became far more available and further change followed in 1986, when the *Divorce Act* was amended to simplify the situation even further through "no fault" divorces.

Another significant development over the last 150 years is the evolution of legal protections for spousal partners when it comes to the division of family assets. In 1867, after a divorce the ex-wife, and any children she might attempt to have living with her, were often left penniless. In the last 150 years, however, various support laws have been enacted so that now both former partners must share the obligations of child support and neither party is able to benefit unfairly from the marriage and its termination. In addition, property acquired during the marriage is to be divided equally between the former spouses, unless one side or the other can prove in court a significantly greater contribution.

Another major change in the area of family law is the recognition and acceptance under our laws that marriage need not be restricted to a man and a woman, but that other equally valid and binding unions are possible. As a result of a number of rulings under the equality provisions of the *Charter of Rights*, Canada was one of the first countries to legalize same-sex marriages. It is now well-accepted in Canadian law – and in society at large – that non-heterosexual couples can marry and parent children as well and as validly as in the more traditional forms of marriage.

When it decided the *Persons Case* in 1929, the Judicial Committee of the Privy Council described our Constitution as a "living tree" which would grow and adapt to changing circumstances and values. The analogy can be applied to our laws in general. Just as they have grown and modified in the last 150 years in ways no one living in 1867 could have imagined, so too will they continue to change and adapt to the challenges and developments in society which will take place in the future as well. I wonder what a review like this one will discuss at Canada's 200th or 250th birthday?

An Indigenous Perspective to Canada's 150th Birthday

By Troy Hunter

This year, there are many celebrations for Canada's 150th birthday. What we are really commemorating is the *British North America Act 1867* (*BNA Act 1867*) which established our country's Constitution. The *BNA Act 1867* has since been renamed the *Constitution Act 1982* after the repatriation of our Constitution from Great Britain.

Ministers' Working Group

One aspect of Canada's 150th birthday is that, this year, the federal government has undertaken a review of laws and policies related to indigenous peoples. A Ministers' Working Group "will examine relevant federal laws, policies, and operational practices to help ensure the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights". There are constitutional rights established in our constitutional documents which the Minister's Working Group might want to have a good look at, which I will highlight later in this article as it pertains to the land question in regards to Canada's indigenous peoples.

Background

It brings me great pride that I was born in the year of Canada's centennial birthday in New Westminster B.C. where I have written this article. Fifty years later, I have made my birthplace my home and practice law in Greater Vancouver. I have ancestral roots that extend to the Ktunaxa territory in southeast B.C. I am a member of the Ktunaxa First Nation, but going beyond that, my ancestral roots can be traced to Scotland, Ireland, England, Germany, Switzerland, and France. My seventh-generation great-grandfather, Mr. Francois Morigeau, immigrated from around Montreal to the Columbia Valley decades before Canada's confederation in 1867.

My French ancestry can be traced to 1666 in New France, now Quebec, where the Morigeau's originated from. I have an ancestor who was a member of the Carignan Salières Regiment and he married one of France's "King's daughters", les Filles du Roi. My ancestors, the Morigeaus, stem from Jean Pierre Forgues and Marie Robineau who married 349 years ago at New France in Notre-Dame de Québec Basilica-Cathedral, Quebec City, Quebec Canada, the first parish church in North America.

Plains of Abraham, photo by Troy Hunter, January 2008.

I had the honour and the privilege to attend the Canadian Constitutional Affairs Conference 2008 which was held in a typical icy cold, January winter in Quebec City at the Plains of Abraham. During that event, an exquisite dinner was held in an ancient church in Old Quebec City. How wonderful it was to be there where the history in 2008 was 400 years old. And for me to be in a place where I have a bloodline connecting me directly to that location was an amazing experience.

As a second-year law student, and member of an indigenous nation, I spoke about the *United Nation Declaration on the Rights of Indigenous Peoples*, free, prior and informed consent, the need for senate reform so as to include Indigenous peoples as a third order of government, and appointing an Indigenous person to the bench of the Supreme Court of Canada. It was at a social get-together afterwards that I was introduced to political scientist Tom Flanagan and you could feel the tension in the room at that moment. It was obvious that neither of us saw eye-to-eye based on our political aspirations and beliefs, but nevertheless, to look Mr. Flanagan directly in the eye and to shake his hand at that conference is a memory that I will always have.

Royal Charter

Royal Charters are established when a monarch grants rights or powers to a person or persons and it is issued as letters patent. Royal Proclamations are similar to Royal Charters. The National Archives of the United Kingdom defines Royal Charters and Letters Patent as "grants which were issued under the Great Seal" that "cover a huge diversity of subjects, including grants of official positions, lands, commissions, privileges and pardons".

Our constitutional history stretches back in time with language that goes back centuries. There are certain words and phrases that we have come to accept as part of the fabric of who we are as Canadians, some of their origins are explored here. Take for example, the word "charter". In Canada's constitutional history, we often think of the more recent, 1982 *Canadian Charter of Rights and Freedoms*. We all have come to know its meaning but perhaps, fail to recognize what a charter is and where it comes from. I will explain how royal instruments such as a charter or a proclamation are venerated to the highest accord and treated as if it were sacrosanct.

Black's Law Dictionary describes a charter as "an instrument that establishes a body politic or other organization, or that grants rights, liberties, or powers to its citizens or members". There are municipal charters which specify organizational structure and create a corporation and body politic. In general, to "charter" as a verb means to establish or grant by charter.

Charters have been granted to organizations that have been involved with Canada's historical roots, which helped form our *Constitution,* two examples are, the Free Masons and the Hudson's Bay Company.

Stone Mason's Charter

In examining the origins of freemasonry, there are written legends that go back over a thousand years to our motherland Great Britain and Scotland, where a Charter had been supposedly granted by the first King of England and one of the greatest Anglo-Saxon kings, King Athelstan.

King Athelstan supposedly granted a Royal Charter through his brother, Edwin. By Royal Charter, stone masons were granted the right to meet and ask for better wages and conditions. which created an elite member group within the trade. Hundreds of years later this became a cause for concern which resulted in the outlawing of Mason's gatherings due to the complaints of the general labourer who were paid less. It was because the Mason's had a Royal Charter that they were allowed to continue to operate and to hold their meetings.

The Hudson Bay Charter

When the vast riches of continental America became common knowledge, the Kingdom of Great Britain, along with other countries, set out to colonize the lands. In 1670 the Hudson Bay Company was established under a Royal Charter and issued under Letters Patent.

The Charter of 1670, granted by the King of England, Charles the Second recognized in its preamble that a certain named group of individuals led by the King's cousin, Prince Rupert, desired to undertake an expedition to the Hudson's Bay to discover a new passage to the South Sea (the Northwest Passage) and to trade in furs, minerals and other commodities. The King of England further encouraged the company of explorers by providing a monopoly over trade and commerce. The Charter established both a corporate body and a political one as well. The newly minted company was both a colony and a company, with territorial rights to resources including rent, to hold public assembly and civil or criminal court in accordance with English law, to hold office, impeachment, the dispensation of land, good governance, elections, law making jurisdiction, imposition of punishment, while at all times, saving the faith, allegiance and sovereign dominion to the British Crown. The Company also had exclusive rights to trade and traffic in respect of adjacent lands and Native persons.

It is remarkable in examining the Hudson's Bay Charter how many words, phrases and concepts it contains that are similar to the *BNA Act 1867*. For instance, "trade and commerce" is used in the

Constitution where its regulation is the exclusive domain of the federal government. Then there is the administration of justice, an exclusive domain of the provincial governments, which somewhat mirrors the Hudson's Bay Company Charter. There are even notwithstanding clauses in both the Charter and the Constitution although their clause meanings may differ somewhat.

Royal Proclamation of 1763

Royal Proclamation of 1763

King George III was only 25 years old when he issued the *Royal Proclamation of 1763*; however, it was issued as Letters Patent under the Great Seal of Great Britain and with the advice of the Privy Council. The *Proclamation* recognized Great Britain as the mother country of the British colonies in the Americas. It provided for the colonies to have Royal Protection for the enjoyment of the benefit of the laws of the realm of England, to erect and constitute courts of judicature, public justice for all causes criminal and civil according to law and equity and as may be agreeable to the Laws of England with liberty for persons in all civil cases to appeal under usual limitations and restrictions to the Privy Council. The *Proclamation* not only recognized Indian title in lands, but created a statutory Indian reserve for all unceded land to the Indians. It named certain colonies but also applied to the Hudson's Bay Company where Warrants of Survey or Patents for any lands whatever could not be issued where the Indians have not ceded or sold their lands to the Kingdom of Great Britain. The *Proclamation* explicitly mentioned that the lands not within the limits of the Hudson's Bay Company westward to the Sea were excluded from being taken up, without special leave and licence for that purpose first obtained from the Kingdom of Great Britain. The Indians were given the right to dispose of their lands but only to the Kingdom of Great Britain (now the federal government), where there has been a public meeting or assembly of the said Indians for that purpose. Furthermore, trade with the Indians would continue on the basis that a trade licence was first obtained from the respective colony. One of the final clauses mentioned the Management and Direction of Indian Affairs within the territories, which in today's terminology, is now known as Indigenous and Northern Affairs Canada (INAC). The *BNA Act 1876* provides the exclusive jurisdiction of Indians and Lands Reserved for the Indians as federal.

King Richard III

Moreover, the *Royal Proclamation of 1763* uses some of the same words as in the Hudson's Bay Charter, for example, "make, constitute, and ordain laws, statutes and ordinances". One of the important and overlooked aspects of the Proclamation is the appeal mechanism to the Privy Council. In Canada's early history, appeals could be made to the Privy Council in England. However, the *Charter of Rights and Freedoms 1982*, section 25, recognizes that there are statutory rights and that the *Charter of Rights and Freedoms* doesn't abrogate or derogate from such rights. S. 25 (a) states that, "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763". Also, s. 26 of the *Charter* says, "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada". Evidently, our *Constitution* extends beyond the words of the *BNA Act of 1867*.

S.91(24) of the *BNA ACT*: Indians and Lands Reserved for the Indians

In 1887, the Supreme Court of Canada in the St. Catharines Milling and Lumber Co. v. R. case recognized that the *BNA Act 1867* reference of Lands Reserved for the Indians as including unceded lands as per the *Royal Proclamation of 1763* follows:

> *… all such lands, until the cession thereof should be made by the Indians to the crown, constituted what were known as and designated "Indian Reserves," "Lands reserved for the Indians," or "Indian lands." It is the lands not ceded to or purchased by the crown which are spoken of in the proclamation of 1763 as the lands reserved to the Indians for their hunting*

> *ground—and the unceded lands have ever since been known by the designation "Lands reserved for the Indians" or "Indian Reserves."*

In 1888, the Judicial Committee of the Privy Council in St. Catherine's Milling and Lumber Company upheld the decision of the Supreme Court of Canada and determined that all unceded lands are reserved to the Indians and therefore, fall under s.91(24) of the *British North America Act*, federal jurisdiction, as Indian Reserves. Moreover, they also stated that the provinces can enjoy the resources of the land when "Indian Title" is ceded (i.e. treaty) as follows:

The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

The Unwritten Constitution

There is even an unwritten constitution that forms part of the fabric of our nation. When I was in law school, I recall learning about the unwritten constitution from the internationally renowned indigenous law Professor John Borrows. Borrows wrote about the political survival of indigenous legal traditions including self-government as follows:

> *Indigenous legal traditions continued to exist in Canada unless … they were incompatible with the Crown's assertion of sovereignty, … they were surrendered voluntarily via the treaty process, or … the government extinguished them." Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continue as part of the law of Canada today. If reconciliation is the lens through which the courts interpret the parties' relationships, there are sound arguments that Aboriginal governance is compatible with the Crown's assertion of sovereignty, that it was not surrendered by treaties, and that it was not extinguished by clear and plain government legislation (*Borrows*)[1].*

Moreover, the unwritten constitution was discussed by the Supreme Court of Canada back in the 1980s after the repatriation of the *Constitution*.

In 1998 the Supreme Court of Canada in *Re: Reference to the Succession of Quebec*, mentioned that there are underlying principles that, "are not explicitly made part of the *Constitution* by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the *Constitution* itself and are as such its lifeblood" (*SCC 1998*).

The Land Question

While there are Supreme Court of Canada decisions that allow for the infringement of Aboriginal title and rights, as legislative objectives, for example, "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title", they are nevertheless, in his own words, only an "opinion" of Chief Justice Lamer, who then went on to say that it "is ultimately a question of fact that will have to be examined on a case-by-case basis" (*Williams*).

The *Supreme Court of Canada Act*, is federal legislation that provides "exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive". In light of the 150th anniversary of the *British North America Act 1867* and the federal review of laws and policies to ensure constitutional obligations towards indigenous peoples are being met, the Minister's Working Group ought to take a very close look at what rights exist under the *Royal Proclamation of 1763*, including the ability for aggrieved persons or groups to appeal to the Judicial Committee of the Privy Council in London, England as the highest court of appeal or court of last resort. Canadians have the 1982 Royal Charter which backs up the *Royal Proclamation of 1763.*

Just as the Free Masons were able to uphold their rights to assemble because they had a Royal Charter issued by a king despite laws to the contrary, so too, should the Indigenous people of Canada that have land grievances over unceded lands, treaty obligations, etc., be able to uphold their rights to appeal to the Privy Council for final and binding determination. After all, the honour of the Crown is at stake and we as Canadians virtue equality both before and under the law. If one group can rely on a Royal Charter or Letters Patent to stand on their rights, so too should another group as the *Royal Proclamation of 1763* is akin to a Royal Charter and likewise to the Hudson Bay Charter, The *Royal Proclamation* was also issued under Letters Patent.

Notes:

[1] John Borrows, *Indigenous Legal Traditions in Canada*, Washington University Journal of Law & Policy, Volume 19 Access to Justice: The Social Responsibility of Lawyers | Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples, January 2005.

The Evolution of Five Legal Doctrines in the Supreme Court of Canada

By Peter Bowal and Rebiah Syed

Supreme Court of Canada

Introduction

Legislation is enacted, amended and repealed over time in response to improvements and changes in social currents. The common law also evolves in the same way as judges pronounce, tweak and elaborate and then occasionally over-rule their previous legal doctrines. A recent search identified over 500 Supreme Court of Canada decisions that had been over-ruled by subsequent panels of the Court, of which 55 over-rulings came in the last 10 years.

Supreme Court of Canada is *not* Bound by its Own Decisions

As early as 1901, the Supreme Court asserted that it is not bound by its previous decisions. In *Burrard Election Case (Duval v. Maxwell)*, http://canlii.ca/t/ggxht, Gwynne J. said:

> I feel difficulty in concurring in the proposition that it is not competent or proper for this court to reverse a judgment of the court differently constituted if it clearly appear to be erroneous.
>
> This court is not invested with the prerogative of finality as is the House of Lords whose judgments are the law of the land until and unless varied by Parliament. Nor is this court invested with the prerogative of infallibility so as to prevent its seeing error in one of its own judgments.

The modern Court said overturning itself is a step not to be lightly undertaken. It must be convinced on compelling reasons that the precedent was wrongly decided and should be overruled, especially where

the precedent was the product of strong Court majorities: *Ontario v Fraser* (2011, http://canlii.ca/t/fl63q). Occasionally, and counter-intuitively, the Court has over-ruled precedent to generate greater certainty: *Minister of Indian Affairs and Northern Development v Ranville* (1982, http://canlii.ca/t/1z1cx).

In practice, across all legal subjects, the Court has overruled itself many times. A few of these over-rulings are: *R. v Chaulk* (1990, http://canlii.ca/t/1fspm); *R. v B. (*1993, http://canlii.ca/t/1fs50); *R. v Robinson* (1996, http://canlii.ca/t/1frbh); *R. v Salituro* (1991, http://canlii.ca/t/1fshg); and *Canada v Bedford* (2013, http://canlii.ca/t/g2f56).

The Development of Five Legal Doctrines

This article describes how five different legal doctrines were developed over time by the Supreme Court of Canada.

1. *Collective Bargaining and Freedom of Association*

In the 1999 decision of *Delisle v Canada* (http://canlii.ca/t/1fqn7), the Supreme Court of Canada found that federal legislation, which denied RCMP members employee status to collective bargaining, did not infringe their constitutional freedom of association under section 2(d) of the *Charter*. The majority 5 – 2 ruling held the *Charter* right existed independently of any legislation protecting the rights of the RCMP. The members enjoyed freedom of association apart from the legislation.

Sixteen years later, the same question subjected to the same law, was answered differently by the same Court. In *Mounted Police Association of Ontario v Canada* (http://canlii.ca/t/gfxx8) a new 6 – 1 majority found the same legislative exclusion to be a violation of section 2(d) of the *Charter*, one so serious that it could not be justified under section 1.

Although RCMP members participated in a labour relations unit, its Staff RelationsRepresentative Program, the Court agreed this was imposed on them, restricted their choice and interfered with their freedom of association. The Program was part of the RCMP management structure, so it failed to ensure RCMP members were independent from management. The majority of the Court concluded it was "not an association in any meaningful sense, nor a form of exercise of the right to freedom of association".

As to the *Delisle* precedent, the Court repeated that overturning its own decisions was not a "step to be lightly taken." However, it was now taking a broader approach to the right. It said *Delisle* was decided "before this Court's shift to a purposive and generous approach to the exercise of freedom of association … the results in *Delisle* must be revisited."

2. *Physician-assisted Suicide*

Section 241(b) of the *Criminal Code* made it a crime for anyone to assist another individual to take their own life for any reason. In 1993 the Supreme Court of Canada ruled 5 – 4 in *Rodriguez v British*

Columbia (http://canlii.ca/t/1frz0) that this criminal restraint on physician-assisted suicide violated Ms. Rodriguez' *Charter* guarantees of equality, and of life, liberty and security of the person, but the breaches were justified under section 1 of the *Charter*. This was not a case of subjecting one to cruel and unusual punishment at the hands of the state. Prohibition of suicide was seen to be a reasonable limit on her *Charter* freedoms.

The Court was unanimous in reversing itself 23 years later in *Carter v Canada* (http://canlii.ca/t/gg5z4). While a generation apart, the *Rodriguez* and *Carter* cases were factually similar. Both patients suffered the same degenerative disease and both sought similar liberties, although only the section 7 "life, liberty and security of the person" *Charter* right was argued in *Carter*.

The criminal rule against assisting another to die was found to violate the life, liberty and security of a person in a way that could not be justified. The Court concluded that prohibiting physician-assisted death led some individuals to take their own lives sooner due to their fear that they would unable to do so later. The Court acknowledged that the "prohibition deprives some individuals of life." The prohibition was not minimally impairing and had to be struck out by the Court.

As to the issue of binding precedent, and how it related to the earlier *Rodriguez* decision, the Court said:

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" . . .
>
> "Both conditions were met in this case. The trial judge explained her decision to revisit *Rodriguez* by noting the changes in both the legal framework for s. 7 and the evidence on controlling the risk of abuse associated with assisted suicide."
>
> The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. . . . This different question may lead to a different answer. The majority's consideration of overbreadth under s. 1 suffers from the same defect: see *Rodriguez*, at p. 614. Finally, the majority in *Rodriguez* did not consider whether the prohibition was grossly disproportionate.
>
> The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*. The majority in *Rodriguez* relied on evidence of (1) the widespread acceptance of a moral or ethical distinction between passive and active euthanasia; (2) the lack of any "halfway measure" that could protect the vulnerable; and (3) the "substantial consensus" in Western countries that a blanket prohibition is necessary to protect against the slippery

slope. The record before the trial judge in this case contained evidence that, if accepted, was capable of undermining each of these conclusions.

3. *Tax Deductions*

In 1977, a unanimous five-judge Supreme Court of Canada released the important taxation decision of *Moldowan v The Queen* (http://canlii.ca/t/1mk9m). It involved interpretation of the federal *Income Tax Act* relating to deductibility of expenses and losses in hobby farm operations. The provision limits deductible losses "[w]here a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income". In *Moldowan,* the Court interpreted the provision to allow:

- all deductions where the farm was the taxpayer's livelihood,
- limited deductions when farming was combined with another income source, and
- no deductions where the operation was a mere hobby farm.

Twenty five years later, the Court decided *Canada v Craig* (2012, http://canlii.ca/t/fs6sb) where the taxpayer was in a very similar situation to the *Moldowan* case. Craig had an established law practice from which he generated most of his income, as well as a farming business in which he was involved in buying, selling, training and racing of horses. He sought to deduct his losses from the horses.

Now, the seven-member panel of the Supreme Court of Canada had second thoughts about its *Moldowan* interpretation. It noted the decision was widely criticized and did not have precise technical grounding in the legislation. The unanimous *Craig* Court wrote:

"It may be that [the lower court] departed from *Moldowan* because of the extensive criticism of *Moldowan*. Indeed, Dickson J. himself acknowledged that the section was "an awkwardly worded and intractable section and the source of much debate." Further, that provision had not come before the Supreme Court for review in the three decades since *Moldowan* was decided."

Not surprisingly, the Court went on to conclude it should overrule *Moldawan:*

> "… in making this decision the Supreme Court engages in a balancing exercise between the two important values of correctness and certainty. The Court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error."

Jettisoning *Moldowan* allowed the Court in *Craig* to make a fresh interpretation of the provision. The Court had previously read the legislation too narrowly. Farming could be a chief source of income, in combination with Craig's law practice, so that there should be no limit on the deduction of losses under the *Act*. The horse-racing operation was a business, not a personal endeavour or hobby. It was more than a sideline business because Craig invested serious capital and a very significant part of his daily work routine to the farming business.

4. *Right to Strike*

Three Alberta statutes prohibited strikes and imposed mandatory arbitration to resolve collective bargaining disputes. In *Reference Re Public Service Employee Relations Act* (1987, http://canlii.ca/t/1ftnn), by a 3 – 2 majority, the Supreme Court of Canada decided that the right to strike was not a constitutional right inherent in the *Charter*.

Twenty eight years later, in *Saskatchewan Federation of Labour v Saskatchewan* (2015, http://canlii.ca/t/gg40r), the Court (5 – 2) reversed itself on the same legal issue in a different province. There was a constitutional right to strike embedded in the *Charter's* section 2 freedom of association, and the Saskatchewan legislation was violating it in a way which could not be justified under section 1. Therefore, it was struck out by the Court.

The Court found a growing trend towards workplace justice in the cases so the right to strike is essential to collective bargaining. As for Supreme Court precedent:

> "Given the fundamental shift in the scope of s. 2(d) since the *Alberta Reference* was decided, the trial judge was entitled to depart from precedent and consider the issue in accordance with this Court's revitalized interpretation of s. 2(d)."

5. *Trial Delay*

In 1992, an accused person, Morin, argued that her trial date, some 15 months after she had been charged for impaired driving, was set too late. She said this violated her section 11(b) *Charter* right to a trial within a reasonable time. The Supreme Court of Canada (6 – 1) disagreed, attributing the delay to scarce resources, institutional delay and the actions of the accused, who did not do enough to seek an earlier trial date: *R. v Morin* (1992, http://canlii.ca/t/1fsc6). The Court said the delay did not have a great consequence to the trial or its fairness.

Twenty four years later, a full, unanimous Supreme Court of Canada reversed itself in *R. v Jordan* (2016, http://canlii.ca/t/gsds3) where four years had elapsed from the charge to the sentencing hearing. The *Morin* precedent was now viewed as "too unpredictable, too confusing and too complex" which rationalized delay and prevented the justice system from trying to locate inefficiencies and address them.

The Court set a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable. Trials must be completed within 18 months in provincial courts and within 30 months for trials in superior courts.

Conclusion

Stare decisis is the quasi-constitutional principle that the common law "stands decided" when declared by the highest court(s) in the country. The authority of the Supreme Court of Canada, indeed the

orderly functioning of our legal system, depends on all lower courts following its decisions. They must follow Supreme Court decisions regardless of their views of the correctness of those decisions.

When it comes to the *Charter*, the Court grants leeway to lower courts to deviate from precedent where new legal arguments or issues are raised "as a consequence of significant development in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (2013, *Bedford* at para 42).

It is an equally serious matter that the Supreme Court be bound by its own previous statements of law. As this article shows, occasionally the Court reverses its own precedents. Many reasons could be posited for those reversals, including changing social norms, turnover of judges, slim majorities in the precedents, undesired impacts and a corresponding sense that the precedent was wrong, an activist yearning to effect change, and new arguments and issues that arise after the precedent decision was made.

Sometimes the Supreme Court needs a do-over. Even then – especially in *Charter of Rights* cases – a generation later it might want to take yet another look.

Free of the Colonial Yoke? Not quite!

By John Edmond

Jeopardy clue: "The Constitution of this 150-year old country exists as "Schedule B" to an ordinary statute of another country." Correct response: "What is Canada?"

This is true of what has been for 35 years the most significant part of the Constitution of Canada, the *Constitution Act, 1982*, Parts I and II of which are, respectively, the *Canadian Charter of Rights and Freedoms* and *Rights of the Aboriginal Peoples of Canada.* Between them they have been responsible for many, if not most, of the significant decisions of the Supreme Court of Canada since their proclamation. Yet, the *Constitution Act, 1982* owes its very existence to an Act of the British Parliament, namely the *Canada Act 1982*, numbered as Chapter 11 of the 1982 United Kingdom statutes of the U.K. Parliament. This was the U.K. statute central to patriation, that is to say the process that finally made it possible for our Constitution to be amended by Canadians, without reference to the parliamentary mother. The *Constitution Act, 1982* is humiliatingly appended to this statute as, not merely the schedule, but "Schedule B." We are constantly reminded of this ignoble fact by lawyers and judges who think it necessary to cite the *Charter*, for example, as follows: "*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11." As if "*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*" would leave the reader pondering: "*Constitution Act, 1982*? Oh, I bet that's the *Constitution Act, 1982* that's Schedule B to the *Canada Act 1982*, which, as I recall, is Chapter 11 of the 1982 statutes of the United Kingdom."

The *Canada Act 1982* is a four-section, single page, English-only statute that enacts the *Constitution Act, 1982* and abjures further United Kingdom jurisdiction over Canada. Since U.K. statutes may be in English only, the French version of the Act is appended as Schedule A, leaving the central document, the *Constitution Act, 1982* itself, to occupy the "B" position.

From its birth in 1867 by Act of the Parliament of the United Kingdom – *British North America Act, 1867* (now the *Constitution Act, 1867*) – Canada was constitutionally a creature of the U.K. Although, by the 1931 *Statute of Westminster*, the autonomy of Canada and the other self-governing Dominions was recognized, the authority to amend the *BNA Act, 1867* remained in London. "Self-governing" it may have been, yet for Canada to effect an amendment to its Constitution, a request had to be directed to Britain.

Not including the 1867 Act, no fewer than 14 *British North America Acts*, as well as numerous other statutes and orders having constitutional effect on Canada, were passed by the U.K. Parliament. Canadian inability to agree on an amending procedure, not British obstinacy, stood in the way of patriation. An excellent and exhaustive account of the more than two decades of effort to get to 1982 is the Honourable Barry Strayer's *Canada's Constitutional Revolution* (2013).

But get there we did. Upon the request and consent of Canada, but not without a good deal of British parliamentary debate not lacking a colonial flavour, the *Canada Act 1982* passed in the British Commons on March 8; in the House of Lords on March 25, and received royal assent March 29, becoming chapter 11 of the 1982 U.K. statutes. (Its companions are c. 10, the *Industrial Training Act 1982*, and c. 12, the *Travel Concessions (London) Act 1982*.) It became law upon royal assent, but it would hardly do for the Canadian Constitution to come into force in another country on an arbitrary date. Section 58 of the *Constitution Act, 1982* cleverly took care of this problem: The Act was to come into force by proclamation of the Queen or Governor General, thus providing for ceremony.

The Queen famously signed the Proclamation, on Parliament Hill, Pierre Trudeau seated opposite, on a rainy April 17, 1982. This was a proud moment for our country if more than a century after its birth. It should not be denigrated. But should our constitution forever exist as a schedule to a British Act of Parliament? Was this the only avenue?

Mr. Strayer's book, thorough as it is, takes it for granted that this was the only lawful route. A unilateral declaration of independence would have been unacceptable as inconsistent with the rule of law. UDI's typically occur in a hostile context – USA, 1776; Ireland, 1919; Rhodesia, 1965 – and international recognition is problematic, though the 2010 advisory opinion on Kosovo of the International Court of Justice did say that international law contains no "prohibition on declarations of independence." While a blatant UDI would have been out of the question in our case, there seems to have been no thought of a more co-equal approach, rather than to follow the time-worn path of requesting U.K. approval of the proposed change. Consideration of an altogether different process is beyond the scope of this article (not to mention that of this writer). But it cannot have been beyond legal ingenuity to devise a valid process whereby Britain would abdicate its role and Canada would simultaneously pass a constitution that did not have a permanent umbilical cord attached. A Supreme Court reference on the legality of a proposed procedure might have been a good first step; the court's imprimatur would ensure that whatever was proposed would survive. A friendly but clear and distinct break with the imperial connection would have produced a truly made-in-Canada constitution.

Mr. Strayer reports that the infamous Enoch Powell, then a U.K. MP, pointed to the irony of Canada asking Westminster to abdicate its power over Canada yet legislate major constitutional change. He proposed that Canada should enter into an "internal compact," apparently similar to that of the United States in 1776. Mr. Strayer's not altogether convincing answer is that the process followed was "the only way our existing laws will recognize." One of his chapters has as epigraph the famous words of Martin Luther King Jr., "Free at last! Thank God Almighty we are free at last!" Well, not quite.

I have it on good authority that, some years after 1982, Westminster asked the federal Department of Justice whether the *Canada Act 1982*, could be repealed, presumably as "spent." The answer was "No, please do not repeal". This is a telling answer: it means that the validity of our Constitution is thought by those charged with the issue to continue to rest on a United Kingdom statute. What, indeed, would be the effect of repeal? The statute, and of course its all-important Schedule B, would cease to exist as a matter of British law. Yet the *Canada Act 1982* provides that no post-*Constitution Act, 1982* United Kingdom Act "shall extend to Canada," so a U.K. bill of repeal would be ineffective in Canada. Technicalities aside, many *Charter*, Aboriginal and other matters having been decided, the courts would beyond doubt find that the Constitution stood on its own; the *Canada Act 1982* be damned. This would have left the legal puzzle: If the *Constitution Act, 1982*, is Schedule B to an Act that no longer exists, how should it be known?

This paradox does not arise; Schedule B carries blithely on as United Kingdom law. This will forever shamefully be so. It betrays the very principle for which Pierre Trudeau stood, that of a wholly-Canadian Constitution. But my appeal to lawyers and judges is to stop reminding us of this unnecessary fact at every citation of the Constitution. Perhaps if it is not constantly mentioned, the fact will fall into that legal wasteland known as desuetude. And we will think of our Constitution as entirely our own – even if it isn't. A resolution for Canada 150.

Gimme Shelter: Housing Law in Canada

By Scarlett Chan

Like most areas of law, the legislation pertaining to real estate and the various forms of residency people experience has slowly evolved as society changes. Once, most people either owned a home or rented and the laws relating to each were relatively simple. Over time, however, the recognition of rights and the need for consumer protection has grown. It has become necessary to distinguish between the various forms of ownership, such as condominium or detached home, as well as the various forms of renting, such as self-contained suites versus shared-space rentals. This article aims to briefly explore some of the significant changes we have seen recently in Alberta and the rest of Canada and consider where future developments may be headed.

Shelter is a basic need for all people, and, therefore, it makes sense to demand laws that protect people in housing situations. So, it is troubling that development in this area of law seems to happen at a snail's pace. However, unlike some areas such as criminal law, housing protections often contrast the rights of two private parties as opposed to the needs of the state versus the needs of the individual. The result is legislative developments which must carefully balance competing interests.

Consider, for example, the desire to encourage the development of condo buildings, an activity which creates jobs, helps with affordable housing, and reflects a growing economy. Although we desire the positive effects of this activity, we also have a countering need for laws to control this activity to ensure building quality, consumer protection for condo purchasers, including the regulation of condominium management. While building standards in the *Alberta Building Code* have remained unchanged since 2014, in 2017 the Alberta government intends to implement the revised *Condominium Property Amendment Act* in an effort improve consumer protection through things like purchase disclosure requirements, trust money safeguards, and "rules for a smooth transition from the developer to the owner-elected board of directors." The proposed changes may not totally fix the faults that exist in the condo market, but they demonstrate a desire to take affirmative steps through legislation to protect the rights of people who reside in such buildings.

Just as we have seen a recognized need to better protect condo purchasers, the Alberta government, as CBC News reported in March, 2107, is contemplating the need to regulate the activity of home builders by implementing mandatory licensing requirements. Logic would suggest that it only makes sense to require a builder to prove they have the skills necessary to construct a home properly. To this end, in

May 2107 the Alberta government introduced the *New Home Buyers Protection Amendment Act* which will establish a builder licensing program which will require builders to secure warranty coverage, and show that they are in good financial standing and are knowledgeable in home construction.

Likewise, when we consider changes in the regulation of the rental market, we witness very gradual developments which reflect the countering needs of landlords, who have ownership rights and responsibilities, and tenants, who may be disadvantaged by their contractual obligations to their landlord or their dependency on the landlord to do things like look after the property they are renting. Consider the very recently proclaimed *Residential Tenancies (Safer Spaces for Victims of Domestic Violence) Amendment Act* which allows victims of domestic violence to break their lease without a financial penalty by showing their landlord a certificate that verifies they have grounds to terminate the tenancy because of domestic violence. On the one hand, you have someone who must get away from a horrible situation, but on the other you have a landlord who may suffer a financial loss due to no fault of their own. The law must be especially careful when balancing competing interests in sensitive scenarios such as this.

Consider yet another emerging area of rental regulation which has seen more and more discussion in recent times: the need to regulate short-term rentals like those found on Airbnb. In cities like Toronto and Vancouver, where there is a reported drastic housing shortage, regulating short-term rentals is about more than quality control, it's about putting long-term rental properties back on the market. Vancouver has already begun taking municipal action in this regard by putting forward a City Council motion which resolves to "study the issue of short-term rentals" and "steps that other cities are taking to address these issues." In Alberta, where the popularity of home-sharing websites has had little impact on the availability of rental properties, the issue of legislation is more about industry and consumer protection. As the Calgary Sun reported in January, 2017, it is the Alberta Hotel & Lodging Association that seeks the development of a regulatory framework for home-sharing websites because it fears a loss of business.

Similar to the Airbnb example, another way housing legislation is often used is for the regulation of the boom and bust cycles of the housing market. For example, the recently implemented Empty Homes Tax introduced in Vancouver in 2017 is designed to tackle the low vacancy rates and inflationary impact on home prices by foreign buyers who purchase properties they do not live in. The B.C. provincial government also enacted the B.C. Home Owner Mortgage and Equity Partnership, which provides first time home-buyers "up to 5% of the purchase price" as an interest-free mortgage loan to assist with their first home purchase. Clearly, using regulations such as these, governments can use the law to shape the housing market in the manner they desire through incentives and penalties.

Another interesting area in which legislation has been lacking, but should be developed is alternative methods to buying, like rent-to-own. Despite the rising popularity of agreements where supposed buyers pay supposed sellers a small down payment and extra money in their monthly rent costs in an effort to buy the property at the end of a fixed-term agreement, no legislation exists to protect tenants that enter into such contracts. Often, they find themselves losing significant sums of money when they

breach the agreement. As Saskatchewan lawyer, Richard Carlson, points out, it's buyer-beware because "[t]here is no such thing in the law as a Rent To Own Agreement."

As society changes in the 21st century, we will surely see more rules and regulations arise as nuanced differences between types of ownership and types of rental properties will continually demand a greater variety of laws to protect consumers, developers, builders, private home owners, landlords and tenants. Evolution of the law is inevitable, and arguably this is an area that could use quicker evolution.

Punitive Damages and the *Residential Tenancies Act*

By Jonnette Watson Hamilton

Case Commented On: *Wilderdijk-Streutker v Zhao*, 2017 ABPC 24 (CanLII)

Punitive damages are rarely awarded in residential tenancy disputes, but *Wilderdijk-Streutker v Zhao* is one of those rare cases. And although an award of punitive damages is very fact-dependent, there are some principles and rules of law which residential landlords and tenants who are contemplating claiming punitive damages should be aware of. They should also be aware that there are a few unsettled issues concerning the awarding of punitive damages in this context. Those unsettled issues are the focus of this post.

Provincial Court Jurisdiction to Award Punitive Damages

The ability of a Provincial Court judge to order punitive damages is not discussed in this case or others where punitive damages were claimed. Nevertheless, as Justice P.R. Jeffrey recently reminded us in *Director (EAP) v Alberta (Provincial Court)*, 2017 ABQB 3 (CanLII) at paras 40-41, the Provincial Court of Alberta possesses no inherent power; the only powers it has are those conferred upon it by statute (see also "Jurisdictional Matters Concerning Environmental Protection Orders Under the Environmental Protection and Enhancement Act" commenting on that decision).

The *Provincial Court Act*, RSA 2000, c P-31, section 9.6(1)(c) lists three types of orders that a Provincial Court judge can make under the *Residential Tenancies Act*, but none of those three include any type of damages. tThe most likely source for the power to award punitive damages claimed by a tenant is section 37(1) of the *Residential Tenancies Act* which provides, with respect to damages, as follows:

37(1) If a landlord commits a breach of a residential tenancy agreement or contravenes this Act, the tenant may apply to a court for one or more of the following remedies:

(a) recovery of damages resulting from the breach or contravention … (emphasis added)

That subsection specifies that the damages must be the result of a breach of a residential tenancy agreement or a contravention of the *Residential Tenancies Act*. That specification may be a problem for the award of punitive damages which, as we shall see, requires an actionable wrong. If there is an independent actionable wrong that allows punitive damages to be awarded, are those damages the result of a breach of a residential tenancy agreement or a contravention of the act? Or is it only compensatory damages that arise from such breaches? If the actionable wrong is "independent", can punitive damages be awarded under section 37(1)(a)?

The equivalent *Residential Tenancies Act* section in a case where the landlord claims punitive damages is section 26(1)(d) providing for the "recovery of damages resulting from the breach" of a residential tenancy agreement. The same questions therefore seem relevant. See also section 32 regarding damages when the tenant fails to vacate the rented premises at the end of the tenancy, where the court's power seems even more restricted.

The Test for the Award of Punitive Damages

The leading cases on the award of punitive damages are two Supreme Court of Canada cases, both cited by Judge Yake in *Wilderdijk-Streutker v Zhao* (at paras 88-89).

The more recent of the two Supreme Court of Canada decisions is *Whiten v. Pilot Insurance Co.,* [2002] 1 SCR 595, 2002 SCC 18 (CanLII). Judge Yake relies upon *Whiten* for three matters (at para 89):

- "The conduct for which the punitive damages are awarded must be an actionable wrong against the party seeking punitive damages."
- "In addition to punishment, the purpose of an award of punitive damages is to deter others from similar misconduct."
- "Punitive damages must be proportionate to such factors as the harm caused, the degree of misconduct, the vulnerability of the tenant and any advantage or profit gained by the landlord[.]" (emphasis added)

The older decision is *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 SCR 1085, 1989 CanLII 93 (SCC). Judge Yake relied on *Vorvis* for the principle that "[p]unitive damages are available for deliberate wrongful acts which are so harsh, vindictive, reprehensible and malicious that they deserve punishment" (at para 88).

In applying the law from those two cases, Judge Yake summarizes the landlord's actions that he found to be "malicious, highly reprehensible and … a marked departure from the ordinary standards of decent

behaviour" (at para 90), dishonest (at para 91), reprehensible, harsh and vindictive (at para 92) and "highly reprehensible" (at para 94) all of which apply the principle he cited from *Vorvis*. He also explicitly refers to the third point he cites from *Whiten*, noting proportionality (at para 92) and the tenant's vulnerability to professional discipline due to the landlord's interference with the tenant's confidential patient records (at para 93).

Notably absent, however, is any discussion by Judge Yake about whether or not the landlord's conduct was an actionable wrong. He perhaps hints at this requirement when he discusses the landlord's "dishonest act" in attempting to cash a replacement rent cheque when the landlord retained the original rent cheque (at para 93), but it is no more than a hint.

The Requirement for an Independent Actionable Wrong

The requirement for an actionable wrong has been problematic for two other Provincial Court cases which briefly discussed punitive damages.

The first of those two cases is *Nordal v McFeeters*, 2008 ABPC 352 (CanLII). The tenants relied on the *Whiten* case and claimed punitive damages as a result of what they called a systematic campaign to force them from the rented premises. However, Judge J. Shriar distinguished *Whiten* on the basis that, under the insurance contract sued upon, the insurance company owed the tenants as policyholders a duty of good faith (at para 82). She noted that "The breach of that duty was itself an actionable wrong and that was an important precondition for the award of punitive damages" (at para 82, emphasis added). However, Judge Shriar found that the landlord did not owe the tenant a duty of good faith.

There is no indication in Judge Shriar's brief decision whether or not she thought there was no duty of good faith owed on the facts before her, or whether she thought there was no duty of good faith owed by any landlord to any tenant in the residential tenancies context.

The second of the two cases is a decision by Judge J.N. LeGrandeur in *Singh v RJB Developments Inc.*, 2016 ABPC 305 (CanLII). Judge LeGrandeur relied upon Ronald M. Snyder and Harvin D. Pitch, *Damages for Breach of Contract*, 2nd ed, at page 4-3 for the requirements for awarding punitive damages:

> (a) There is an independent actionable wrong, separate from the ground upon which the Applicant is suing;
>
> (b) The conduct of the Respondent is sufficiently high-handed, outrageous or egregious;
>
> (c) Compensatory damages (i.e. aggravated damages, costs etc.) are not sufficient to fully express the Court's repugnance regarding the Respondent's conduct (at para 70, emphasis added).

Because Judge LeGrandeur found that the conduct of the landlord was not high-handed, outrageous or egregious enough to justify an award of punitive damages (at para 72), he did not say much about the requirement for an independent actionable wrong. What he did say, however, was almost the opposite of what Judge Shriar said in *Nordal*:

There is undoubtedly an element of good faith required by the Landlord in exercising any of the powers granted the Landlord under a residential tenancy agreement and so there is likely a breach of that good faith requirement in this case such as to satisfy the independent actionable wrong requirement (at para 71, emphasis added).

Judge LeGrandeur suggests that all landlords exercising any power under a residential tenancy agreement owe a duty of good faith.

One big change in the law between the *Nordal* decision in 2008 and the *Singh* decision in 2016 is the intervening Supreme Court of Canada decision in *Bhasin v. Hrynew*, [2014] 3 SCR 494, 2014 SCC 71 (CanLII). The issue in *Bhasin* was whether the Canadian common law imposes a duty on parties to perform their contractual obligations honestly and the answer was yes. (at para 1) In the unanimous decision written by Justice Cromwell, the Court took "two incremental steps" in the development of the common law:

> 1) An "organizing principle" of good faith: "The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance" (at para 33).
>
> 2) A duty of honest performance: "The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations" (at para 33).

Justice Cromwell made it clear that he was talking about contracts. For example, he did not rule out the ability of the parties to reach an agreement that influences the scope of honest performance in a particular context (at para 77).

Is a Residential Tenancy Agreement a Contract to Which the Organizing Principle of Good Faith Applies?
In *Wilderdijk-Streutker v Zhao*, Judge Yake called the *Residential Tenancy Act* "a comprehensive statute" (at para 58). He cited *Krause v Bonin*, 2011 ABPC 171 (CanLII), for that characterization. In *Krause*, Judge J.D. Holmes stated:

The *Residential Tenancies Act* SA 2004 ("the Act") is a comprehensive statute outlining the rights as between landlords and tenants. A tenancy can only be terminated in accordance with the act. Any

waiver or release by the tenant of the rights, benefits or protections of the Act is void (s. 3(1)) (at para 13).

The *Residential Tenancies Act* is not entirely comprehensive. It does not, for example, include a landlord's right to distrain the goods of the tenant in any of its provisions setting out the rights of landlords. And as another example, it says nothing about the need for registration of a residential tenancy agreement with a term of more than three years in order to bind third parties.

Nevertheless, the *Residential Tenancies Act* is a fairly comprehensive statute, albeit not a complete code. It regulates the landlord-tenant relationship in great detail and offers protections to the tenant that the tenant cannot vary or waive. Is a residential tenancy agreement – highly regulated by the *Residential Tenancies Act* as it is – a "contract" that attracts the two principles set out by Justice Cromwell in *Bhasin*? Does it matter that the governing statute says nothing about good faith (whereas some provincial landlord and tenant legislation does with respect to very specific aspects of the relationship)?

Because Judge LeGrandeur did not state why he found that there is "undoubtedly an element of good faith required by the Landlord in exercising any of the powers granted the Landlord under a residential tenancy agreement" (at para 71, emphasis added), we do not know if he was applying the Supreme Court of Canada decision in *Bhasin*.

Conclusion

The uncertainties about the possibility of the Provincial Court awarding punitive damages in the right case could easily be resolved with an amendment to sections 26 and 37 the *Residential Tenancies Act*.

Jonnette Watson Hamilton "Punitive Damages and the* Residential Tenancies Act *" (18 April, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/04/Blog_JWH_Wilderdjik_v_Zhao.pdf

Real property; GST and Rebates

By Faezeh Moeini

Sales of used residential complexes are generally exempt from GST/HST however; the GST/HST applies on sales of new residential properties. The New Housing Rebate and New Residential Rental Property Rebate permit recovery of a portion of the GST/HST that is paid on a newly constructed or substantially renovated residential unit. These rebates are available if certain conditions have been met.

Key Definitions

Residential complex; subsection 123(1)

Key points regarding the definition of the residential complex are that it:

- contains includes adjacent land and common areas which are necessary for enjoyment;
- can be a house, row house, condo unit, mobile or floating home, apartment or similar premises, student and senior residences, or residence for persons with disabilities;
- excludes boarding house, hotel, inn, motel; and
- must be occupied by a person as a place of residence or is intended to be occupied as a place of residence.

It is necessary to determine a reasonable portion of the land and common area that is "necessary for the enjoyment of the residential complex". Just like the definition of a principal residence in the *Income Tax Act,* up to one-half a hectare of land may be included in a principal residence without question; any land in excess of this amount must be proven to be required for enjoyment of the property.

Builder

The definition of the builder includes a person who;

- has an interest in real property and carries on or engages someone else to carry on the construction or substantial renovation of the property; or
- acquires the interest in a residential complex before the construction or renovation is completed.

Substantial renovation

Substantial renovation makes a building look like a new building. This means that 90% or more of the whole or that part of the building (other than the foundation, exterior walls and supporting walls, floor, roof and staircases) has been removed or replaced.

Residential Real Property – Federal New Housing Rebate

The new housing rebate is designed to refund a portion of the federal component of the GST/HST that is paid on the purchase of a new or substantially renovated residential unit if the property/unit is bought as a person's primary place of residence. Ontario offers a similar rebate regarding the provincial component of the HST and Nova Scotia offers a sales tax rebate. The rebate must be applied for within two years of the transfer of ownership date or possession.

To be eligible for the rebate the following conditions must be met:

- A builder, as defined above, must supply the residential unit to an individual to ensure that the residential unit is unused at the time of the purchase.
- The purchaser (an individual) of the residential unit must be using the unit as either their primary place of residence or the primary place of residence of a related individual including a former spouse. The Canada Revenue Agency (CRA) requires that the residence should be where the individual or related individual ordinarily resides. For the purposes of GST/HST, the definition of "occupancy inhabits" varies from the *Income Tax Act*. The CRA wants to make sure that the person or related person will use the residence more than 90% of the time and therefore, vacation homes typically will not be eligible for the rebate.
- The individual (or related person) who purchased the unit must be the first person to occupy the unit after its completion and transfer of ownership. This means that a unit cannot be used by anyone as a place of residence during the period between completion and transfer of ownership. The only time the CRA relaxes this rule is for a residential condominium unit. In this case the individual buyer or related person can occupy the unit before the transfer of ownership because of interim occupancy agreements used in condominiums that allow for the possession before transfer of the ownership.
- The ownership of the unit must be transferred to the individual after the completion of the unit's construction or after the completion of the unit's substantial renovation. If the ownership transfers before this completion then the buyer is considered a builder and not a purchaser.
- Lastly, the first person who occupies the unit must be the individual or individual related to the person who purchased it. If a group of people bought the unit together, a person from this group must occupy the unit first.

The CRA allows builders to pay or credit the purchaser for the rebate amount if the purchaser submits the rebate within the two-year period after the ownership transfer or possession (whichever is first).

Then, the builder can deduct the rebate against the GST/HST payable in their GST/HST return in the period that the rebate was paid or credited to the buyer.

The rebate amount is the lesser of 36% of the federal portion of GST/HST paid (effectively 1.8% of the pre-GST/HST price of the property) and $6,300 and applies to residential units priced at less than $450,000. Based on the formula used for the calculation, units below $350,000 normally generate the maximum rebate. However, the rebate amount steadily declines after a purchase price of $350,000 and is zero at a price of $450,000. The price for the unit includes any add-ons such as a garage but does not include provincial taxes, such as land transfer taxes imposed by B.C.

The CRA allows the New Housing Rebate for owner-built units as well. However, the rebate on these properties is capped at 36% of the total GST paid on the land and construction costs, as opposed to the GST on the price of the property.

If a builder supplies a residential complex under a land-lease agreement, the builder has to self-assess GST/HST and not charge GST/HST on the sale of the residential unit as the supply to the purchaser is GST/HST exempt. In this case the purchaser is not eligible to apply for this rebate. However, the new housing rebate is available to the purchaser as long as the land lease is for at least 20 years or contains a purchase option, but is not applicable to the land portion of the unit. Again, this rebate can also be assigned to the builder.

New Residential Rental Property Rebate

The rules for this rebate are similar to those for the New Housing Rebate. The rebate is available for single and multiple unit residential complexes, condominium units and co-operative housing units being rented out. However, the following conditions need to be met in order to qualify for this rebate:

- The residential complex must be newly constructed or substantially renovated.
- The rental unit has to be self-contained, meaning it should have a private kitchen, bath, and living area.
- The first use of the unit must be for rental property.
- The unit has to have a rental agreement for at least 12 months and be the primary place of residence of the tenant.
- For a multiple unit complex, the eligibility is assessed on a unit-by-unit basis and the entire complex considered for the 12-month occupancy test. This means that all or substantially all of the units must be rented out for at least a 12-month period before the rebate is available. Generally, the CRA considers 90% occupancy as being “substantially all”.

Landlords or property owners can apply for the New Residential Rental Property Rebate if the landlord paid GST/HST on the purchase of the rental property or, where required, to self-assess and pay GST/HST on it.

Similar to the New Housing Rebate, the New Residential Rental Property Rebate is calculated as the lesser of 36% of the federal portion of GST/HST paid and $6,300 for each unit. The highest rebate amount will be for units priced at $350,000, and decline between $350,000 and $450,000, to zero for rental units priced at $450,000 or above.

The landlord/property owner normally has two years from the end of the month in which the GST/HST becomes payable on the purchase of the property or the self-assessment of the GST/HST, to claim the rebate. If the landlord/property owner sells the unit before the end of the first year of occupancy and the purchaser is not using the unit as their primary place of residence, or primary place of residence of a person related to the purchaser, then the CRA recaptures the rebate plus interest, which must be repaid by the original owner.

A federal rebate is also available for land that is leased long-term for residential purposes. The rebate is calculated as 36% of GST paid. The rebate is maximized if the land is priced at $87,500 and declines until it becomes zero at land valued at $112,500 or above.

Conclusion

Planning for construction or renovation of residential complex properties allows builders, purchasers, and landlords to take advantage of available programs to decrease the cost of construction or renovation.

BenchPress – Vol 41-5

By Teresa Mitchell

Get Going Minister!

Morteza Momenzadeh Tameh was a member of a resistance group with links to terrorist groups in Iran in the 1980s. He was imprisoned by the Iranian government from 1982 to 1987. After his release he fled to Canada and requested permanent residency in 1994, after being found to be a UN Convention refugee. He was turned down because of his association with the resistance group. He requested, on the recommendation of an immigration counsellor, that the Minister of Public Safety grant him relief. Then Minister Stockwell Day turned him down. Appeals followed. In 2012, Canada removed his resistance group from its list of terrorist organizations. Delays continued. The government changed. Still, Mr. Tameh waited. Finally, he applied to the Federal Court of Canada to ask for an order of *mandamus,* meaning the Minister must make a decision. The Minister of Public Safety, Ralph Goodale, argued that because of his many duties and responsibilities, he should not be held to any timelines whatsoever in making a decision. Chief Justice Crampton of the Federal Court disagreed. He wrote: "Ministers of the Crown are typically very busy people. But they are not so busy that they can take as many years as they see fit to respond to requests made pursuant to validly enacted legislation, by persons seeking determinations that are important to them. At some point, they will have an obligation to provide a response." Justice Crampton set out a very stringent set of timelines for the Canada Border Services Agency (CBSA) and Mr. Tameh to follow, and ordered the Minister to make a decision within 60 days of receiving submissions and a recommendation from the President of the CBSA.

Tameh v. Canada (Public Safety and Emergency Preparedness), 2017 FC 288 (CanLII)

https://www.canlii.org/en/ca/fct/doc/2017/2017fc288/2017fc288.html

The Maple Syrup Caper

In November 2016 Richard Vallieres was convicted of theft, fraud and trafficking in stolen goods as a ringleader in the theft of $18.7 million worth of maple syrup. The case made headlines around the world. The elaborate scheme bypassed the Federation of Quebec Maple Syrup Producers, which regulates the syrup industry in Quebec. On April 28, 2017 he was sentenced to eight years in prison and a fine of $9.4 million. If he cannot pay the fine, his jail term will be extended by an additional six years. Pretty hefty price to pay for sticky fingers!

R. c Vallieres, 2017 QCCS 1687 (CanLII)

https://www.canlii.org/fr/qc/qccs/doc/2017/2017qccs1687/2017qccs1687.html?resultIndex=2

School Funding Bombshell

A Saskatchewan Court of Queen's Bench Justice has ruled that Catholic separate schools do not have a constitutional right to admit and obtain funding for non-Catholic students. He further found that the Government of Saskatchewan, in funding non-Catholic students in Catholic schools, violated its *Charter* duty of religious neutrality and equality. The case involved a small Catholic school with only 24 students, of whom only 9 were Catholic. Justice Donald Layh reviewed a number of constitutional documents, including the *1901 NWT School Ordinance* in reaching his decision. Justice Layh stayed his decision until June 30, 2017 because of the effect his judgment will likely have on enrollment in both Catholic and public schools in the province. If enforced, it would mean that non-Catholic students would have to move to public schools by the fall of 2018. The case could have repercussions outside of Saskatchewan. Alberta and Ontario also allow fully funded Catholic schools. However, Alberta Education Minister David Eggan has stated that the ruling will have no impact in Alberta and "Any student in Alberta can enroll in the school of their choice, provided there is sufficient space and resources." Saskatchewan Premier Brad Wall has announced that the province will use the *Charter*'s Notwithstanding Clause to override the decision.

> *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212*, 2017 SKQB 109 (CanLII)
>
> https://www.canlii.org/en/sk/skqb/doc/2017/2017skqb109/2017skqb109.html

WCB Covers Workplace Bullying

In what her lawyer considers to be a Canadian first, a Prince Edward Island widow has been awarded benefits after her husband's death was found to be the result of workplace bullying. Eric Donovan died at age 47 from cardiac arrest. He worked for a not-for-profit organization that runs group homes and provides services for intellectually challenged adults. For the last few years of his life, his wife noticed him becoming more and more depressed, stressed and anxious. He claimed his supervisor was bullying him. After being away because of an injury to his back, he returned to work only three days before his death. At first, the WCB said it didn't have jurisdiction to hear her claim, but the Supreme Court and the Court of Appeal for Prince Edward Island sent the case back to the WCB for determination. The WCB asked for an independent legal opinion. It then told Mrs. Donovan that a "workplace accident" as defined by the province's Workers *Compensation Act* could include workplace bullying. If she could establish that her husband's death was because of workplace bullying, she would be compensated. She and her lawyer then gathered affidavits from four of his co-workers along with medical records and medical opinions to make their case. Lisa Donovan was awarded benefits including funeral costs, a lump sum for death benefits, and monthly payments to cover survivor benefits based on a percentage of his pensionable salary.

> Citation not available. See http://www.cbc.ca/beta/news/canada/prince-edward-island/pei-workplace-bullying-harassment-workers-compensation-board-lisa-eric-donovan-1.3959704

Viewpoint 41-5: Canada at 150: How strong are the ties that bind our federations?

By Institute for Research on Public Policy (IRPP)

The nation is not in crisis – what better time to take a fresh look at the state of our federal community?

Graham Fox and F. Leslie Seidle

Canadians are enjoying a year-long celebration of the 150th anniversary of Confederation. This important milestone will be marked by festivities of various kinds in cities, towns and villages across Canada. Community groups, artists, musicians and many others will help commemorate significant events in our history and reflect on our shared achievements, including the very fact of Confederation – a signature accomplishment in and of itself.

But if Canada's sesquicentennial is an opportunity to consider the road already travelled, it should also be an opportunity to take stock of today's Canada and analyze the challenges that appear on the horizon. By almost every meaningful measure, we are not the same country as we were a few decades ago. Our economy is more open to the world, and it draws its strengths from different regions and sectors. Our people are older, more diverse and more urban. The relationships between the provinces and territories have changed, as have those between them and Ottawa.

At the same time, many of our fundamental challenges remain the same. A founding partner in Confederation, Quebec, has yet to sign part of our country's basic law — the Constitution. We continue to struggle with balancing the aspirations of our regions. Fundamental issues concerning the rights of Indigenous peoples remain unresolved. We should seize the opportunity that 2017 presents to re-imagine our approach to addressing these and other pan-Canadian issues.

The 2014 referendum in Scotland and the British referendum on the European Union earlier this year demonstrate the need to keep a watching brief on trends that have an impact on the ties that bind us together as a country. It's critical that we understand the underlying issues that affect the political, economic and social links between our country's communities, regions and nations. This requires solid research on the consequences of a fundamental change or the risk of rupture. Observing events happening abroad and concluding "it could never happen here" is probably not the most prudent way forward.

When the threat of Quebec secession emerged in the 1960s, Canada's political leaders, academics, interest groups and many others did more than keep a watching brief. They analyzed the dynamics of Canadian federalism, debated and reflected on Canadian unity, and negotiated reforms. Many of these reforms were never enacted, which led some to be frustrated and others to down tools.

In contrast, following the near-death experience of the 1995 Quebec referendum on secession, many of our political leaders viewed any discussion of federalism as too risky, opting instead to focus on what they considered to be bigger priorities. Today, not enough policy-oriented research is being done to ensure that we have the data and knowledge we need when debate on, for example, a particular feature of our federal system, or the federation itself, arises.

To help fill this gap, the Institute for Research on Public Policy has launched a new research program called Canada's Changing Federal Community.

The term *federal community* is deliberate. Although the program will incorporate research and public discussion on institutions, intergovernmental relations and fiscal arrangements, it will also focus on key aspects of community – living together with others from different backgrounds based on shared values and a commitment to ongoing adaptation. This sense of community has been and will remain central to the country's effective governance and development. Canada is an act of will, and the ties that bind us need to be constantly renewed.

> *The IRPP has launched a new program called Canada's Changing Federal Community to help fill the gap in policy-oriented research in this area.*

Just as the country has changed in the last few decades, so too must our approach to research. Federal and intergovernmental institutions must be a major focus, but Indigenous issues and perspectives, particularly with regard to governance, also warrant particular attention. Moreover, the discussion must be broad enough to include how we might agree on a common approach to energy and climate change, improve fiscal transfers, eliminate internal trade barriers, recognize the specificity of Quebec as a nation within a united Canada, and support the aspirations of all our regions.

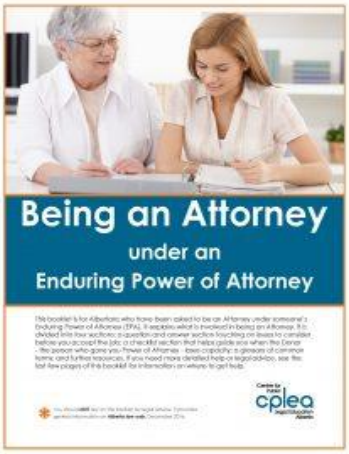
The upcoming 150th anniversary celebrations – and the absence of an imminent crisis – make this an ideal time to launch this initiative. Our aim is to spark a broad public debate on the future of what is arguably the world's most successful country. Complacency born out of past achievement will not solve the real problems we face. And eschewing public discussion on the future of our federal arrangements out of fear of reopening old wounds may give rise to even more risk, as we have seen overseas. It is time to take a fresh look at how the Canadian federal community has evolved in recent decades and examine how the ties that bind us can be modernized and strengthened, so we can better meet the policy challenges of tomorrow.

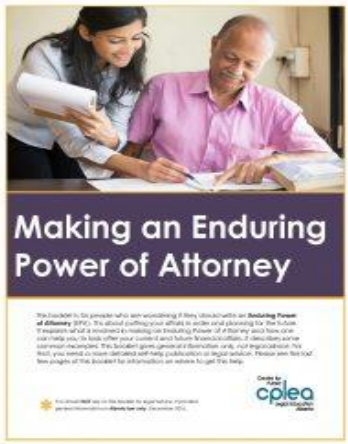
New Resources at CPLEA – Vol. 41:5

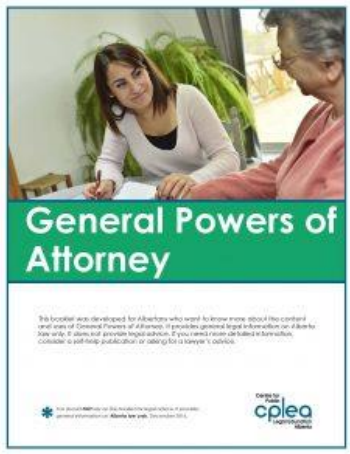
By Teresa Mitchell

LawNow has created a Department called New Resources at CPLEA, which is now 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 recently developed a set of three resources about Powers of Attorney. The first booklet, General Powers of Attorney, discusses the uses and limitations of this document and stresses the fact that once the maker loses capacity, a General Power of Attorney ceases to be valid. Our second booklet in the set describes why, when and how to make an Enduring Power of Attorney. Our third resource outlines the role and responsibilities of the Attorney under an Enduring Power of Attorney. Taken together, we hope that these materials answer many common questions that the public asks about Powers of Attorney.







New Project Improves Access to Justice, Affordability of Lawyers in Alberta

By John-Paul Boyd

Innovative project to produce first research on impact of limited scope legal services.

http://albertalegalservices.com/

Rob Harvie QC and John-Paul Boyd, Executive Director of the Canadian Research Institute for Law and the Family, today announced the launch of the Alberta Limited Legal Services Project, an exciting new program aimed at improving Albertans' access to justice. Forty-three lawyers, located across the province and practicing in the most requested areas of law, have agreed to provide limited legal services – giving clients the services they want, when they want them, at a price they can afford – for the 18-month period of the project.

Lawyers are normally hired to handle a case from start to finish, which can quickly become unaffordable. Studies show that the high cost of lawyers is a factor in most people's decisions to go to court on their own, and that even middle-income Canadians are often unable to hire a lawyer to manage their legal problems.

Limited legal services, also called *limited scope retainers* and *unbundled legal services*, allow people to hire a lawyer for just one or two tasks rather than all of a case. The lawyer might provide advice or an opinion, coach someone through a difficult court application or disclosure process, prepare an argument or an affidavit, or advise on responding to a lawsuit or settlement offer.

Limited legal services are expected to help people navigate Canada's complicated court system, increase the chances that justice will be done and improve people's capacity to respond to legal problems. However, no studies have yet been done to prove that limited services have this effect. The Alberta Limited Legal Services Project will fill this gap in the research. The Canadian Research Institute for Law and the Family will survey both lawyers and clients during the data-collection phase of the project to learn about the usefulness of limited services and assess clients' and lawyers' satisfaction with legal work provided on this basis.

Harvie said that this project "will show lawyers that limited legal services are profitable and rewarding, and can easily be integrated into the busiest of law practices." Boyd says that "this project will have a huge impact on access to justice throughout Alberta and across Canada," by "encouraging lawyers to provide brief legal services, and by letting people who struggle to pay for legal help know that affordable alternatives to the usual cradle-to-grave approach exist."

Robert G. Harvie QC *is a lawyer with Huckvale LLP, a Lethbridge law firm, and a Bencher of the Law Society of Alberta. Rob has practiced family law for more than 30 years. He presently serves as the Chair of the National Self Represented Litigants Project Advisory Board.*

John-Paul E. Boyd *is a family law lawyer and the Executive Director of the Canadian Research Institute for Law and the Family, an independent non-profit organization affiliated with the University of Calgary. He is the founding author of the wikibook JP Boyd on Family Law and a regular speaker on family law subjects for judges, lawyers and the public.*

The Alberta Limited Legal Services Project is organized by Rob Harvie and John-Paul Boyd with an ad hoc steering committee of Alberta lawyers, and is generously funded by a grant from the Law Foundation of Ontario. Although services in all areas of the law are available, the project focusses on family law, being the area of the greatest and most urgent need. Lawyers may join the project at any point during the data-collection phase, which runs from April 2017 to September 2018. The final report will be available at the end of October 2018.

Whatchu doing with our Rights, Virgin Radio?

By Melody Izadi

How a Toronto-based radio station makes light of the presumption of innocence, every week.

One of the cornerstones of our justice system is the presumption of innocence. It's a constitutionally protected right that is supposed to guarantee an individual all the blessings and grandeur of 'innocent until proven guilty.' In reality, that's rarely the perspective that people have— unless of course you're a criminal defence lawyer.

Most people— the public and news media alike— often assume that anyone who has been arrested must be guilty. Otherwise, why on earth would they have been arrested? *Cue Guy Paul Morin reel.*

Assuming that every accused person is guilty is not only problematic and adverse to our constitutional principles, but when it's perpetuated by the media, it becomes a cringe-worthy and embarrassing display of the lack of appreciation and knowledge many have for this fundamental principle of justice.

On Virgin Radio's 99.9 in Toronto, there is a segment entitled "Whatcha doing at the courthouse?" that's played during the *Tucker in the Morning* daily radio show. Essentially, a radio host stands outside a Toronto courthouse, and asks individuals walking in and out of the courthouse what they're doing there. The host asks about the nature of the charges individuals are facing, and then proceeds to asks questions such as:

> *What did the cop say to you when he came to the window?*
>
> *What were you caught with?*
>
> *So crack was the next logical step?*
>
> *Can you tell me the whole story: I'm fascinated by this?*
>
> *You know these people (referring to the complainants)?*
>
> *So how did you get caught?*

How did they find out that you were in possession?

So your suspended license from 5 years ago gave them cause to search your car for anything else?

Did you know you had [drugs] in there?

Did you say anything before they started searching you?

How did you find out that they found something?

These are questions a lawyer should be asking these people in private. Instead, this radio host is compromising the strength of people's criminal cases that are presently before the courts for the sole purpose of radio entertainment, and presumably ratings. Almost every time the host asks a question, embedded in the question is a presupposition that each individual was *caught*. The host seems to be blind to the concept of having a right to silence or the fact that these individuals have legal interests that they need to protect. The host asks them to share details about their charges, without a lawyer present, which are then broadcasted to hundreds if not thousands of people. In one instance, the host even describes what an individual looks like that day, and what he's wearing.

Some may say that these individuals are answering the questions voluntarily, and that they are confessing their sins to this radio host knowing full-well they are being recorded by a radio station. That very well may be so. But are they making an informed decision? Has it been explained to them that they could be charged with perjury, lose possible defences, and incriminate themselves in incidents that the Crown may otherwise not be able to prove? Has anyone told them that their on-air statements could cost them thousands of dollars to litigate in court if the Crown got a hold of them?

While courthouse news can be interesting, titillating, dramatic and even humorous, such overt disregard for the presumption of innocence manufactured in a pithy, minute-long radio segment is offensive to the integrity of the justice system. At the very least, an informed host, well versed in the criminal justice system, should have been chosen to host the show. Instead, there are recordings, like the one that aired on March 6, 2017, where an accused discloses that he's been charged with possession of drugs for the purpose of trafficking:

"P to the P," the accused thinks it's called.

"You sure it's not P to T?" asks the host.

It's P for P, guys. Possession for the Purpose… of trafficking.

If Virgin Radio is going to pry into the lives of accused people in the Toronto courts and exploit the comments of non-legally trained individuals for fun, at the very least, we should expect that the host has done his homework. At this point, I would even settle for an undertaking by the host to engage in a couple Google searches of fundamental human rights.

Minimum Notice Limitations are Enforceable

By Peter Bowal and John Jamieson

Introduction

In Canada, employment is a legal contract. The collective agreement in unionized workplaces represents the ultimate comprehensive contract between employer and employer. It sets out the rights and obligations between the parties, including how employment-related disputes are to be resolved.

The concept of a contract makes intuitive sense because both employer and employee voluntarily agree upon obligations which they must fulfill. Individual (non-unionized) employment contracts may be oral or written, or a bit of both. Often, they incorporate terms by reference from employment manuals and legislation from the taxation, human rights, minimum standards and occupational health and safety fields. There are about two to three times as many workers who enter into individual contracts of employment as there are unionized workers.

Individual employment contracts can be of fixed-term duration such as a summer job or time-sensitive projects. However, by far, most workers start and continue to work indefinitely until one party – employer or employee – quits the other. Contract law implies a term that either party can terminate that contract by giving reasonable notice.

Employees can quit their jobs and they should give their employers reasonable notice of quitting so the employer can find replacement workers. Employers may terminate their employees on reasonable notice – this serves as a period for them to find another job. The notice model is viewed as fair to both parties. By contrast, non-unionized workers in the United States are not viewed as being in a contract, but rather a mere *relationship* that exists at the will of both parties. If one party wants out, one can quit. This brings the relationship to an immediate end. Notably, this "at will" approach, while highly responsive, simple and efficient, provides no security or protection for workers.

While the Canadian notice model for indefinite employment appears more compassionate, it suffers a major flaw: what notice is reasonable in each worker's different circumstances? Employers, employees and judges might all have assorted perspectives on reasonable notice. This uncertainty leads to extensive, costly litigation.

This article describes a solution to this uncertainty problem in reasonable notice, at least as it relates to employers dismissing their employees. We start with distinguishing between minimum and reasonable notice of employment termination.

Minimum versus Reasonable Notice

Every jurisdiction in Canada has enacted legislation which operates as the floor for minimum employment terms. These legislated minimum "standards" protect workers from the excesses of the marketplace and cover all aspects of work: hours of work; how earnings must be paid; minimum wages; holidays; layoffs and recalls; hiring children; breaks during and between shifts; maternity, parental, reservist and compassionate leaves; overtime; vacation and terminating employment.

All employers must comply with these minimum standards. And for termination, these standards are indeed minimal. Section 53 of the Alberta legislation is a good example:

> *56 To terminate employment an employer must give an employee written termination notice of at least*
>
> > *(a) one week, if the employee has been employed by the employer for more than 3 months but less than 2 years,*
> >
> > *(b) 2 weeks, if the employee has been employed by the employer for 2 years or more but less than 4 years,*
> >
> > *(c) 4 weeks, if the employee has been employed by the employer for 4 years or more but less than 6 years,*
> >
> > *(d) 5 weeks, if the employee has been employed by the employer for 6 years or more but less than 8 years,*
> >
> > *(e) 6 weeks, if the employee has been employed by the employer for 8 years or more but less than 10 years, or*
> >
> > *(f) 8 weeks, if the employee has been employed by the employer for 10 years or more.*

These standards were enacted in 1996 and are currently under review by the Alberta government.

Reasonable notice is a common law standard, set by judges over decades and implied into employment contracts. They are more generous than minimum standards. For example, reasonable notice grants approximately one month for every year worked up to a few years of notice. It considers factors beyond length of service such as employee expectations, employer promises made, and the employee's age and managerial responsibility.

To contract out of implied reasonable notice, the employer may do so expressly in the employment contract or in a subsequent addendum to it that is otherwise enforceable. However, few employers choose to take the specific step of contracting out of reasonable notice and limiting employees to minimum notice. When non-cause termination occurs at a later point, reasonable notice must be estimated and provided.

Machtinger

In 1992, the Supreme Court of Canada, in *Machtinger v. HOJ Industries Ltd* http://canlii.ca/t/1fsd2 stated:

> I would characterize the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly.
>
> . . . an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act . . . Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice.

Several Ontario cases involved clauses that demonstrated how to rebut the presumption of reasonable notice: *Simpson v Global Warranty*, http://canlii.ca/t/g64bh; *Roden v Toronto Humane Society*, http://canlii.ca/t/1lmtb; *Oudin v Le Centre Francophone de Toronto*, http://canlii.ca/t/gltc6.

Yet, some judges remain sympathetic to employees who were limited to minimum notice. In the words of the *Oudin* court, judges should not "engage in searching for a means to avoid the parties' commitments." For example, notice "in accordance with" minimum notice legislation was determined inadequate to limit notice to minimum standards: *Kosowan v Concept Electric*, http://canlii.ca/t/1qslp.

The *Nutting* Case

This very recent Alberta case, *Nutting v Franklin Templeton Investments Corp*, http://canlii.ca/t/gvsrk, confirms that well-drafted clauses will rebut the presumption of reasonable notice and provide the certainty of minimum notice.

Mr. Nutting worked for less than 2½ years before he was dismissed without cause by the employer. His employment contract contained the following provision:

> Additionally, your employment may be terminated at any time without cause upon the provision by [the employer] of the minimum notice of termination, or pay in lieu of notice, benefits and, if applicable, severance pay prescribed by applicable employment standards legislation in the province in which you are employed. The provision of such notice or pay in lieu

> of notice, benefits and severance pay constitutes full and final satisfaction of all rights or entitlements which you may have arising from or related to the termination of your employment (including notice, pay in lieu of notice, severance pay, etc.), whether pursuant to contract, common law, statute or otherwise.

The employer paid Nutting for the minimum standard of two weeks which is what the minimum notice legislation accorded to him. Nutting sued for reasonable notice instead, which would attract up to three months of pay.

The Queen's Bench Master, on summary judgment, dismissed Nutting's claim. The clause in the employment contract was clear and unambiguous, which limited Nutting to two weeks of pay, the minimum notice required by the Alberta *Employment Standards Code*, http://canlii.ca/t/52bwr.

Conclusion

Employers are largely in control of employment contracts. They can avoid expensive and intractable lawsuits about what is reasonable notice in every case by inserting clear limitation clauses in these contracts which *prescribe* that the applicable notice period shall be as set out in minimum employment standards legislation or any other lawful period of notice. The language should also reinforce the parties' intention that the minimum notice replaces any other notice requirement that may have otherwise been implied. One cannot agree below minimum standards.

The employee might wish to bargain and stipulate quitting notice in the same way. As separation is to marriage, termination is not something employers and employees like to discuss at hiring. Nevertheless, all employment ends, often without cause. Ideally, this notice limitation should be discussed and inserted when the contract is made. When the termination occurs, the party giving the notice can choose to confer more generous notice, but will be under no legal obligation to do so.

The Environment and Aboriginal Rights

By Jeff Surtees

In my inaugural column for LawNow (here) I suggested five reasons that environmental law can be challenging to understand. One of those reasons was that it requires some understanding of Aboriginal law, a complex subject in its own right.

Even if I were up to the task, it would be impossible to provide even an overview of Aboriginal law in a short column such as this. Instead, I will look at five things that I think give some context to the discussion.

First, Aboriginal people have rights that pre-date the formation of Canada. Some of these rights exist because of their prior occupation of the land. Some exist, or are at least first recognised, because of the *Royal Proclamation, 1763*, issued by King George III of England following the Seven Years War with France. This *Proclamation* defined the relationship between the British government and Aboriginal people who then lived in the areas being settled by the British. It is cited as being the basis for the proposition that Canadian governments must deal with First Nations as one nation to another, not as a government to its subjects. Under the *Proclamation*, Aboriginal land remains Aboriginal land unless it is "ceded" (meaning conquered or surrendered) or purchased. Vast areas of Canada are unceded.

Second, Aboriginal people (defined as Indian, Inuit and Métis peoples), collectively, have rights that are enshrined in Canada's Constitution. This includes section 25 of the Constitution Act, 1982 which says that the *Charter of Rights and Freedoms* does not remove any rights of aboriginal people, including any rights that originate in the *Proclamation of 1763*. Section 35 begins by saying that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Aboriginal people are then given a right to participate in any discussions about amending these provisions or altering the federal government's constitutional authority over Aboriginal matters.

Third, Aboriginal rights are affected by treaties made both before and after Confederation. What the treaty that applies to the area says is important. The treaties are not all the same and they do not cover all land in Canada. In the Maritime Provinces "peace and friendship" treaties were signed before Confederation but rights to land were not given up. Between 1871 and 1921, eleven treaties (called the "numbered treaties") were signed, covering land from Ontario to Alberta and taking in the north-east section of British Columbia and the western part of the Canadian North. The rights of Aboriginal people in the majority of British Columbia not covered by any treaty and the areas of Canada covered by the numbered treaties are not the same. In any area, to understand Aboriginal rights to protect land, and

what the obligations of government are, you must determine if a treaty is in place and what it says. *When* the Treaty was created can be important. For example, Treaty 8, covering most of northern Alberta and smaller adjacent areas in British Columbia and Saskatchewan, was signed in 1899 *after* the federal government passed the *North West Irrigation Act* to promote settlement in 1895. All the other numbered treaties were signed prior to 1895. The result is that aboriginal peoples who are parties to Treaty 8 have a clearer claim to certain water rights than do those peoples subject to the other seven numbered treaties.

Fourth, the Supreme Court of Canada has ruled upon the existence, extent and nature of the rights of aboriginal people in a number of important cases. At the risk of over-simplifying, the following are some of the principles that have emerged from the cases between the 1970s and today:

- Aboriginal title to land is a unique concept. It's a communal right, not an individual one. If established, it brings with it a variety of rights related to the land, including the rights to use and occupy the land and to participate in decisions about what happens on the land;
- Even if title isn't established, Aboriginal groups may have rights to continue their traditional uses of the land which could include hunting and fishing. Anything that makes those activities impossible (such as resource development) could be banned;
- Aboriginal rights are not absolute. Legislation can infringe on Aboriginal rights if the objectives of the legislation are valid (such as environmental protection, preservation of species at risk, resource development or settlement);
- Establishing title requires historical proof of continuous occupation of the land but it can still be established by nomadic groups;
- The Crown has an ongoing duty to consult with Aboriginal groups during environmental assessment processes;
- The "honour of the Crown" must always be upheld and this requires consultation with and accommodation of First Nations even before Aboriginal title is proven;
- The constitutional obligation to consult is the Crown's responsibility, not the responsibility of any group proposing a development;
- Once Aboriginal title is proven, unless there is a compelling public purpose, consent must be obtained to do anything on the land that would otherwise interfere with the rights of First Nation that hold title.

Fifth, relations between Canada's Aboriginal and non-Aboriginal peoples are complex, evolving and dynamic. There are ongoing debates in society and in the courts about the nature and extent of Aboriginal rights. Treaty and land claims negotiations are still taking place. There are debates about the appropriate extent of resource and commercial development, even between and within Aboriginal groups. There are concerns about drinking water quality in many Aboriginal communities and debate over whose responsibility it is to correct the problems. There are significant differences in wealth between Aboriginal groups. High unemployment and significant poverty plague many communities.

Canada has not yet fully dealt with or implemented the recommendations of the Truth and Reconciliation Commission, made in 2015 (available here), whose report began with the words “For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties;
and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct lega l, social, cultural, religious, and racial entities in Canada.”

All of these factors affect the claims to rights that are made and the resulting complexity of the interactions between Aboriginal and environmental law.

Symposium on Children's Participation in Justice Processes Coming to Calgary

By John-Paul Boyd

Canada and its provinces are signatories to the UN Convention on the Rights of the Child, an international treaty that requires governments to recognize children's fundamental human rights. In particular, Article 12 of the Convention says that children must be given "the opportunity to be heard in any judicial and administrative proceedings" affecting them.

Many of the Canadian laws governing family law disputes say something similar. In British Columbia, for example, section 37(2) of the *Family Law Act* provides that parents and the court must consider the child's views in deciding the course of action that is in the child's best interests. Section 18(2) of Alberta's *Family Law Act* says that the court must consider the child's views and preferences, and section 24(2) of the Ontario *Children's Law Reform Act* provides that the court must consider the child's views in determining the child's best interests.

Despite these legal requirements, the mechanisms available for hearing the views and voices of children in family law disputes vary enormously from province to province – and sometimes from case to case – as do the standards, training and methodologies those mechanisms employ.

This September, the Canadian Research Institute for Law and the Family and the Alberta Office of the Child and Youth Advocate are presenting a two-day national symposium on how the voices of children and youth are heard in legal proceedings, how their interests are protected and how their evidence is received in justice processes. A special half-day conference on Canadian family law, designed for mental health professionals, precedes the symposium.

Children's Participation in Justice Processes: Finding the Best Ways Forward is scheduled for 15 and 16 September 2017 at the Calgary Hyatt Regency, and features keynote speakers Sheldon Kennedy of the Sheldon Kennedy Child Advocacy Centre and Dr. Nicole Sherren of the Alberta Family Wellness Initiative.

The symposium involves leading practitioners, researchers and academics and is intended to generate innovative proposals for policy reform, best practices and recommendations for future research about children's participation in justice processes.

The Fundamentals of Family Law in Canada Conference is intended for symposium participants other than legal professionals and runs on the afternoon of 14 September 2017. It will review the law on parenting and the care of children after separation as well as contemporary dispute resolution processes, and the traditional and emerging ways that the views and voices of children and youth are presented in those processes. The Conference will help set the scene, and provide valuable additional context, for the work of the symposium.

An impressive but preliminary lineup of speakers and workshops has been published. Confirmed presenters include: Professor Nick Bala of Queen's University; Dr. Francine Cyr of the Université de Montréal; Wayne Robertson QC of the Law Foundation of British Columbia; Dr. Rachel Birnbaum of King's University College; the Honourable Donna Martinson QC, formerly of the British Columbia Supreme Court; Carolyn Leach of the Ontario Office of the Children's Lawyer; and, Dale Hensley QC of the Children's Legal and Educational Resource Centre. Workshops include:

- Creating, Operating and Sustaining Legal Clinics for Children and Youth
- Best Practices for Representing Youth in Conflict with the Law
- Hearing the Voices of Infants and Toddlers
- Child Participation in Mediation and Parenting Coordination
- Establishing a Child Interviewer Roster, Training Child Interviewers and Implementing Practice Guidelines
- Judicial Interviews with Children
- Hearing the Voice of the Alienated Child in Family Law Disputes
- The Role of Children's Counsel in Family Law and Child Protection Proceedings
- Assessing the Credibility of Children

The Symposium and Conference are open to anyone with an interest in how children and youth participate in justice processes. Early bird rates, and special discounts for certain students, are available until 3 June 2017; a block of rooms at reduced rates have been reserved at the Hyatt Regency.

Money for Nothing: *International Longshore v. Ford*

By Peter Bowal and Jasper Sloan

Introduction

Recently, the Government of Alberta clawed back money it had paid to individuals on the basis of mistake. The government determined that these individuals had been ineligible to receive the money. This story attracted attention because the government was demanding the return of money from people who had passed away.

The story raised the question of whether, and under what circumstances, one can demand the payback of money by others. It turns out that this question was addressed last year by the British Columbia Court of Appeal in *International Longshore & Warehouse Union Local 502 v. Ford*, 2016 BCCA 226 (CanLII), http://canlii.ca/t/grthf. This article describes that decision.

Facts

Robert Ford was a former union treasurer who embezzled some $1.7 million over seven years from his employer to support a gambling addiction. He was able to exploit a longstanding careless practice at work where blank cheques were signed in advance by the other officer.

He deposited almost $900,000 of this loot into two bank accounts he held jointly with his wife at the time, Teressa Prentice. The rest of the money was probably squandered through gambling. Since Ford was also managing the family finances, Prentice did not know about the stolen money intermixed with their joint accounts and used for regular expenditures.

The union obtained a civil judgment ordering Ford to repay the full amount he stole. Since that was unlikely to happen, the union turned to recover it from Prentice. It demanded Prentice pay back the $900,000 that she "had and received" on the basis that the law says it would be unjust for her to keep it.

In response, Prentice questioned the amount, said the claim was too late, and blamed the union's lax accounting controls. Her main argument, however, was that she was an innocent joint bank account holder who was unaware of her husband's fraud.

Judicial Decision

Prentice lost on summary trial of the case. She appealed to the British Columbia Court of Appeal. The case turned on whether Prentice had actually developed a detrimental reliance on the stolen funds. If she had genuinely thought that it was her money and had significantly and in good faith materially changed her circumstances to enjoy it, she would be entitled to keep it: *Storthoaks v. Mobil Oil Canada Ltd.,* (SCC, 1976) http://canlii.ca/t/1z6hj.

The principle, which originates 170 years ago in England, is that it is unfair to force someone who received money mistakenly through no fault of her own (or in this case, dishonestly from someone else) to repay it if she had already changed her life circumstances in reliance upon it. Years later, how could the law reasonably ask her to pay it back? Otherwise, as the old case stated, "it is against conscience to retain it."

The change in circumstances defence requires an exceptional and material expenditure or financial commitment incurred in good faith in reliance upon the extra money. Ordinary spending of the money to pay down debts and cover expenses will not qualify.

Upon reflection, it is challenging to imagine instances which will meet these tests of 'change of position.' Most people receiving a windfall will have a legal obligation to pay it back when asked.

One qualifying scenario might be where, soon after learning of a windfall, someone surrendered a well-paying job and retired. Or, liquidated a business and distributed the proceeds to family members in the expectation that he or she would live off the newly-discovered windfall. Maybe, seeing the extra money, he or she adopted eight children or gave it to the local hospital which spent it on new equipment!

The change in position defence will more likely succeed when the payor makes the demand for repayment *several years* after the mistaken or fraudulent payment is made, when the recipient's "position has so changed that it would be inequitable in all the circumstances to require him to make restitution" [*Lipkin Gorman v. Karpnale Ltd* [1991] 2 A.C. 548].

All four British Columbia judges could see no indication that Prentice had made any significant new expenditures, commitments or decisions as a result of this windfall money in her account. She did not know about the windfall in her joint account so she could not have changed her position based on that money. Even after discovering it, she admitted she did not rely upon the tainted money and she never spent it after she learned about it.

Prentice was unable to rely upon the change of position defence. In what must have seemed like double victimization or being forced to assist a reckless union, the Court ordered her to pay the money back. As it turned out, the union had received some settlement money from its auditor. The Court sent the question of whether this should offset Prentice's liability to be determined by the trial judge.

Conclusion

When a person or corporation mistakenly pays money into the account of another, or has money stolen from it, it has a *prima facie* right to recover that money. The recipient of the windfall money can assert a defence of 'change in position' by proving a dependence on that money – that one has already relied to one's detriment on those funds. This could be shown by having undertaken new projects or financial obligations dependent on the misappropriated money.

This is an important case because it clearly stands for the proposition that every joint bank account holder may be required later to repay money that was mistakenly or fraudulently paid into it. It does not matter that the recipient was blameless and innocent, or that the person made the payment carelessly.

This cases offers several lessons. On the payor side, you see the hazards of ignoring cheque-signing and financial controls, and the advantage of immediately demanding payback of misappropriated money. On the payee side, if your account seems too plump to be true, it might not be your money. Or, if you discover a windfall in your account, only if you quickly change your position might you be able to keep it.

Otherwise, no free lunch. No money for nothing.

Age Discrimination and the *Alberta Human Rights Act*

By Linda McKay-Panos

Recently, the Alberta government agreed to add protection for age discrimination in the *Alberta Human Rights Act (AHRA)* in two areas—tenancy and services, goods and accommodation customarily available to the public. This was the result of a Consent Order on January 13, 2017 in the case of *Ruth Maria Adria v Attorney General of Alberta*. Age will be covered in these areas in effective January 2018. "Age" was already covered in employment, notices and membership in trade unions. This case was very similar to that of Delwin Vriend, 1998, when the Court held that the absence of protection from discrimination based on sexual orientation in the *Individual's Rights Protection Act*, RSA 1980 (*IRPA)* violated the *Canadian Charter of Rights and Freedoms*, section 15(1). The difference is that in *Vriend*, the Supreme Court of Canada ordered that the words "sexual orientation" be read into the *IRPA*. This time, the government agreed that the *AHRA* should be amended.

It is interesting to look at the history of legal protection for age discrimination. First, it is generally accepted that youth and elders experience the most effects of age discrimination. Yet, originally the definition of "age" in the *Individual's Rights Protection Act*, 1972, (*IRPA*) was "between 18 and 65". So the two most vulnerable groups were originally excluded from protection in all areas covered under the *IRPA*. The upper limit of age 65 was removed from the definition of "age" in the 1980s, so at least elders were protected from discrimination in some areas.

After a review of the *IRPA* (*Equal in Dignity and Rights*, 1994), the Review Panel recommended that age be covered in all areas and that the lower age limit be removed. This would be in keeping with the *United Nations Convention on the Rights of the Child*.

It is clear that the addition of coverage of age in two areas will definitely be welcomed by all, especially seniors. This group is especially vulnerable and deeply affected by discrimination in all of the areas covered by the *AHRA*. Any fears by landlords or service providers that there will be a flood of claims must be allayed by the defence section 11 in the *AHRA* that allows a reasonable and justifiable excuse for discrimination. And, these landlords and service providers have a year to modify their practices and policies to ensure they comply with the law.

However, the Review Panel's recommendation that the lower limit of 18 be removed was not followed. So, youth are still unprotected from age discrimination in all areas under the *AHRA*. At the Alberta Civil Liberties Research Centre, we receive inquiries from youth who are not allowed to eat in a restaurant in groups or who are not allowed in stores with their friends. These young people have no recourse to the *AHRA* for age discrimination. They *are* able to complain about discrimination based on other grounds such as race, religious belief, and sex, however.

Young people are vulnerable in our society and we are trying to teach them to be responsible citizens. At the same time, by allowing age discrimination against them we are hurting their dignity and demonstrating that they have no rights. The message this relays is not in keeping with youth developing into responsible citizens. This current definition of age (over 18) could also be the subject of a *Charter* section 15(1) case, similar to that of *Vriend*. Again, any concerns about floodgates are allayed by the reasonable and justifiable section 1. For example, there are good reasons why youth cannot purchase liquor or attend bars that serve alcohol.

Hopefully, the Government of Alberta will remove this lower limit so that all Albertans are equally protected from age discrimination.