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LawNow

relating law to life in Canada

Juries in Canada

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Juries as the Great Democratic Hope of the Criminal Trial

Rob Normey

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The greatest lawyer of the ancient world, Cicero, proclaimed that where there is life, there is hope. It seems to me that one can adapt that saying to the inspiration for retaining the right to a jury trial in the modern world, despite all the potential hazards that individual juries might present to the accused in a serious criminal trial. Before turning to potential pitfalls of a trial before a judge and jury, we should trace the undeniable benefits to Canada's criminal law system that accrue through the use of juries.

Canadian criminal law has long made use of jury trials, but it was the advent of our *Charter of Rights and Freedoms* in 1982 that enshrined a "right" to a jury trial. I had the good fortune to appear as counsel in one of the leading cases on the right, a case which heard two consolidated challenges to *Securities Act* prosecutions on the basis that the accused were unable to avail themselves of a jury trial. The matter went all the way to the Supreme Court of Canada. My work on it allowed me to develop a keen appreciation for the relative merits of the jury trial and its significance for our legal system.

> *"The right to a jury trial is ultimately an important hallmark of our democratic society."*

The right to a jury in serious criminal and quasi-criminal matters is found in s. 11 (f) of the *Charter of Rights,* which states: "any person charged with an offence has the right: … [except before military tribunals] to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment." Our securities cases involved the need to determine just what the framers of the *Charter* meant when they employed those words dealing with punishment. But in order to answer the question, we had to delve into the purpose of jury trials, and why it was that our *Constitution* contains such a clause.

> *"Returning to a consideration of the role of juries in serious criminal trials, it is more important than ever to affirm the value of the function that they perform."*

In the Anglo-Canadian and Anglo-American legal systems, the role of juries emerged in a gradual and fitful fashion. One might be scandalized to consider that in the early days of English law, trials were determined by physical combat. The result of the fight determined the legal result. An important development was the calling of inquests throughout England over a number of years, leading to the regular use of a "jury" to provide reports of local crimes and suspects. These jurors had personal knowledge of the wrongdoing that the Crown gathered information about. Gradually, by the 13th century, trial by jury became a regular practice for serious criminal trials.

It is fascinating to consider that in the early days of trial by jury, the scales were weighed heavily in favour of the prosecution. It was often convenient to use the same individuals who brought accusations against accused persons as the jurors who would decide guilt or innocence. Of course, the practice had to undergo a series of further modifications before it could become the type of jury system we know today. One important breakthrough worth noting is that which occurred as a result of the famous *Bushell's Case* of 1670. This landmark decision ended the practice of punishing jurors who rendered the "wrong verdict", that is, they acquitted the accused in political trials, particularly those conducted by the notorious Star Chamber.

That decision was one of several innovations and recognitions of the need for fairness which led to the sovereign role now laid out for juries. They and no one else – not legal specialists, not judges who may have become jaded or prejudiced as a result of their role in conducting cases over many years, are the ultimate arbiters of the fate of the accused. They are a body of lay people, traditionally 12 in number (still the number in Canada), chosen at random from a wide cross-section of the general public. The jury is the trier of fact in the criminal trial. But it decides more than that – it makes the crucial determination on the guilt or innocence of the accused. Traditionally, the verdict must be a unanimous one and involves a clear democratic participation by citizens in a system that might otherwise be prone to the dangers of professionalized "production-line" and obsessively rule-oriented justice. The idealists and optimists who favour jury trials value this ability of jurors to act as the "conscience of the community", bringing a fresh and hopefully common sense quality to the decision-making process. The potential is certainly there for jurors to act as better fact-finders than judges, and to reach decisions on a more equitable basis, while receiving the guidance of the trial judge's directions on the law.

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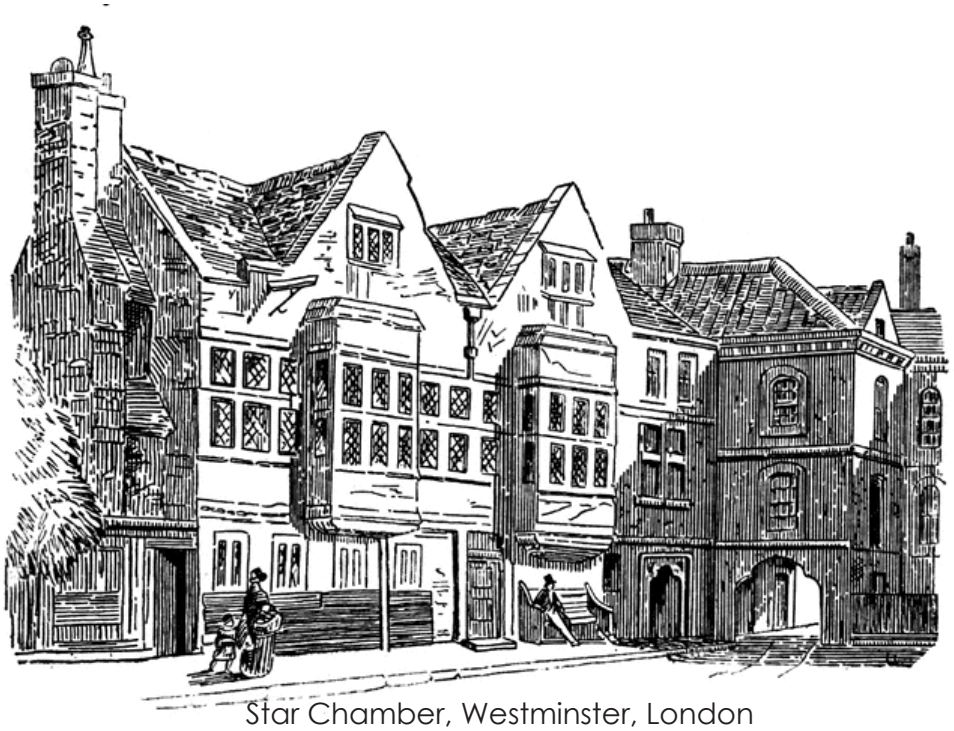

Star Chamber, Westminster, London

The Law Reform Commission of Canada in its outstanding 1980 *Report on Juries*, emphasizes that the jury tackles each case afresh, thereby avoiding the biases and predispositions which judges must surely acquire after hearing hundreds of similar cases, and that they are removed from the court when applications for the exclusion of evidence are made, returning to discharge their duty untainted by evidence that has been excluded. It concludes that juries serve to disperse and decentralize authority.

In my arguments before various courts on the meaning of s. 11(f) of the *Charter*, I also emphasized the conclusions of the Law Reform Commission that, because the jury involves the public in the central task of the criminal justice system, it provides a means whereby the public can learn about, and critically examine the system. Jurors are well placed to exemplify community standards when engaging in fact finding and deliberations to reach a verdict. The act of serving on a jury is indeed likely to be one of the most important democratic services one will perform in our society. Finally, the literature reveals the indisputable fact that in times of stress and possible pressure on the judiciary, the jury can act as a bulwark in the protection of civil liberties and can reach "just" and "fair-minded" decisions by avoiding undue deference to unfair laws or the unfair application of a law in unique circumstances.

> *"The matter went all the way to the Supreme Court of Canada. My work on it allowed me to develop a keen appreciation for the relative merits of the jury trial and its significance for legal system."*

This analysis leads me to believe that the right to a jury is a vital aspect of criminal trials where the liberty of the accused is at stake in a significant fashion. By adopting a "purposive" approach to the meaning of the words found in s. 11(f) of the *Charter*, the framers of this right intended that

the right to a jury should be exercised by those who face imprisonment for a maximum period of five years or more, as well as those who face other forms of physical punishment. These might include corporal punishment, banishment from the community, forced labour, or revocation of citizenship in certain circumstances where deportation to a place of danger might result.

In the now leading case on the extent of the right under this section of the *Charter* – *R v Peers*, a 2015 decision of the Alberta Court of Appeal, these arguments were largely accepted by the majority of the Court. It rejected the arguments of my learned friends that the phrase "a more severe punishment "should not include fines, even large fines totaling millions of dollars. Such fines can be meted out in the highly regulated securities industry to traders who might commit acts of fraud or deceit. The Supreme Court of Canada heard argument on this vital issue and rejected the arguments advanced on behalf of the accused in the securities prosecution. In 2017, the Court affirmed the result and the reasoning of the Court of Appeal.

> *"The act of serving on a jury is indeed likely to be one of the most important democratic services one will perform in our society."*

Returning to a consideration of the role of juries in serious criminal trials, it is more important than ever to affirm the value of the function that they perform. Studies show that most jurors do a reasonably good job of adhering to the legal expectations that are imposed on them. Yet, at the same time, they do not have to follow court directions when they perceive these to be unfair or lacking in a sense of reality. In short, they inject into the trial process the ability to reach a decision on the basis of the spirit rather than the letter of the law.

One way of assessing the value of providing for a more flexible and non-technical means of deciding guilt or innocence is to read cases such as the 2004 United States Supreme Court judgment of *Blakely v. Washington*. This ruling emphasized that it was indeed preferable to allow juries more discretionary power when various harsher sentences might potentially be imposed. I suggest these sentences may well have been established on the basis of an unyielding "law and order" agenda. In any event, the right to a jury under the U. S. *Constitution* has been interpreted to mean that mandatory sentence practices do not override the role of the jury.

The right to a jury trial is ultimately an important hallmark of our democratic society. It is vital at the same time to remember that the role of jurors is one that comes with both rights and responsibilities. In high profile Canadian cases, we sometimes perceive decisions that could be said to be motivated by prejudice, including racial and sexual prejudice. Where this might possibly be the case, the dramatic denouement of the trial may result in an urgent call to strive to better educate citizens and foster policies designed to affirm equality and a robust commitment to substantive justice. The trial of Gerald Stanley following the shooting of 22 year old Colten Boushie, a Cree member of the Red Pheasant First Nation, is a recent controversial example of such a case. ◆

Why do We Have Jury Trials?

Charles Davison

Juries. To some, it may seem bizarre that 12 laypersons, untrained in the law, would be asked – required – to come into a courtroom and listen to the recounting of events about which they know nothing, involving people with whom they have no familiarity, and then make a decision about whether someone has committed a crime. And yet, jury trials are such a fundamental aspect of our criminal law that this right of every accused person facing serious charges is part of our *Constitution*.

Why do we use juries? What are their advantages and disadvantages? How do we decide who should sit on a jury?

An accused's may choose to select a trial by jury or a trial by a judge alone if he or she may be imprisoned for more than five years, and in some cases, where imprisonment between two and five years is a possible result. In the most serious cases – mainly, murder – the *Criminal Code* says the trial must be with a jury unless both the prosecution and the defence agree to have a trial by judge alone.

> *"Simply holding views about different racial groups, or having some knowledge of the matter due to publicity will not necessarily exclude an individual from the jury."*

Sometimes, accused persons have firm views about whether they want a judge or a jury to hear their case, often the result of past experiences with the court system. An accused who has been in trouble in the past and feels she has not been treated fairly, when in front of a judge alone, will often insist on a jury trial, believing she will get a better hearing in front of 12 ordinary people. The reverse is sometimes true: an accused who feels he was wrongly convicted by a jury in the past may be more likely to ask for a "judge alone" trial.

Sometimes, simply as a matter of principle, accused persons want representatives of their community to pronounce judgment opposed to a judge. Sometimes the opposite occurs, where an accused declines his right to a jury because he does not want local people to know the details of what he is alleged to have done.

A defence lawyer who is advising an accused may have different considerations. Cases which are mainly about the law are probably better suited to the assessment of a judge. (In a jury trial, the judge explains to the jury what the applicable law is; the jury then has to apply that law to the evidence and determine the verdict).

Cases where the main question is what precisely took place between the people involved are sometimes better suited for

a jury, but not always. One big difference between a trial with a judge and one with a jury is that a judge is required to give reasons for the verdict he reaches, while a jury gives only a one or two word verdict ("guilty" or "not guilty") without any explanation of any sort. Even for a judge, finding a coherent, logical way through a tangled web of evidence can be a challenge. It might be easier to appeal a judge's decision, if his or her reasons include errors of fact, or illogical or irrational trails of reasoning. It is often more difficult to appeal a jury's decision which considers the evidence and returns with a verdict.

> *"A criminal trial must always begin with 12 jurors, and the law allows for up to two to be excused as the trial proceeds."*

Juries are always told they must not allow sympathy to play a role in their decision-making, but in the real world sympathy is almost always a factor taken into account in choosing whether to have a jury trial. An accused who will likely be seen with sympathy and compassion by other persons may more likely want a jury. Arguments along the lines "this could have been you; what would you have done?" are more likely to find favour with ordinary persons than with judges, whose reasons must show that they have carefully and dispassionately applied the law.

Sympathy and compassion can also weigh against an accused, in which case they will more likely not want a jury trial. If a particularly vulnerable person is the victim or an important prosecution witness, the accused might want a judge alone: a judge must dispassionately apply the law, and provide logical reasons which show she has done that, no matter how sad or sympathetic the plight of the victim might be. Similarly, if the crime alleged is particularly violent and the evidence expected to be graphic, a judge might be a better choice, as he or she will be less likely swayed by the horror of what they are hearing and seeing than might be the case with a jury, who might let feelings of revulsion and anger sway their reasoning.

In the most serious situations (murder trials) the *Criminal Code* requires the trial be in front of a jury unless both sides agree to have a judge sit alone. The theory is that in the most serious cases, where someone has died and someone faces imprisonment for the rest of his or her life, community representatives, under the guidance of a judge who knows the law, should make this important decision. In murder trials, we can usually be satisfied that the final verdict has been reached after the careful

> *"In the most serious cases - mainly murder - the Criminal Code says the trial MUST be with a jury unless both the prosecution and the defence agree to have a trial by judge alone."*

consideration and close attention paid by 12 ordinary community members who have brought their common sense and everyday wisdom to bear upon the issues they have been told to consider. We view juries as a fundamental protector of our liberties and freedoms, – 12 ordinary, independent fellow citizens who can protect us from the whims and arbitrariness of decisions made by officials who are beholden to the sovereign, a local figure, or other arms of government.

When it comes to deciding who from our communities should sit on a jury, the process is designed to ensure independence and impartiality. The first step is to summon a large group of persons selected from the community at random, to attend a court sitting to choose a jury. Local sheriffs, using names taken at random from sources such as health care records, electors lists, tax rolls and telephone books choose this group – sometimes called the jury "pool" or "panel". They make an effort to obtain as wide a cross-selection of community members as possible. However, The Supreme Court of Canada recently ruled, in relation to accused persons of a minority background, that they are not entitled to a jury pool which represents their group, or even one which has a proportionate number of their community, but rather, a panel which randomly represents the makeup of society at large.

Jury selection usually begins with dozens of people, and sometimes 200 or 300, gathered together in a courtroom or other facility large enough to accommodate the group. Sometimes an even larger pool of persons is necessary to ultimately select 12 jurors when the trial is going to be quite long or the charges have been widely publicized. The presiding judge usually begins by explaining in general terms how the proceedings will unfold – the length of time the trial will likely take, who is the accused and who will be the lawyers and witnesses, and the reasons individuals might properly ask to be excused from jury duty. This usually leads to many persons coming forward asking to be excused for various reasons such as health problems, work or school commitments which cannot be avoided, and travel which has been booked and paid for. As well, anyone who is related or otherwise closely connected to any of the participants is usually excused from jury duty for that trial, in order to ensure that all jurors are unbiased and impartial.

Unlike what we see on American media, in Canada most juries are selected relatively quickly, and with almost no questions. The Clerk of the Court will select possible jurors at random, and then the defence and the Crown decide whether that individual is someone they want on the jury. Each side gets to "challenge" – or veto – a particular number (in most cases 12, but 20 in first degree murder trials) of candidates without having to offer any reason or explanation. These are called "peremptory challenges". One by one, persons are chosen until there are 12 who will form the jury. Sometimes, either two more persons are chosen to sit as alternates (in case, before the trial begins, one of the original 12 is not able to continue) or as substitutes (in case, during the trial, one of the original 12 cannot carry on). A criminal trial must always begin with 12 jurors, and the law allows for up to two to be excused as the trial proceeds. Having alternates and substitutes better ensures the trial will proceed to a conclusion, in the event that a juror cannot carry on.

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Relatively rarely, jury selection includes what is called a "challenge for cause" process. This usually occurs where there are concerns about impartiality. In Canada, these concerns usually arise from either racial bias, or from pre-trial publicity. In some situations and among some communities racial and ethnic prejudices may taint virtually all potential jurors. Similarly, where there was unusually high-profile media coverage when the crime occurred, there will sometimes be concern that potential jurors may have been influenced by what they have heard about the allegations and the accused even before the trial has begun. In such situations, the judge will allow questions to be asked in an effort to "weed out" anyone who will not be able to act impartially. However, in Canada, we place great emphasis upon intruding the least amount possible into the privacy and views of potential jurors. Thus, the judge will allow a few (often only three or four), carefully crafted questions to be asked of them.

This process is complicated somewhat because the jurors themselves are given a decision-making role. Two members of the jury panel are selected at random to hear the answers of the other potential jurors and to decide whether they are satisfied the individual will be able to act properly as a member of the jury. Simply holding views about different racial groups, or having some knowledge of the matter due to publicity will not necessary exclude an individual from the jury. What matters is whether the juror can leave those views, or their knowledge of the case, outside the courtroom and, for the purposes of the trial and rendering their verdict, take account only of the evidence introduced in court, the arguments of the lawyers, and the legal instructions given by the judge. Finally, even if the two decision-makers agree the potential juror is suitable, the parties retain the right to challenge the individual in order to exclude them from the jury.

With those background details as to when, why and how we have jury trials, I will turn to some of the controversies surrounding juries in Canada. ◆

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Jury Trials: Cost, Controversy and Secret Powers

Charles Davison

Charles Davison is the Senior Criminal Defence Counsel with the Somba K'e office of the Legal Services Board in Yellowknife, NWT.

In the first part of this discussion about juries, I explained some basic points: why we have jury trials and how we decide who should be on a jury. Now, I will discuss some of the more controversial aspects to juries, and will focus on three areas:

- the costs of (including delays associated with) jury trials and government efforts to limit their use as a result;
- controversies surrounding the selection process; and
- the "secret" power of juries to make any decision they want.

> *"This little-known fact about jury trials is highly controversial, to the extent that lawyers cannot even mention this power in court."*

Cost

Compared to "judge alone" trials, jury trials are expensive. They usually take longer to conclude and require more court resources. They require the 12 persons selected as jurors to be away from work, school, and household and childcare duties, which can mean both personal financial hardship and a cost to employers. Sometimes jurors receive a small daily stipend to help alleviate hardship. Once deliberations begin jurors cannot separate, which means that, in addition to meals, they must also be provided with overnight hotel accommodations until a verdict is rendered. All of that costs the state money.

There is usually more delay involved with jury proceedings than those with a judge sitting alone. Since the summer of 2016, when the Supreme Court of Canada set out new rules to protect the rights of accused persons to "trial within a reasonable time", governments and the courts have become extremely sensitive to anything which might cause undue delay in the proceedings. The Supreme Court said superior

court matters – which include jury trials – must be finished within 30 months of the laying of charges. Meeting this deadline is a significant challenge in many parts of the country due to the caseloads of the courts and judges. Where a prosecution takes longer than 30 months, a judge may enter stay (end) the proceedings without a final decision about the guilt of the accused.

For all of these reasons, governments always seem to be seeking ways by which they can limit the rights of Canadians to have a trial by jury. At this time, Parliament is considering removing the choice of a jury trial in many cases where this option has been available. Because our Constitution guarantees the right to a jury trial where the possible punishment is five years imprisonment or longer, the proposed law will increase the number of offences where the Crown prosecutor has the option of treating the charge as a less serious offence punishable by a term of less than five years. These trials will take place in a Provincial or Territorial Court with a judge alone. The option of a jury trial will continue only where the Crown decides to treat the offence as more serious – meaning the accused may be imprisoned for a longer period.

By making such changes the government hopes to be able to both save money, and have proceedings concluded more quickly, thus avoiding prosecutions being ended without a verdict due to delay. The result, however, will be to remove from many accused persons the right to be judged by lay persons representing the community in the form of a jury.

Controversy

The way we select jurors has recently been the subject of controversy arising from the verdict in the Colton Boushie trial in Saskatchewan. Gerald Stanley – a white farmer – was charged with murder after he shot Colton Boushie – a young First-Nations man. During jury selection it appeared the defence was seeking an all-white jury by using its peremptory challenges to exclude any potential jurors who appeared to be Aboriginal. At the end of the trial the jury found Stanley not guilty.

In the aftermath, there have been loud complaints about the use of peremptory challenges. Many who feel Colton Boushie's killer was wrongfully allowed to go free see the defence challenges as being one of the causes of a serious miscarriage of justice. At the time of writing this article, the furor has led the government to propose abolishing this form of challenge to potential jurors.

As with most areas of political and legal development, making significant change in the midst – or as a result – of emotion and outrage is a very risky endeavour. If

there is to be a change to the procedures by way we choose juries, it should come about only as the result of careful study and unemotional debate – and hopefully *not* by assessing the situation on the basis of a single "worst case", emotionally-charged scenario.

> *"Without peremtory challenges, if the first 12 persons called are uniformly "white" or of any other background than Aboriginal or Inuit, my client will have to accept that her jury will be composed entirely of persons whose backgrounds and life experiences are probably nowhere similar to her own."*

As a criminal defence lawyer I suggest Aboriginal accused persons will actually stand to suffer more, in the longer term, if peremptory challenges are abolished.

Because of the random way in which persons are summonsed for jury duty, jury pools tend to be overwhelmingly of the majority, "white", segment of the population. In every case where I have acted as defence counsel for an accused person, with the possible exception of efforts to pick a jury in a northern community which is 70% Aboriginal or Inuit, we would consider it lucky (and rare) to have as many as 10 or 15 percent of the panel who appear to be of First-Nations or Inuit ancestry.

That means that when I am defending an Aboriginal or Inuit client, our only hope of selecting even one or two Aboriginal or Inuit jurors is using our peremptory challenges of non-Aboriginal persons in the chance that eventually someone who appears to be of a similar background or ancestry as the accused is chosen. Without peremptory challenges, if the first 12 persons called are uniformly "white" or of any other background than Aboriginal or Inuit, my client will have to accept that her jury will be composed entirely of persons whose backgrounds and life experiences are probably nowhere similar to her own.

> *"As with most areas of political and legal development, making significant change in the midst - or as a result - of emotion and outrage is a very risky endeavour."*

One possible result of abolishing peremptory challenges may be an increase in the situations where we "challenge for cause". While not every non-Aboriginal person is biased, we know that racial prejudices against Aboriginal persons frequently occur in Canadian society. One way to try to "weed out" persons who hold such views is the "challenge for cause" process (described in my earlier article). If the defence loses the peremptory challenge as a way to get at least one or two Aboriginal or Inuit (or other non-white) jurors, the need to screen persons from the majority group to eliminate those with racial prejudices and biases will increase. Perhaps in anticipation of this development, in the same Bill, the government proposes replacing the challenge for cause process involving jurors themselves with a hearing before the trial

judge alone who will make the decision about impartiality.

The "Secret Power"

The final area of jury controversy is an almost-secret one: it is the power of juries to ignore the law in making the decision they consider the proper outcome in the case. Sometimes called "jury nullification", it is largely the result of the secrecy of jury deliberations, and the fact that juries give only one or two word verdicts: guilty or not guilty. Juries are prohibited by law from revealing anything about their deliberations, which means they are not allowed to explain or give reasons for their decisions. Thus, although they swear to make their decisions based only upon the evidence and the law the judge has explained, in the secrecy of the jury room jurors are actually free to decide a case in any way, and for whatever reasons, they alone see fit.

This little-known fact about jury trials is highly controversial, to the extent that lawyers cannot even mention this power in court. For a lawyer to tell a jury that they should ignore the law and make their decision based upon what they think is right would likely lead the judge to declare a mistrial. The lawyer could be punished for contempt of court and could also be punished by their Law Society for unethical behaviour, including disbarment from the legal profession.

> *"Compared to "judge alone" trials, jury trials are expensive. They usually take longer to conclude and require more court resources."*

Yet this power of juries, despite its potential for legal mischief, remains an important "safety valve" for representatives of society to express their views by refusing to endorse outdated or objectionable laws. One of the most famous examples of this came in the 1980s, in the trial of Dr. Henry Morgentaler and his colleagues under the controversial sections of the *Criminal Code* which restricted (and often denied) abortions. In his closing argument the defence lawyer invited the jury to "send

> *"The Supreme Court said superior court matters - which includes jury trials - must be finished within 30 months of the laying of charges."*

a message to Parliament" about their views of the law by refusing to apply it and acquitting the accused. The jury may have accepted this invitation because they found Dr. Morgentaler and the others not guilty. The case was appealed to the Supreme Court of Canada which, while restoring the acquittals (the Court of Appeal had overturned them), strongly condemned counsel's comments. The Chief Justice noted that this power of a jury is the "ultimate protection against oppressive laws and the oppressive enforcement of the law" but also pointed out the dangers and injustices which might occur if juries routinely ignored the law and made decisions based only upon their own opinions. In extreme cases, he noted, juries could potentially make their decisions based upon their affiliations with, or biases against, the racial and ethnic roots of one or more of the parties.

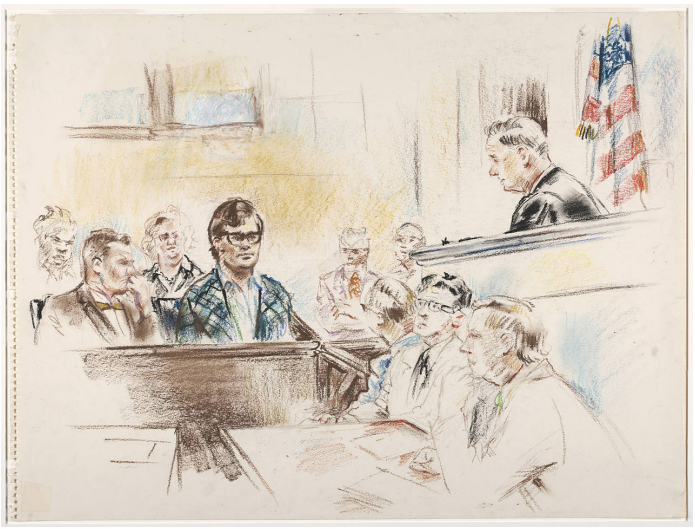
Other cases recognizing the possibility of jury nullification include the Robert Latimer prosecution for killing his severely disabled

daughter, and Grant Krieger – an Alberta man prosecuted for growing marijuana which he provided to persons who used it to alleviate their suffering from terrible medical conditions. In these and other cases, the courts have reiterated the statement in the *Morgentaler* case: that although jury nullification may sometimes protect individuals from government oppression, its inherent risks are possibly even more significant to a legal system based upon consistency of application and enforcement of its laws.

We continue to place our faith in juries to listen to the evidence and apply the law explained to them by judges despite challenges and failures. As long as we continue to see the benefit of having the common sense and community wisdom of jurors, we must try to ensure that this unique form of courtroom proceeding is maintained and improved. If we receive a jury summons, all of us have a duty to contribute. Without the continuing good faith efforts of ordinary members of our communities, the jury system will wither and die, replaced by decisions made exclusively by lawyers and judges. We will lose the benefits of having the input of community representatives in very important legal matters.◆

Transparency Around Jurors and Verdicts Would Help Trial Fairness

Robin McKechney and Institute for Research on Public Policy (IRPP)



To many observers, the verdict in the Gerald Stanley trial was wholly unsatisfactory. From the outside, an acquittal in the shooting death of the 22-year-old Cree man Colten Boushie seemed unthinkable: he had been shot in the back of the head, while sitting unarmed in a vehicle. The trial became a referendum on the justice system and race, as it played out in an area of Saskatchewan where racial tensions between Indigenous people and White farmers were already high.

The difficulty, however, is that in asking a criminal trial to be a barometer of race relations, we are asking it to do a job it was not designed to do. A criminal trial is not designed to answer any question other than whether the Crown can prove the offence charged beyond a reasonable doubt. It is a fact-specific inquiry made on the basis of the evidence at trial. Juries are strictly warned that evidence from outside the courtroom is not to be used or considered. In the context of the Stanley trial, this includes perceptions about race relations in rural Saskatchewan.

Although it is tempting to conclude that the verdict was not based on the evidence, to do so is to accuse the jurors of acting in bad faith. The only conclusion that can be reached from the verdict is that the jury had a reasonable doubt that Gerald Stanley's gun accidentally misfired. No more, no less.

Of course, the reason that it is tempting to ascribe a nefarious motivation to the jury is that the trial took place in front of an all-White jury, a result of the defence having used peremptory challenges to reject certain jurors. This jury composition has naturally led to speculation that the verdict was the product of racism, but this is conjecture at best. In fact, jury research in the United States has demonstrated that in criminal trials that are racially charged, jurors are more attentive to bias than in other trials. If this is true, the jurors in the Stanley trial may have had an increased sensitivity to ensuring that bias did not play a role in the result.

The most unsatisfactory part of the Stanley trial is not the verdict itself but the fact that we will never know the reasons for it. The gap in our knowledge has been filled with unverified assumptions that are unfair to the 12 jurors but are the inevitable by-

product of a system that allowed the jury to be composed in the way it was. The result was not unfair but it feels unfair, which demonstrates why reform is critical.

This is not a criticism of the defence strategy, as distasteful as it appears from the outside.

> *"As long as jurors can be chosen based on race and the reasons behind verdicts are kept secret, there will be more trials like that of Gerald Stanley."*

A defence lawyer is tasked not with ensuring global fairness but with doing everything within the rules to defend the accused. If the use of peremptory challenges was viewed as potentially critical to an acquittal, the defence lawyer was entitled if not duty-bound to employ it. However, where the use of such a strategy leads to the perception of an unreasonable verdict, we must determine if there is another path that preserves (or even enhances) trial fairness and the public perception that justice has been done.

Any solution to the problems presented by the Stanley trial should attempt to address one or both of the primary issues that contributed to such visceral public reaction to the verdict: the rules that allowed for the composition of a jury to be ostensibly determined based on race, and an opaqueness around the verdict that left observers to speculate that racist considerations had driven the result.

Eliminating race-based peremptory challenges

The social science evidence does reveal that we will achieve more consistently reliable verdicts with diverse juries. In a diverse jury, jurors are less likely to express explicit bias than in a homogenous jury. Further, jury studies have demonstrated that diverse juries deliberate longer, analyze the evidence more thoroughly and discuss race-related issues more openly than all-White juries.

The immediate reaction of Parliament to the Stanley trial was to introduce legislation (Bill C-75) that would eliminate peremptory challenges altogether. Peremptory challenges, however, serve a useful function in ensuring that the Crown and the defence have a role in determining who will ultimately decide the trial. Further, there is no evidence that the elimination of peremptory challenges will result in a more diverse jury. When the accused is racialized, peremptory challenges are often used by the defence to ensure diversity, not oppose it.

The question becomes, How can choice in juror be preserved while employing a jury selection process that can reap the benefits that a diverse jury can provide?

> *"The most unsatisfactory part of the Stanley trial is not the verdict itself but the fact that we will never know the reasons for it."*

The United States has attempted to tackle this problem. Following the 1986 case of *Batson v. Kentucky*, a peremptory challenge can be contested on the basis that the challenge was used solely because of the juror's race. The "Batson challenge" has been criticized, however, as being ineffective because of the requirement to prove that a challenge was a race-related choice. Disturbingly, prosecutors

in North Carolina were trained to provide race-neutral explanations when using a peremptory challenge to eliminate a racialized juror.

In the state of Washington, a rule has been created to make the Batson challenge more robust and less vulnerable to race-based choices thinly veiled as neutral. The rule disallows a peremptory challenge if "an objective observer could view race or ethnicity as a factor." An "objective observer" is further defined as someone who is aware of "implicit, institutional, and unconscious biases." Presumably, this rule would allow a judge to disallow a peremptory challenge where a pattern appears of systemic choices based on race, as took place in the Stanley trial.

Instead of eliminating all peremptory challenges, Canada should adopt a process whereby *race-based* peremptory challenges are eliminated. Following developments in the United States, a rule should be implemented disallowing a peremptory challenge when there is an objective basis to conclude that it was based on race, even when there is a plausible neutral explanation. Such a rule would preserve choice for the parties while at the same time protecting the perception of the proper administration of justice, a perception that is damaged when a jury's composition fails to be representative of the community it is serving.

The removal of ostensibly discriminatory peremptory challenges would remove at least part of the skepticism and distrust with which the Stanley verdict was greeted. It seems likely that the same verdict from a more balanced jury would have been seen at least somewhat differently in the public eye.

Removing the cloak of secrecy from emotionally charged trials

However, without a further departure from the status quo, the Crown, the accused and the public will still be left without an explanation for verdicts that appear on their face to be illogical at best or racially driven at worst. In many ways, it is an inexplicable policy decision that in the most important criminal cases, reasons are not provided for the result, and the jurors are forever prohibited from revealing why they decided as they did. The Stanley trial has demonstrated the damage that can be done to the perception of the administration of justice from such opaqueness.

If it is inevitable that criminal trials will be asked to perform the "referendum" role that was foisted on the Stanley trial, then the debate over the result should be done with a full understanding of how the verdict was arrived at.

On the assumption that transparency is a critical step to eliminating racial bias, policy-makers should be open to all possibilities to reform a system that has left conjecture and speculation to fill the gap in knowledge created by jury secrecy. Although the jury system as it now stands has proven a reliable tool of the justice system, it does not mean that alternatives cannot be considered.

One option that may allow for the transparency that is required to eliminate racial bias would be to lift the ban on revealing jury deliberations. Although this would depend on a juror's willingness to discuss the deliberative process, it would at least open up the possibility of removing the cloak from emotionally charged trials.

Another more radical suggestion would be to allow criminal trials for serious offences to be conducted in front of a three-judge panel as opposed to a jury. Judges are extensively trained (or should be) in recognizing bias and, just as important, could provide reasons for their decision. Although there is no magic wand for eliminating bias, the process of writing reasons may be the best mechanism for drawing it out. A three-judge panel would serve as a similar check and balance to a jury by not leaving the high-stakes decision of a criminal trial in the hands of one person. No doubt this would impose its own logistical issues, but the path to the end result would be there and would allow for an informed public debate.

The Stanley trial did result in harm to the justice system, but not because of the verdict (as illogical as that might seem). The harm was caused by a process that left the verdict open to being criticized as blatant racism, with no available evidence on which to dispute that conclusion. As long as jurors can be chosen on a manifestly discriminatory basis and as long as the public is left in the dark as to how a verdict was determined, there will be more trials like that of Gerald Stanley. Only transparency, both in the choice of the juror and in the reasons for decision, will allow for an open and honest debate as to whether the scales of justice are balanced.

A Message from Jeff Surtees, Executive Director, Centre for Public Legal Education Alberta

I was honored to be invited to participate in the inaugural meeting of Project Fact(a), to provide input and support from the public legal education sector. This article is part of a series produced by *Policy Options*, which they describe as follows:

In April 2018, a group of legal scholars and practitioners formed Project Fact(a) as a response to the acquittal two months earlier of Saskatchewan farmer Gerald Stanley. Stanley had been charged with second-degree murder in the shooting death of Colten Boushie, a 22-year-old Cree man. Legal experts, Boushie's family and the Canadian public wanted a better understanding of what actually happened during this criminal trial process. The goal of the project, which is supported by York University's Osgoode Hall Law School, is to engage in deeper reflections on legal procedure and law, and to consider important factors not explicitly raised during the trial – such as systemic racism and the history of the land where the case unfolded. This Policy Options series is based on research presented by participants in Project Fact(a). They hope their work will provide some context and educational tools for those trying to see positive next steps in the aftermath of Boushie's tragic death.

This article is part of What can we learn from the Stanley trial? special feature.

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The Lack of Representation of Indigenous People in Canadian Juries

Christopher Gallardo-Ganaban

Christopher Gallardo-Ganaban is a student at the University of Alberta's Faculty of Law and a member of Pro Bono Students Canada. Pro Bono Students Canada is a student organization. This document was prepared with the assistance of PBSC University of Alberta law student volunteers. PBSC students are not lawyers and they are not authorized to provide legal advice. This document contains general discussion of certain legal and related issues only. If you require legal advice, please consult with a lawyer.

Earlier this year, the acquittal of Gerald Stanley in *R. v. Stanley*, 2018 SKQB 27 ("*R. v. Stanley*") sparked important discussions on the Canadian criminal justice system and Indigenous peoples' experiences within this system. Specifically, this decision sparked a discussion on the representation of Indigenous peoples on Canadian juries.

What happened in *R v Stanley*?

In *R. v. Stanley,* the Saskatchewan Court of Queen's Bench held a jury trial in the case of a Caucasian defendant, Gerald Stanley, who was charged with second-degree murder of an Indigenous man, Colten Boushie.

The incident giving rise to the charge occurred on August 9, 2016. Mr. Boushie and four friends were drinking. After getting a flat tire, they drove to a farmhouse owned by Mr. Stanley, crashing into one of his cars. One of the friends tried to start an ATV on the property. This resulted in Mr. Stanley firing two warning shots with his handgun in an attempt to scare the group off. Mr. Stanley alleged that he approached the SUV, and Mr. Boushie was in the driver's seat. He alleged that his gun accidentally fired, killing Mr. Boushie instantly.

> *"Since the decision in R. v. Stanley, the Government of Canada has introduced Bill C-75, which amends the Criminal Code in several ways, one of which would be to abolish peremptory challenges of jurors."*

The jury selected appeared to be all white, and the result was Mr. Stanley's acquittal. This brought forward discussions amongst Indigenous communities, other citizens and legal professionals: is this appropriate in meeting the goals of our criminal justice system and is the jury selection process fair for Indigenous people?

Importance of a Representative Jury

To provide context regarding the composition of juries, we can look to the decision of the Supreme Court of Canada in *R. v. Sherratt,* [1991] SCR 509. The Court held that the requirement of a representative jury is a constitutional principle, and that juries must represent the larger community as far as is possible and appropriate in the circumstances.

However, this idea was narrowed in *R. v. Kokopenance,* 2015 SCC 28. In this case, the accused, an Indigenous man, challenged the representativeness of his jury. In *Kokopenance,* the Supreme Court

> *"Peremptory challenges were the focus of much discussion after R. v. Stanley."*

of Canada determined what efforts the state must make to ensure that a jury is representative of the community. It held that an accused at trial is not entitled to a jury that includes members of their own race or religion; rather, they are only entitled to a fair and honest process of random jury selection.

Justice Moldaver, in writing for the majority, stated that it is not the result of the jury selection process that should be at issue. Instead, we must ensure that the process is fair and honest, which ensures that the rights of parties are met. In essence, the constitutional principles being respected by a representative jury are met through a fair and honest process and do not require the resulting jury panel to be representative statistically.

However, in their dissent, Justice Cromwell and Chief Justice McLachlin argued that the failure to put together a jury that included on-reserve Indigenous people was indeed a constitutional violation. Justice Cromwell stated:

> *An Aboriginal man on trial for murder was forced to select a jury from a roll which excluded a significant part of the community on the basis of race — his race. This in my view is an affront to the administration of justice and undermines public confidence in the fairness of the criminal process. (*R. v. Kokopenance, *2015 SCC 28, 195).*

While this case analyzed the representation of the accused's race and religion on the jury, the representation of the victim's race and religion in the jury applies as well.

The issue with a lack of representation of Indigenous people in juries, whether it is the accused or the victim who is Indigenous, is the increased likelihood of perceived bias amongst the panel of jurors. Furthermore, it contributes towards a public perception of unfair procedure.

In *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci,* Iacobucci explores these issues of representation on Ontario juries. After consulting with various First Nations groups, Mr. Justice Iacobucci found that the relationship between the Canadian justice system and Canada's Aboriginal peoples

> *"In essence, the constitutional principles being respected by a representative jury are met through a fair and honest process and do not require the resulting jury panel to be representative statistically."*

continues to be troubled. The history of mistreatment and injustice of Aboriginal peoples in the Canadian justice system influences the attitudes of Indigenous people towards this system.

The lack of representation in jury trials such as *R. v. Stanley* contributes towards this negative perception of the Canadian justice system. The underrepresentation of Indigenous peoples in Canadian juries is just one factor that can contribute towards negative attitudes from the public to the justice system.

The Jury Selection Process and Peremptory Challenges

In *R. v. Stanley*, both the Crown prosecutor and defence counsel had a hand in jury selection. There are several considerations for assembling the panel of jurors, which include exclusion of certain types of people (this differs from province to province), randomness, and representativeness. Both defence counsel and the Crown can challenge the prospective jury members.

The Crown and defence counsel are both entitled to a number of peremptory challenges, giving them the ability to independently veto a selected juror without the obligation of giving reasons for it.

Peremptory challenges were the focus of much discussion after *R. v. Stanley*. There were criticisms as to how it can be abused to discriminate against minority groups. This is because there is no requirement to provide reasons for eliminating a juror.

Since the decision in *R. v. Stanley*, the Government of Canada has introduced Bill C-75, which amends the *Criminal Code* in several ways, one of which is to abolish peremptory challenges of jurors. As of December 3, 2018, Bill C-75 passed its Third Reading in the House of Commons.

> *"The issue with a lack of representation of Indigenous people in juries, whether it is the accused or the victim who is Indigenous, is the increased likelihood of preceived bias amongst the panel of jurors."*

In an article titled "Should Jury Selection Be Changed? " published in *Alberta Views* on November 19, 2018, University of Alberta Faculty of Law professor Steven Penney and criminal defence lawyer Kelly Dawson provided their insights but disagreed about whether jury selection should be changed. Penney believes that peremptory challenges lead to juries that are less diverse, while Dawson asserts that peremptory challenges protect diversity.

Despite disagreeing on the effect of peremptory challenges on diversity, the two agree on one thing: the underrepresentation of Indigenous Canadians on criminal juries has little to do with peremptory challenges.

Instead there are other factors that contribute towards an underrepresentation in the pool of jurors available for selection at court. Penney explains that there are many reasons for this underrepresentation, including a disinclination to participate, logistical barriers, socioeconomic barriers, discriminatory eligibility rules, and inadequate efforts by provincial governments to ensure proportional representation in selection databases and summons delivery.

> *"In Kokopenance, the Supreme Court of Canada determined what efforts the state must make to ensure that a jury is representative of the community"*

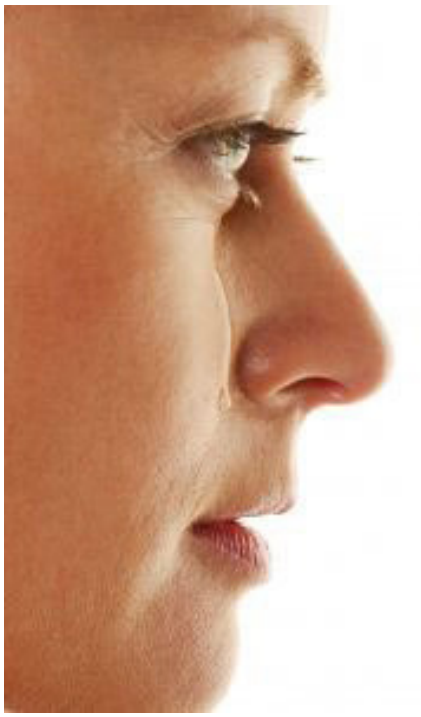
Conclusion

There seems to be differing opinions as to how to address these issues of underrepresentation of Indigenous people in Canadian juries. The *R. v. Stanley* trial brought this issue into the spotlight and prompted important discussions regarding the role of Indigenous peoples in the Canadian justice system. Specifically, the responses highlight the need for a system that allows for an increased representation of Indigenous people in juries.

While there is no conclusive answer as to how to adequately address this issue, we seem to be making progress in providing efforts towards juries that are representative of the larger community.◆

This document does not contain legal advice.

Christopher Gallardo-Ganaban is a student at the University of Alberta's Faculty of Law and a member of Pro Bono Students Canada. Pro Bono Students Canada is a student organization. This document was prepared with the assistance of PBSC University of Alberta law student volunteers. PBSC students are not lawyers and they are not authorized to provide legal advice. This document contains general discussion of certain legal and related issues only. If you require legal advice, please consult with a lawyer.



Canadian Jurors Need Mental Health Support

Michael Cooper

Former juror Mark Farrant has observed that jury service is the last mandatory form of service since the abolition of military subscription. Each year thousands of Canadians are called to perform this last mandatory form of civic duty.

Much is asked of jurors. To sit on a jury means taking time off from work, and having one's family and social life disrupted, all for practically no remuneration. Jurors are expected to take in all of the evidence, no matter how gruesome, and ultimately deliberate on the fate of the accused. To be a juror is to be entrusted with significant responsibility. Indeed, there are few matters weightier than potentially deciding whether to send an accused to jail for the rest of his or her life. With significant responsibility comes significant stress for many jurors, including being exposed to disturbing evidence. Tina Daenzer, who served on the Paul Bernardo jury said: "Imagine watching young girls being raped and tortured over and over again. You couldn't close your eyes and you couldn't look away because your duty was to watch the evidence." While Canadians are very familiar with high-profile trials like Bernardo's, the fact is that every day across Canada jurors are exposed to horrific evidence in cases involving horrific crimes.

> *"Jurors play an integral role in the administration of justice in Canada, often at a significant personal sacrifice."*

Despite this, jurors are more or less expected to get on with their lives as though nothing happened following the conclusion of a trial. Many former jurors are able to more or less return to life as they knew it before jury service. However, others understandably are not.

Recently, the House of Commons Standing Committee on Justice and Human Rights, of which I am a member, undertook the first Canadian Parliamentary study on juror supports. During our study, we heard from several former jurors who suffered from stress, anxiety and even PTSD arising from their jury service. These men and women courageously

told the Committee, some for the first time publicly, about how their lives have been forever changed. For example, Daenzer is still affected by the Bernardo trial more than two decades later.

> *"Clearly, being unable to talk about one of the most stressful aspects of jury service, for life, is an inhibiter to getting full mental health treatment and support."*

Despite all the sacrifices that jurors make, they have been the last people in the courtroom to be provided with mental health supports. This is the case even though they are often put at great risk. Judges, lawyers, and court staff all get support. Only recently have some provincial governments established juror mental health support programs. These programs are a patch-work across Canada with some provinces offering no support at all.

Even if an affected juror seeks help through one of the provincial juror support programs or out of their own pocket, as is more often the case, the ability to get full mental health support is inhibited by section 649 of the *Criminal Code*. Section 649 codifies what is known as the jury secrecy rule. The jury secrecy rule prohibits jurors from disclosing what took place during the jury deliberation process *for life*. Failing to do so is a *Criminal Code* offence punishable by summary conviction.

The jury deliberation process is often one of the most stressful, if not the most stressful aspect of jury service. During the deliberation process jurors are sequestered with eleven other strangers and expected to methodically review the evidence, however difficult, apply the law to the facts of the case and together reach a consensus on a verdict. Dr. Sonia Chopra, a psychologist who did her dissertation on the experience of stress among Canadian jurors, found that seven of the top ten jury stressors relate to reaching a verdict and the jury deliberation process. Clearly, being unable to talk about one of the most stressful aspects of jury service, for life, is an inhibiter to getting full mental health treatment and support. The jury secrecy rule can also sometimes make it more difficult for jurors to seek help. Some mental health professionals are reluctant to provide services to former jurors, because they are uncertain as to what they can and can't discuss.

It is unacceptable that former jurors are unable to get the full support they need. At the same time, there are important reasons for the jury secrecy rule. These include the sanctity of the deliberation process, the finality of a verdict, and the protection of the privacy of jurors.

> *"With significant responsibility comes significant stress for many jurors, including being exposed to distrubing evidence."*

A solution to this seeming conundrum is my Private Members' Bill C-417. It would provide a narrow exception to the jury secrecy rule, while maintaining the integrity of the rule. More specifically, it would authorize former jurors who are seeking mental health treatment arising from their jury service to disclose their experiences from the jury deliberation process to a mental health professional who is bound

by rules of confidentiality once the trial is concluded. That the exception would only apply post-trial, in a completely confidential setting, ensures the protection of the rationales underlying the jury secrecy rule. This narrow exception has been successfully implemented in the Australian State of Victoria since 2000. Moreover, my Bill is consistent with a key recommendation of the unanimous Justice Committee report on juror supports: *Improving Support for Jurors in Canada*.

> *"The jury secrecy rule prohibits jurors from disclosing what took place during the jury deliberation process for life. Failing to do so is a Criminal Code offence punishable by summary conviction."*

Bill C-417 would bring about a practical, minor amendment to the *Criminal Code* that will go a long way towards helping jurors get the help they need. Several high-profile trials scheduled to soon take place that most certainly involve disturbing evidence, including that of accused serial killer Bruce McArthur, the accused in the Toronto van attack, and the Edward Downey trial currently taking place in Calgary, speak to the urgent need for this reform.

I am pleased that the Bill has been well-received across party lines. Murray Rankin, the NDP Justice Critic, is the seconder of the Bill. Several Liberal MPs are co-seconders, and Liberal MP Anthony Housefather, the Chair of the Justice Committee, has voiced his support. This, after all, is a non-partisan issue. It is about trying to do right for those men and women who are suffering, only because they did their civic duty and served on a jury.

Jurors play an integral role in the administration of justice in Canada, often at a significant personal sacrifice. Every effort should be made to lessen the personal burden placed upon them. Bill C-417 is one small but important measure that will help.◆

Michael Cooper is the Member of Parliament for St. Albert-Edmonton. He is the Official Opposition Deputy Shadow Minister of Justice and Vice-Chair of the House of Commons Standing Committee on Justice and Human Rights.

Special Report:

Emergencies and the Law

The Evolution of the *War Measures Act*

Marjun Parcasio

Marjun Parcasio is an associate practicing in international arbitration and business and human rights at Hogan Lovells International LLP in London, England.

"*We are living in extraordinary times*," opined Anglin J in *Re Gray* (1918) 57 SCR 150, "*which necessitate the taking of extraordinary measures*." It was 1918, the final year of the First World War, and the extraordinary measures at issue were powers exercised by the government pursuant to the federal *War Measures Act, 1914* (5 George V, c. 2) cancelling Mr. Gray's exemption from military service and resulting in his arrest for refusing to report for duty. The *War Measures Act* set out Canada's initial legislative framework on emergencies, and Mr. Gray found himself unsuccessful challenging the government's exercise of the sweeping powers granted under the *Act*. Despite its generally limited use, the *War Measures Act*'s invocation over the years has been highly controversial and reflects some of the darker episodes in Canadian history.

The *War Measures Act*

By virtue of Canada's status as a dominion in the British Empire, Great Britain's entry into the war on August 4, 1914 also resulted in a state of war existing between Canada and Germany. Within weeks, the *War Measures Act* passed quickly through Parliament with widespread support and was adopted on August 22, 1914. The Act applied "*during war, invasion, or insurrection, real or apprehended*" and the powers it conferred on the government (via the authority of the Governor in Council) were incredibly wide in scope. Section 6 of the *Act* gave the government the power to:

> "*[…] do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace order and welfare of Canada.*"

> "*…the history of the War Measures Act illustrates the dangers of having unfettered and unchecked executive power and derogation from the constitutional order.*"

Canadian Forces stands guard in downtown Montreal. (Image: Montreal Gazette October 18, 1970)

This included, but was not limited to:

- censorship of publications;
- arrest, detention and deportation of individuals; and
- appropriation of property.

In just a couple of short paragraphs, the *Act* delegated powers normally exercised by the federal Parliament, with all its in-built means of scrutiny and review, to the executive, or cabinet. It also affected the constitutional division of powers between the federal and provincial branches of government: certain enumerated powers (such property and civil rights) within the purview of the provinces were effectively transferred to the federal government. This concentration of power resulted in what some term a "constitutional dictatorship" for the period during which the state of emergency continued to exist.

The *Act* has been invoked three times in Canadian history: during the First World War, the Second World War, and the October Crisis in 1970. The wartime measures took their toll on civil liberties, with widespread censorship of the media and written publications and the arrest and detention of individuals without due process. Perhaps the most capricious and arbitrary exercise of the powers under the *Act* was the treatment of suspected "enemy aliens" and the suspension of *habeas corpus*. During the First World War, the government targeted "enemy aliens", among which were thousands of Ukrainian descent who, having moved to Canada to find work and build a new life, were interned in camps and forced to work on labour projects across the country. Others hailed from other parts of the German and Austro-Hungarian empires and were similarly detained.

> *"The extensive powers under the War Measures Act were significantly curtailed in 1988 when the War Measures Act was repealed and replaced by the Emergencies Act, which remains in force to this day."*

Conditions during the Second World War were no better. The federal government passed the *Defence of Canada Regulations* in 1939 pursuant to the *War Measures Act*, which led to restrictions on free speech and the detention of those who were considered to act "*in any manner prejudicial to the public safety or the safety of the state.*" Notably, Japanese immigrants became a particular target with the breakout of war on the Pacific front. Their property was confiscated, expelled from their homes and forcibly relocated to

internment camps. Despite being Canadian citizens, a significant number were deported to Japan.

The exercise of a number of these wartime powers was challenged in the courts. However, in successive decisions (*Chemicals Reference* [1943] SCR 1; *Reference Re Persons of Japanese Race* [1950] SCR 124), the Supreme Court of Canada determined that the government's actions were *intra vires*, or within its powers. In the *Chemicals Reference,* the Court considered that the *War Measures Act* effectively provided the executive branch of government with law-making powers equivalent to the authority vested in Parliament. When the *Japanese Persons Reference* was appealed to the Judicial Committee of the Privy Council, Lord Wright considered that in a state of emergency:

> *"[t]he interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge" (Co-operative Committee on Japanese Canadians v Attorney-General for Canada [1947] AC 87 at 102).*

Therefore, in the view of their Lordships, the government, to whom Parliament had delegated its powers, had significantly wide latitude in the measures it chose to take and, as a matter of statutory construction of the *Act*, this included the power to deport individuals (even of Canadian or British nationality) or strip them of their status.

The final use of the *War Measures Act* was also highly controversial, not least because it was invoked during peacetime. On October 5, 1970, the British Minister of Trade James Cross was kidnapped by the *Front de libération du Quebec* (FLQ), a radical separatist group. A few days later on October 10, Pierre Laporte, the Deputy Premier of Quebec was also kidnapped and subsequently killed. At the request of the Premier of Quebec, the federal government led by Prime Minister Pierre Elliott Trudeau invoked the *War Measures Act* on the grounds of an "apprehended insurrection". This resulted in the subsequent arrest of hundreds of individuals, from suspected FLQ members, to students, union members, and many others. Perhaps one of the immortal moments of Canadian political history was born from the affair. Tim Ralfe, a CBC reporter, asked the Prime Minister how far he would go to keep law and order in society in response to the FLQ's threats, to which Prime Minister Pierre Elliott Trudeau responded: "Well, just watch me."

> *"Notably, Japanese immigrants became a particular target with the breakout of war on the Pacific front."*

The *Emergencies Act*

The extensive powers under the *War Measures Act* were significantly curtailed in 1988 when the *War Measures Act* was repealed and replaced by the *Emergencies Act*, which remains in force to this day. Unlike its predecessor, the *Emergencies Act* contemplates a greater degree of parliamentary supervision over a declaration of a state of emergency and the ability for Parliament to revoke or extend any such declaration. It is also more prescriptive, with four categories of emergency identified:

1. public welfare;
2. public order;
3. international emergencies; and
4. war emergencies

and includes an express provision for compensation.

> *"At the request of the Premier of Quebec, the federal government led by Prime Minister Pierre Elliott Trudeau invoked the War Measures Act on the grounds of an "apprehended insurrection."*

Significantly, the preamble of the *Emergencies Act* suggests that any measures are made subject to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. In this respect, the executive will need to consider whether a suspension of civil rights using powers granted under the *Emergencies Act* would be reasonable and justified in accordance with s. 1 of the *Charter*. In addition to the domestic human rights instruments, the *Emergencies Act* also makes reference to the *International Covenant on Civil and Political Rights* (*ICCPR*), which Canada ratified in 1976. The *ICCPR* itself does recognize that states can, in some instances of emergency, derogate from their treaty obligations, although there are certain "non-derogable rights", for instance, the right to life, freedom from torture, and freedom from slavery and servitude.

Use of the *Emergencies Act* is still to be tested and it remains to be seen how any future government will operate within its provisions, and what impact the reference to these human rights instruments (which are not operative provisions but are merely included in the preamble) will have when measures taken under the Act inevitably become subject to judicial scrutiny.

> *"This concentration of power resulted in what some term a "constitutional dictatorship" for the period during which the state of emergency continued to exist."*

Conclusion

The modern world faces new threats beyond war and insurrection: there is the ever-pressing danger of climate change, threats from cyberspace, home-grown and international terrorism, and economic depression, all of which may well trigger the need for emergency measures in the future. While there is no doubt that some sort of dispensation of the usual order is required in times of emergency, the history of the *War Measures Act* illustrates the dangers of having unfettered and unchecked executive power and derogation from the constitutional order. To what extent must the interests of the individual submit to the collective interests of the nation? How far do we go in the name of national security and to restore order and peace? These are quintessential dilemmas for any modern state, and the lessons learned from the history of the *War Measures Act* will certainly need to be considered in developing answers to these questions.◆

The *Emergency Medical Aid Act* and Emergency Situations

Donna L. Gee

The New Testament story of the *Good Samaritan* is familiar to most people with even a basic knowledge of Christian teachings. Briefly, Jesus is reputed to have been asked "who is my neighbour?" In other words, give us an example of what would constitute an act of compassion for a stranger in trouble. So, Jesus told a story about a man who was mugged and left for dead at roadside. A priest passed by without lending a hand, then a Levite passed, ignoring the badly hurt man. Finally, a Samaritan (a member of a group who in Jesus's time was ostracized by many) happened along, tended to the victim's wounds and paid for his shelter while he was recuperating at a nearby inn.

In modern legal terms, the question to be asked is not "who is my neighbour"? Instead, the legal question to be asked is do we owe a duty of care to give assistance to strangers in distress? For many of us, there's a natural tendency to help somebody in distress, whether we come upon somebody who has collapsed on a sidewalk or we come upon a car accident.

The question of whether there should be a legal duty to assist strangers in trouble has been the occasional source of debate among legal scholars over the years. However, generally throughout the parts of the world that have been influenced by or that have adopted the British common law tradition, so-called *Good Samaritan Law* has fallen short of legislating a positive legal duty to help strangers in distress. However, if people do render aid to strangers suffering a medical emergency or some sort of injury, there is some degree of protection in law. In Alberta, the actions of people who voluntarily help strangers in distress fall under the *Emergency Medical Aid Act*, R.S.A. 2000, c. E-7 (the Act).

The Act divides people who voluntarily help others in distress into four groups:

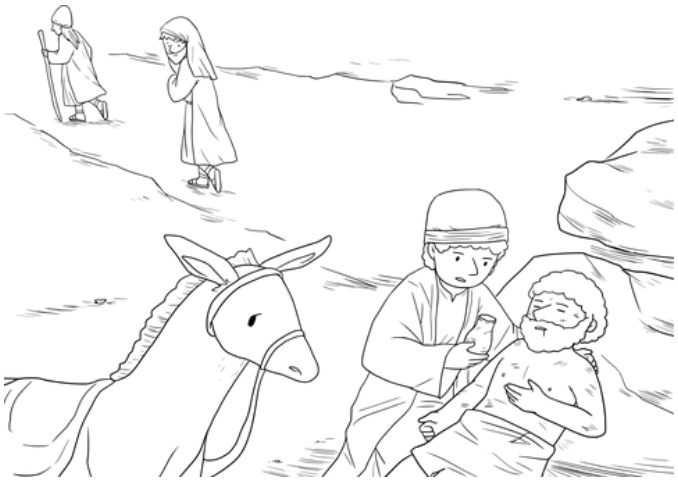
> *"...tort law professors and lawyers practising tort law may occasionally engage in debate about whether there should be a legally mandated, postitive duty to render aid to strangers in distress."*

- physicians;
- registered health discipline members (e.g. licensed practical nurses, midwives or paramedics;
- registered nurses; and
- everyone else who is not a member of the first three groups.

According to section 2 of the Act, anyone, whether they are a member of the first three groups of health care professionals or simply a concerned person with no health care background, would not be held liable for any subsequent harm or death of a person in medical distress to whom voluntary assistance was given. However, there is an exception. If it could be proven that the subsequent harm or death resulted from the gross negligence of the person providing voluntary aid, then the Act will not absolve the person of liability.

> *"In practical terms, the diligent nurse or other health care professional should always be cognizant that their greater knowledge and vaster skills set might mean their actions in a voluntary emergency aid situation would come under greater scrutiny."*

Unfortunately, the Act does not define what omission of action or action would constitute gross negligence. Nor does a search for "gross negligence" and "good Samaritan" of an online resource such as *CanLII* yield cases where the courts have had to adjudicate on emergency or crisis situations where strangers gave voluntary assistance to persons in medical distress.



That said, from numerous decisions arising in the context of contractual disputes and tort law cases generally, the following definitions of "gross negligence" have emerged:

- very great negligence;
- an obvious departure from the applicable standard of care;
- the doing of some act in such a careless fashion that willfulness may be imputed to the negligence as opposed to simply not doing something; or
- an act or series of acts so egregious that a total lack of care for the consequences can be imputed.

A plain reading of the Act would suggest that everyone, regardless of whether they be a registered nurse, other health care professional, or layperson would be held to the same standard of care. In practical terms, the diligent nurse or other health care professional should always be cognizant that their greater knowledge and vaster skills set might mean their actions in a voluntary emergency aid situation would come under greater scrutiny.

For example, registered nurses in Alberta have a professional duty in accordance with section 1 (Professional Responsibility) of

the College and Association of Registered Nurses of Alberta (CARNA) *Nursing Practice Standards* to be accountable at all times for their actions and to conduct themselves in accordance with all current legislation relevant to their profession. Such knowledge includes awareness of legislation ancillary to their profession, which would arguably include the *Emergency Medical Act*, or the "Good Samaritan Law" as it is more colloquially known.

> *"However, if people do render aid to strangers suffering a medical emergency or some sort of injury, there is some degree of protection in law."*

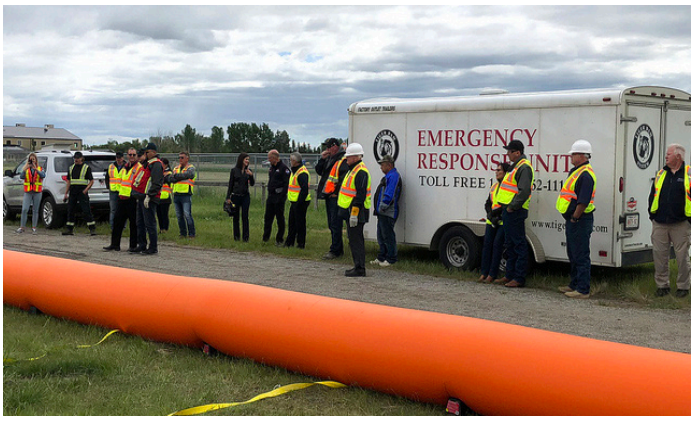
In conclusion, tort law professors and lawyers practising tort law may occasionally engage in debate about whether there should be a legally mandated, positive duty to render aid to strangers in distress. Those same law professors and lawyers may also engage in conjecture about whether despite what the "Good Samaritan Law" says, registered nurses (and other health care professionals) could or should in fact be held to a higher standard in rendering emergency aid when they are on their own time away from the job. The safe and practical recommendation would be that when a nurse or other health care professional happens upon the scene of an emergency or crisis where somebody is in medical distress, they should act as their professional codes require them to do, but also act with all the diligence that is demanded of them by their respective professions.◆

Please note this article provides general information only so does not constitute legal advice.

Donna L. Gee is the Managing Partner of Guardian Law Group, LLP a Calgary based law firm. Her preferred areas of practice include Elder Law; Wills, Estate and Estate Law; and Guardianship and Trusteeship matters. She is also past president of the Canadian Bar Association National Elder Law section.

Updated Rules Protect Albertans from Disaster

Government of Alberta



The *Emergency Management Amendment Act* is now in effect, providing communities with an easy reference as they develop and refine their emergency management plans and programs.

> *"We have all seen the number and severity of disasters increase over the years – and every time a major event happens, we learn from it. By updating our legislation, we are applying what we have learned and are working with municipalities to help them better prepare for disasters and keep Albertans safe."*
>
> *Shaye Anderson, Minister of Municipal Affairs*

Changes to the act also allow for the addition of the Local Authority Emergency Management Regulation.

The regulation will come into force Jan. 1, 2020 to give municipalities sufficient time to implement. The regulation will ensure:

- Municipalities have up-to-date emergency plans and programs that are regularly reviewed and exercised.
- Elected officials and municipal employees are trained for their roles and understand their responsibilities.
- Responsibilities and functions of municipal emergency advisory committees and emergency management agencies are clear.
- Regional collaboration agreements with other municipalities are clear.

> *"The update to the* Emergency Management Act *and addition of the Local Authority Emergency Management Regulation not only demonstrate the importance of emergency management in Alberta, but also support all municipalities by providing a clear and objective set of requirements to assist in ensuring we continually strive to improve our internal processes."*
>
> Merrick Brown, Director, Health, Safety, Environment & Emergency Management, City of Medicine Hat

Over the summer, the government engaged with 92 municipalities and five organizations to gather input that helped inform the new regulation. First responders, local elected officials, municipal directors of emergency management, Metis Settlements and First Nations all participated

in the discussions. The resulting feedback has been issued in a report that is now available online.

Minister Anderson announced the amendments and the addition of the regulation at the Alberta Emergency Management Agency Summit on Dec. 5. The summit brings together emergency management partners from across Alberta to help strengthen and build relationships and offer opportunities for professional development.

The *Emergency Management Amendment Act* was introduced in April 2018. It was passed on Nov. 1 and came into force on Nov. 19.

Related information

- Emergency management legislation
- Report Back: Alberta Emergency Management Framework Review (PDF) ◆

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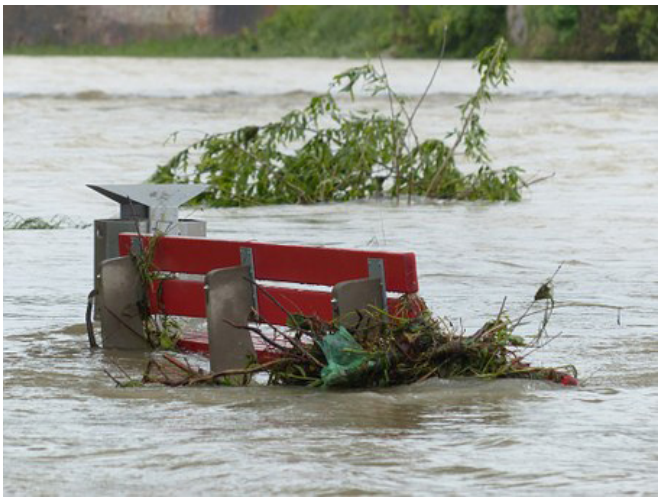
Liability of Volunteers in Natural Disaster Emergencies



Peter Bowal, Lila Swiatylo and Kristen Leinweber

Peter Bowal is a Professor of Law at the Haskayne School of Business, University of Calgary in Calgary, Alberta. Lila Swiatylo recently earned a B.Comm from the University of Calgary. Kristen Leinweber is currently a business student at the University of Calgary.

Introduction

Alberta has recently suffered several sudden, prominent, ruinous natural calamities: the 2012 wildfires in Slave Lake, the 2013 flood in southern Alberta, and the 2016 wildfire in Fort McMurray. The 2013 flood affected hundreds of thousands of people and took five lives. It is the most costly natural disaster in Canadian history with damages estimated at $6 billion. Provincial and federal governments leapt to the rescue. Military units were deployed, in addition to the Canadian Red Cross and many other civilian rescue organizations.

In Calgary alone, 2,500 volunteers joined in, some of whom were injured during the recovery. Three volunteers suffered chemical burns, were transported to hospital and were later billed for the ambulance ride. Alberta Health Services eventually decided not to bill any volunteers whose injury resulted from their participation in the flood cleanup, even without any formal policy to exempt them.

> *"Only Nova Scotia's Volunteer Protection Act sets out the roles and responsibilities of volunteers."*

This article identifies some of the legal issues and laws pertaining to volunteers who serve in disaster relief efforts.

First Responders

Natural disasters are managed first at the local level by first responders such as medical professionals and hospitals, fire departments, the police, and municipalities. They

are responsible for the protection and preservation of life, property, evidence and the environment. They are police officers, firefighters, military personnel, paramedics, medical evacuation pilots, dispatchers, nurses, doctors, emergency medical technicians and emergency managers. Physicians and other first responders benefit from explicit legislation that protects them from liability for negligence in their rescue work.

Legal Issues Facing Volunteers in Natural Emergencies

> *"Injuries incurred by volunteers, especially if unfit and unprepared, can lead - in addition to mental and physical health issues - to loss of income. Compensation coverage varies across the country."*

Who is a Volunteer?

The common law does not specifically define volunteers. The British Columbia *Emergency Program Act* requires a legally protected volunteer to be "registered by a local authority or the Provincial Emergency Program for the purpose of responding to a disaster or an emergency" [s. 1(1)]. This specifically includes these pre-registered "volunteers" in the class of persons who are protected from general liability in ordinary negligence while acting in good faith. Other "Good Samaritan" legislation, discussed below, does not specifically name volunteers as coming within this exemption from liability but they would most often be included in it.

Volunteers, by definition, do not receive any remuneration from an organization for their work. They are not employees. A prepared volunteer may work without compensation for a non-profit organization. Spontaneous volunteers assist in an emergency unaffiliated with any organization.

Inadequate Training and Protective Equipment

When natural disasters strike, the call for help goes out and volunteers are pressed into service of all kinds while professional first responders focus on tasks that demand their expertise. Volunteers bring varied levels of skill and care to the field. They act outside the scope of an organization which would be legally responsible for proper training, personal safety and protective equipment.

Occupational Health and Safety and Workers' Compensation

Injuries incurred by volunteers, especially if unfit and unprepared, can lead – in addition to mental and physical health issues – to loss of income. Compensation coverage varies across the country. Unlike Ontario, which specifically excludes volunteers from coverage under Occupational Health and Safety legislation, some jurisdictions (Alberta, Northwest Territories, Nunavut and Quebec) include volunteers in coverage. Under Alberta OHS legislation, a volunteer is considered a covered worker if the organization requests the volunteer's participation, the organization organizes the volunteer's activities and the volunteer provides a service to the organization.

Workers' compensation is equally inconsistent across jurisdictions because coverage for non-profit activities is defined by various exclusions and inclusions. In

Alberta, volunteer firefighters are deemed "part-time firefighters" and they can be eligible for compensation.

General Emergency Legislation

Under Alberta's *Emergency Management Act*, once a state of emergency has been declared, the province may delegate powers and implement emergency plans. This legislation defines roles, regulations for ministers and municipalities as well as liability protection for emergency service providers. It does not deal with volunteers, or whether they qualify as "acting under the local authority's direction or authorization (s. 28)" or "acting under the direction or authorization of [a search and rescue organization] (s. 29)."

Only Nova Scotia's *Volunteer Protection Act* sets out the roles and responsibilities of volunteers.

> *"When natural disasters strike, the call for help goes out and volunteers are pressed into service of all kinds while professional first responders focus on tasks that demand their expertise."*

Good Samaritan Legislation

Canadian law does not require people to render emergency assistance to others, but it encourages them to do so through what are known as "Good Samaritan" statutes. These laws excuse volunteers who intervene in good faith even if their acts are negligent and cause injury to others. These statutes may actually be called Good Samaritan Acts (as in British Columbia and Quebec) or something else, such as the *Emergency Medical Aid Act* in Alberta. Overall, these Good Samaritan Acts provide relief from liability when volunteers assist victims in emergency situations, but they do not protect volunteers from their gross negligence.

Negligence

If volunteers are not protected by Good Samaritan legislation, they will be subject to the laws around duty of care and negligence. Liability is also measured on the basis of foreseeability and remoteness and the likely outcome if the volunteer had not acted. Volunteers helping in disaster zones may be assuming the ordinary risks involved with the recovery activity.

Criminal Negligence

A voluntary organization and its management may be subject to criminal liability under section 217.1 of the *Criminal Code*:

> *"Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."*

Insurance

Disasters are problematic for insurance providers because their unpredictable, significant, and concentrated losses make it difficult to spread risk. Accordingly, private insurers usually exclude coverage for disasters.

On the side of rescue, first responders such as paramedics require insurance based on their occupation. Disaster volunteers,

by contrast, who suffer harm or loss in rescue and recovery efforts may obtain compensation from those legally responsible for their injuries. An organizational or the individual personal insurance policy may also cover such injuries.

Conclusion

Every province manages disasters differently. Many issues involving volunteer liability are resolved in a small claims court or through insurance companies so they are not reported publicly.

While non-profit organizations and governments want to encourage volunteers to help others in need during a natural disaster, there is no coherent law that deals with volunteers.◆

BenchPress

Teresa Mitchell

The Supreme Court of Canada has released a number of interesting cases over the last few months. This issue of BenchPress will look at four of them. Two are of national significance, and two reveal the profoundly personal situations that cause Canadians to access the justice system

A Deal is a Deal

The provinces of Quebec and Newfoundland and Labrador have been fighting over the terms of the Churchill Falls hydroelectric plant since they first contracted to build and operate it in 1969. The deal allowed Hydro-Quebec to buy electricity at a fixed rate for the 65-year duration of the contract, in return for promising to buy the electricity whether it needed it or not. After the contract was completed, the market price of electricity dropped well below the price set in the contract. Hydro- Quebec now buys electricity from Churchill Falls and sells it for a substantial profit. Newfoundland and Labrador asked the Court for an order allowing it to renegotiate the contract and adjust the price of the electricity. The Supreme Court of Canada rejected the appeal. The majority ruled that Hydro-Quebec did not have a duty to renegotiate the contract once it was clear that it was receiving an unanticipated, substantial profit. The Court concluded that it could not change the contents of the contract, require the parties to renegotiate it, or to share its benefits. It stated that the doctrine of unforeseeability, which could allow for a contract to be renegotiated if its terms become excessively onerous for one party, did not apply in this case. The doctrine is not a part of the Quebec *Civil Code,* and, in any event, the circumstances of this case did not allow for its limited use. The Court also dismissed suggestion that Hydro-Quebec was under obligations of good faith and equity to renegotiate. The Court wrote: "Hydro-Quebec is not breaching its duty of good faith in exercising its right to purchase electricity from Churchill Falls at fixed prices. Nor does its insistence on adhering to the contract despite the unforeseen change of circumstances constitute unreasonable conduct."

Churchill Falls (Labrador) Corp . v. Hydro-Quebec, 2018 SCC 46
http://canlii.ca/t/hvw0n

Teenage Tragedy from Joyriding

Two teenaged boys, who had been drinking and smoking marijuana, went looking for cars to break into. They found an unlocked car at a service garage and discovered the ignition key in the ashtray. One boy, who had never driven a car before, decided to steal the car and drive to the next town. He crashed the car and his companion suffered catastrophic brain damage. At trial, a jury found the driver, the driver's mother and the service garage liable in negligence. The garage appealed, arguing that it did not owe a duty of care to the injured plaintiff. The Court noted, perhaps wryly: "There is no clear guidance in Canadian case law on whether a business owns a duty of care to someone who is injured following the theft of a vehicle from its premises." It stated, however, that "… the notion that illegal or immoral conduct by a plaintiff precludes the existence of a duty of care has consistently been rejected by the Court. Whether the personal injury caused by unsafe driving of a stolen car is suffered by a thief or a third party makes no analytical difference to the duty of care analysis." The majority concluded that, upon analysis of the evidence, the plaintiff did not prove a duty of care on the part of the garage. While it was reasonably foreseeable for the garage to anticipate the theft of a car, the risk of theft in general did not automatically include the risk of theft by minors or the risk that negligent operation of the stolen vehicle would result in physical injury. It concluded: "A business will only owe a duty to someone who is injured following the theft of a vehicle when, in addition to theft, the unsafe operation of the stolen vehicle was reasonably foreseeable." The Court ruled that the garage was not liable for the injuries to the plaintiff.

Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19 (CanLII) http://canlii.ca/t/hrxsd

The Holy Grail of a National Securities Regime

Many a Canadian Attorney General and Minister of Finance has sought to establish a national framework for a capital markets regulatory system. Canada is one of the few developed countries that does not have a national securities regulator. Currently, each province and territory has its own regime. Some provinces, notably Quebec and Alberta, have resisted a national system, arguing that it would transgress on provincial powers.

The system currently being proposed consists of a "Model Provincial Act", which covers the day-to-day aspects of the securities trade, a "Draft Federal Act", aimed at preventing and managing risk within the system, and establishing criminal offences relating to financial markets, and a national securities regulator (the Authority") to administer the regime. The Authority and its Board of Directors will operate under the supervision of a Council of Ministers, which will be made up of the provincial ministers responsible for capital markets regulation for participating provinces and the federal Minister of Finance.

The proposal was referred to the Supreme Court of Canada, which released its opinion this fall. It concluded:

1. It is within the powers of the *Constitution* for the Government of Canada to establish a pan-Canadian securities regulation under the authority of a single regulator;

2. The proposed Draft *Federal Act* falls within Parliament's trade and

commerce power pursuant to s. 91(2) of the *Constitution Act*.

The Court wrote: "With respect to the classification of the Draft Federal Act, the ultimate question in this case is whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole, in a way that is distinct and different from provincial concerns. …the Draft Federal Act does address a matter of genuine national importance and scope relating to trade as a whole, and it therefore falls within Parliament's general trade and commerce power under s. 91(2) of *the Constitution Act 1867*. The preservation of the integrity and stability of the Canadian economy quite clearly has a national dimension, and one which lies beyond provincial competence."

The Court also set out the protections in the plan for provincial sovereignty. Neither model Acts have any force of law until they are properly enacted by provincial legislation. Any proposals to amend the Model Provincial Act are subject to a vote and must be approved by at least 50% of the members of the Council of Ministers.

Reference re Pan-Canadian Securities Regulation, 2018 SCC 48
http://canlii.ca/t/hw0hz

The "Ex" and the Widow

The Supreme Court of Canada had to decide recently who should receive the benefit of a life insurance policy: the deceased policy holder's spouse or his ex-wife. The deceased, Larry Moore, took out a life insurance policy while married to Michelle Moore. They divorced in 2003 but Michelle continued to pay the policy premiums until Larry's death in 2013. She maintained that they had a verbal contract that she would remain the beneficiary of the policy and the proceeds would be used to help support their children. However, unbeknownst to her, shortly after Larry began to live with Risa Sweet, he named her the irrevocable beneficiary under the policy. After Larry's death a dispute arose between Ms. Moore and Ms. Sweet over who should receive the $250,000 insurance payment. Ms. Sweet argued that she was the irrevocable beneficiary and should receive the money. Ms. Moore argued that this would amount to an "unjust enrichment" for Ms. Sweet.

The majority of the Supreme Court ruled in favour of Ms. Moore. It stated that a plaintiff will establish unjust enrichment when:

- the defendant was enriched;
- the plaintiff suffered a corresponding loss; and
- There was no legal reason to justify the defendant's enrichment and the plaintiff's loss.

The majority ruled that Ms. Sweet was clearly enriched by receiving the insurance proceeds and that her enrichment came at Ms. Moore's expense. It further ruled that there was no reason in law to justify Ms. Sweet's enrichment. The *Insurance Act* of Ontario does not prohibit a claim for unjust enrichment from succeeding against an irrevocably designated beneficiary. The majority decided that Ms. Moore should receive the money. It ruled that it was Ms. Moore's payment of the premiums that kept the life insurance policy in effect and that Ms. Sweet's claim to the proceeds was only possible because of those payments.◆

Michelle Constance Moore v. Risa Lorraine Sweet, 2018 SCC 52
http://canlii.ca/t/hw6vr

Columns

Post Jordan Mentality vs. Humanity: Who Wins?

Melody Izadi

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

After the Supreme Court of Canada's ruling in *R. v Jordan,* 2016 SCC 27, which clarifies and streamlines the *Charter of Rights and Freedoms* delay of proceedings applications pursuant to section 11(b), "*Jordan* issues" in the courtroom are still alive as ever. Crown Attorneys, judges and court staff all have instituted protocol, mandates, better practices and directives to ensure the swift movement of matters through our criminal justice system.

However, if you are a defence counsel, beware. Each and every request for time to accomplish tasks on a file, even when reasonable, is often met with aggressive opposition from the Crown Attorney and/or a grand inquisition by the presiding jurist. But what can ya do? Everyone is doing their respective jobs. Everyone has to protect the court record by clearly suggesting or declaring whose fault it is for the "delay."

> *"What we all need is a deep breath, and a moment of reflection before offensively and unnecessarily attacking our colleagues when serious personal issues are brought to the attention of the court."*

What is in issue is when the interest of justice— and the stern cautions from the Supreme Court in *Jordan*— trump the humane treatment of circumstances beyond the control of the defence. Yes, we all have a job to do and a court record to protect, but have we lost our humanity all together when defence counsel's request to adjourn a matter due to the tragic and unexpected death of loved one is opposed? Yes, we have a duty to protect the record, but don't we also have a duty to respect and dignify the tragedy of our learned colleagues— *as humans*?

I would fathom a guess that, in the name of justice, the Supreme Court of Canada in *Jordan* was not instructing the judiciary to give defence counsel's student a hard time when they attended to adjourn a trial date because the defence counsel was in a coma. I would fathom a guess that the

Supreme Court of Canada in *Jordan* was not instructing Crown Attorneys to oppose the adjournment request of a colleague who had to undergo surgery unexpectedly on the date of the trial for serious medical reasons. I would fathom a guess that the Supreme Court of Canada in *Jordan* was not instructing judges to cross-examine defence counsel on who died, and how affected they are by that recent death in order to substantiate the adjournment request.

The irony is that in those cases, should an accused's delay rights come into issue, what would the defence counsel say? I was in a coma therefore my client's rights were breached because I couldn't conduct a trial? I had to attend a funeral but the Crown is responsible for the new trial date? I was in a hospital having my appendix removed, therefore it's the Court's fault that my client had to reschedule the trial date?

It appears as though we have all lost a piece of our souls in this post-*Jordan* hysteria. The illogical and offensive questions into defence counsels' personal lives— at a time when they are dealing with personal hardship or tragedy— is unwarranted. We need not trade in our humanity in order to satisfy the direction of the *Jordan* decision by the Supreme Court. Rather, a respectful and personal approach should be taken when requests are made that involve serious and personal reasons. The disclosure of that highly personal information by defence counsel should be sufficient to warrant the necessity of an adjournment request, especially since we too are officers of the court. The nature of that information should be respected and considered, instead of discounted and qualified.

What we all need is a deep breath, and a moment of reflection before offensively and unnecessarily attacking our colleagues when serious personal issues are brought to the attention of the court. Reprimanding defence counsel or inquiring into the nature of their relationship when someone in their life has passed away brings justice to no one. Rather, it clouds our criminal justice system with the smog of inhumanity, and indignity: two words that should never be used to describe our system of justice. ◆

A Year of Holidays

Peter Bowal and Dustin Bodnar

Introduction

The Christmas and New Year holiday season is a good time to reflect generally on work and legally enforced rest. This article is about the law of holidays, the legislated observance, and payment of holidays by employers across the country for the benefit of their workers.

There is substantial overlap of holidays in Canada. But you may be surprised by some of the regional variations.

Nationally Recognized Holidays

There are five national holidays – New Year's Day, Good Friday (in Quebec employers can offer Easter Monday instead), Canada Day ("Memorial Day" in Newfoundland and Labrador), Labour Day and Christmas Day.

Beyond these five common holidays, each province and territory, as well as the federal sector, has its own distinctive set of statutory holidays. This table summarizes the respective provincial and territorial employment standards legislation.

Not all statutory holidays are employer-paid days off. Just as each jurisdiction has its own holidays, they each have their own criteria for holiday pay eligibility. In addition to the standard five national holidays, the federal *Canada Labour Code* sets apart Victoria Day (the Monday preceding May 25), Thanksgiving Day (second Monday of October), Remembrance Day and Boxing Day.

> *"Not all statutory holidays are employer-paid days off. Just as each jurisdiction has its own holidays, they each have their own criteria for holiday pay eligibility."*

The Atlantic provinces mandate the fewest public holidays – two in addition to the five national holidays, and no Thanksgiving Day. However, these provinces also allow optional holidays that employers usually grant. For example,

Observed Holiday / Canadian Region	Christmas Day	Boxing Day	New Year's Day	Family Day	Good Friday	Victoria Day	Canada Day	Labour Day	Thanksgiving Day	Easter Monday	Remembrance Day
British Columbia	☑	X	☑	☑	☑	☑	☑	☑	☑	X	☑
Alberta	☑	X	☑	☑	☑	☑	☑	☑	☑	X	☑
Saskatchewan	☑	X	☑	☑	☑	☑	☑	☑	☑	X	☑
Manitoba	☑	X	☑	X	☑	☑	☑	☑	☑	X	X
Ontario	☑	☑	☑	☑	☑	☑	☑	☑	☑	X	X
Quebec	☑	☑	☑	X	☑	X	☑	☑	☑	☑	X
Nova Scotia	☑	X	☑	X	☑	X	☑	☑	X	X	X
New Brunswick	☑	X	☑	☑	☑	X	☑	☑	X	X	☑
Prince Edward Island	☑	X	☑	X	☑	X	☑	☑	X	X	☑
Newfoundland & Labrador	☑	X	☑	X	☑	X	X	☑	X	X	☑
Yukon	☑	X	☑	X	☑	☑	☑	☑	☑	X	☑
Northwest Territories	☑	X	☑	X	☑	☑	☑	☑	☑	X	☑
Nunavut	☑	X	☑	X	☑	X	☑	☑	☑	X	☑

in Newfoundland and Labrador, St. Patrick's Day, St. George's Day, Discovery Day and Orangemen's Day are observed, but not legislated. By contrast, British Columbia, Saskatchewan, Yukon, Quebec, and the North West Territories all have the highest number of paid statutory holidays; namely ten.

Observed Holiday / Canadian Region	*PROVINCE TOTAL*
British Columbia	10
Alberta	9
Saskatchewan	10
Manitoba	8
Ontario	9
Quebec	10
Nova Scotia	6
New Brunswick	8
Prince Edward Island	7
Newfoundland & Labrador	6
Yukon	10
Northwest Territories	10
Nunavut	9

Remembrance Day is a statutory holiday everywhere except in Ontario and Quebec, but these places enjoy Boxing Day. Family Day, the third Monday in February, has caught on in six provinces. Victoria Day in Quebec is called National Patriots Day. Civic holidays are often named after the province or heritage and are set in August. Overall, some twenty four unique public holidays are observed each year in Canada.

Holiday Entitlements

Not all statutory holidays are employer-paid days off. Just as each jurisdiction has its own holidays, they each have their own criteria for holiday pay eligibility. Generally, all jurisdictions require employees, in order to be eligible for holiday pay, to have been in employment and performed work before and after the holiday, although these details vary widely.

Mostly, employers are obligated to pay workers the average daily wage for the holiday. This is also spelled out in more detail. In British Columbia, the legislation states that employees get holiday pay equaling their total wages earned in the last 30 days divided by the number of days the employee worked in that time period. In Alberta, employees working solely on commission receive holiday pay equal to minimum wage for the day. In Saskatchewan, holiday pay is calculated as equaling 5% of the employees total wages earned in the four weeks preceding the holiday.

While statutory holidays offer most employees a break, many employees will still have to work. In most provinces and territories, an employee who works on a statutory holiday receives 1½ times the

Observed Holiday / Canadian Region	Memorial Day	British Columbia Day	Saskatchewan Day	Louis Riel Day	Saint Jean-Baptiste Day	All Sundays	Sovereign Day (Nunavut)	Civic Day (NWT, Nunavut)	New Brunswick Day	Islander Day	Nova Scotia Heritage Day	National Aboriginal Day	Discovery Day
British Columbia	X	☑	X	X	X	X	X	X	X	X	X	X	X
Alberta	X	X	X	X	X	X	X	X	X	X	X	X	X
Saskatchewan	X	X	☑	X	X	X	X	X	X	X	X	X	X
Manitoba	X	X	X	☑	X	X	X	X	X	X	X	X	X
Ontario	X	X	X	X	X	X	X	X	X	X	X	X	X
Quebec	X	X	X	X	☑	☑	X	X	X	X	X	X	X
Nova Scotia	X	X	X	X	X	X	X	X	X	X	☑	X	X
New Brunswick	X	X	X	X	X	X	X	X	☑	X	X	X	X
Prince Edward Island	X	X	X	X	X	X	X	X	X	☑	X	X	X
Newfoundland & Labrador	☑	X	X	X	X	X	X	X	X	X	X	X	X
Yukon	X	X	X	X	X	X	X	X	X	X	X	☑	☑
Northwest Territories	X	X	X	X	X	X	X	☑	X	X	X	☑	X
Nunavut	X	X	X	X	X	X	☑	☑	X	X	X	X	X

regular wage plus the holiday pay they would have received had they not worked. Most places (Alberta, Saskatchewan, Ontario, Nova Scotia, New Brunswick, Northwest Territories and Nunavut) permit holiday substitution by the employer. Employees working a holiday may be given an alternative day off for the holiday.

Conclusion

Some holidays, such as Easter Monday, Heritage Day and Boxing Day, are not nation-wide holidays. Even in Alberta, Heritage Day (for example) is not a mandatory employer-paid holiday. Nor are some of these holidays enjoyed by all workers within the same province or territory. If an employer designates any of these optional days as general holidays, all the rules pertaining to general holidays and general holiday compensation will apply to employees.

For longer stretches in the year – such as the week between Christmas and New Year's Day – employers must decide whether to grant an informal holiday rest period to their employees, and whether to pay for it. This may be negotiated in a Collective Agreement. For non-unionized employers, competitive business practice and community custom, social pressure, the desire to reward employee performance, and cultivate loyalty are all influential factors in that decision. Many employees will not be their most productive in the workplace when their peers in the industry are indulging in a tranquil holiday.

Don't forget to thank your employer for the holidays. They are paying for them!

Happy Holidays! ◆

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Important Concepts in Environmental Law – The "Precautionary Principle"

Jeff Surtees

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Last issue we talked about sustainable development. This time the topic is the precautionary principle.

Most human activity has risk. When we are deciding whether we should do something, we balance the risks against the possible rewards. Risk has two parts. First, there is the probability that something bad will happen. Second, there is the seriousness or severity of that result. The two parts have to be considered together. A fifty percent probability that we will break a fingernail while fixing a light switch might be acceptable. A one percent chance that we will burn down the house doing the same task when we don't know how probably isn't.

"Decisions about which risks are acceptable in a society are always going to be political."

Risk can also be external. If harm occurs, it will be to someone else or to society as a whole. Without the protection of regulation, people (and companies) are more likely to disregard the risk of an activity if the possible harm will happen to someone else. To economists these public harms are called "negative externalities". Air pollution from factories drifting across borders, fish dying downstream from a plant that pollutes the river, and migration routes of animals being altered by transportation corridors are all examples of negative externalities. To economists, negative externalities can be a sign that competitive markets aren't working properly and that regulation might be needed.

For many decisions that have risk, people are free to take chances unless there is a law that says they can't. For example, we are all free to sink our life savings into a legal business venture even if it has a low probability of success. If someone wanted to stop us, they would have to prove

that our activity is against a law or at least, harmful to others. We wouldn't have to prove anything.

Because the natural world is complex it can be hard, or even impossible, to prove in advance either the probability or severity of possible harm from taking risks. In many cases we simply don't have the scientific knowledge or the data to accurately predict what could happen if we do something. And for the really big things, the results could be catastrophic and impossible to repair.

To deal with this, the precautionary principle turns the calculation around – someone proposing an activity has to prove that it would *not* cause an unacceptable level of harm before they do it. Where the precautionary principle applies, governments have a duty to protect the public interest through regulation even when there isn't full scientific certainty that harm will occur. The *Rio Declaration* (the 1992 Report of The United Nations Conference on Environment and Development) used these words: "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". When scientific information about environmental effects is incomplete, extra caution is needed. Prevention of harm will always be easier and cheaper than remediation after harm has been done.

The Supreme Court of Canada has cited authors who state that the precautionary principle has become a norm of international law. The Federal Court of Canada has applied the principle when considering the regulation of fish farms. The principle has been recognized in various forms in international agreements. It has been incorporated into some Canadian legislation including the Preamble to the federal *Oceans Act*, section 2(1)(a) of the *Canadian Environmental Protection Act, 1999*, section 9 of the *Federal Sustainable Development Act*, the Preamble of the *Canada National Marine Conservation Areas Act* and section 4(2) of the *Canadian Environmental Assessment Act, 2012*. Although it is not universal, it has been incorporated into many provincial statutes, regulations and policies dealing with protection of the environment.

> *"To deal with this, the precautionary principle turns the calculation around - someone proposing an activity has to prove that it would not cause an unacceptable level of harm before they do it."*

Arguments have been raised that broad application of the precautionary principle can result in gridlock with no decisions ever being made. Applying the principle does not provide automatic, easy answers about which risks should be taken and which ones should be avoided. It just says a serious risk shouldn't be disregarded only because there is a lack of scientific certainty about the likelihood or severity of harm. Decisions about which risks are acceptable in a society are always going to be political.

Next time we will talk about the important concept of "polluter pays" in Canadian environmental law." ◆

Alternatives to Court: The Collaborative Process

Sarah Dargatz

John-Paul Boyd explained why people might want to find an alternative to court to reach a resolution about their family law disputes in the November/December 2018 issue of LawNow.

One alternative to court is the Collaborative process. Many processes, such a negotiation or mediation, can be "collaborative", meaning cooperative or amicable. However, here I am writing about the big "C", *Collaborative Divorce* process.

"The process can feel slow at the start. The first few meetings will be focused on building a foundation based on sharing information and discussing what is important to each person. However, once that foundation is built, solutions can come quickly."

In this process, the people involved in a family dispute sign an agreement to be forthright and transparent in providing relevant information, negotiating in good faith, and to not go to court. Each person has a lawyer who is trained and registered in the Collaborative process. Other specially trained professionals, such as financial and mental health specialists, may also join the team to help the couple find solutions to their disputes. The process, unlike court, is private and confidential.

Through a series of meetings, the separating couple and their lawyers identify what is most important to them and explore options to satisfy their interests. This is often referred to as *interest-based negotiations*. The goal is to find solutions that work for everyone. It allows a separated couple to come up with creative solutions that work for them and their children. The process works because everyone is playing by the same ground rules.

If the separated couple needs more information about the value of a company or one person's income in order to set child support, they can jointly retain a neutral financial specialist who will provide an objective analysis to both of them, and their lawyers. If the separated couple needs more information about how their actions might affect their children, or what decision might be in their child's best interests, they can jointly engage a child specialist who can educate them or provide their professional opinion. If

one, or both, people are having a hard time moving forward or processing the separation, they can hire a divorce coach to give them the best tools to manage stress, communicate with their former partner, and fully participate in the process.

The lawyers continue to have the same professional obligations they would have to any family law client such as to advise on the law and provide opinions of likely outcomes. Each lawyer owes a duty to their own client and is not neutral. Once an agreement is reached, the lawyers will draft a legally binding agreement and provide independent legal advice to their own client, separate and apart from the other person. Any necessary court documents to finalize the divorce or separation will be submitted with the consent of both parties.

Many people have found the Collaborative process very satisfying for resolving family disputes.

If the separating couple is not able to reach an agreement, either one can withdraw from the process. In that case, each person would need to find a new lawyer. The discussions that took place during settlement meeting are *without prejudice* and cannot be repeated, or relied on, in court.

A Collaborative process is not suitable for everyone. Some disputes are relatively simple and a separating couple may be able to reach an agreement on their own, so that all they need from a lawyer is independent legal advice. Or, a separating couple might be well-served by a mediator. In these cases, the Collaborative process may be more than what is required to reach an agreement.

On the other hand, the Collaborative process may not be suitable where one, or both, people are not willing to negotiate in good faith or to be open and honest about their financial situation. In these cases, a court application might be necessary. Where there is a power imbalance, such as in cases of family violence, or where one person has a mental health concern that prevents them from fully participating, it may not be appropriate to use a Collaborative process. Lawyers who are registered in practice in this area are trained to screen clients for their suitability for the process.

The Collaborative process is sometimes criticized as being slow and expensive. It can be expensive relative to mediation or a quickly negotiated settlement. However, when compared to a full litigation, it will usually be more cost effective and the outcome will be more satisfying for everyone involved.

The process can feel slow at the start. The first few meetings will be focused on building a foundation based on sharing information and discussing what is important to each person. However, once that foundation is built, solutions can come quickly. If an immediate remedy is required, or if one person is intentionally delaying, the Collaborative process may not be the best choice.

For more information on the Collaborative process, or to find a registered professional in Alberta, visit www.collaborativepractice.ca and for the Edmonton Association, visit www.divorceseparation.ca. ◆

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No Judicial Role in Religious Disputes: Jehovah's Witnesses v Wall

Peter Bowal and Joshua Twa

Introduction

A perennial criticism of the Canadian judiciary is its excessive activism. Many think that the courts have helped fashion Canada into a nanny state and the Supreme Court of Canada is the most interventionist of the nanny courts.

The recent case of *Highwood Congregation of Jehovah's Witnesses v Wall* deals with whether a court should intervene to settle a grievance between a religious body and its member. This time, the Supreme Court stayed on the sidelines.

> *"Secular courts have no jurisdiction in the internal operations of religious organizations. Judicial review is only available to challenge public decision-makers acting under legislation."*

Facts

Randy Wall was a member of the Jehovah's Witnesses for 34 years. He was shattered that the church had expelled his 15-year-old daughter, and that she was evicted from the family home. He admitted to being drunk twice while under this family stress, and during one of those times he verbally abused his wife. He was also "disfellowshipped" as a result of these behaviours. As in the case of his daughter, the church ordered his family and Witness members to shun him. He feared this would have a serious negative impact on his social life and livelihood as a realtor.

Wall's appeals through three church levels were all unsuccessful. His expulsion was upheld.

Private Activities and Disputes

Consider, for example, if one forms a singing club in the neighbourhood. Disagreements about the list of songs or their order of performance at the upcoming Christmas show are not legal matters and should not be determined by a judge. Likewise, a child should not be able to sue a parent to ensure her favourite foods are packed every day in her school lunch.

Private actors are not subject to judicial review. This is especially true in matters of religion. If people voluntarily join religious groups and agree to beliefs and principles by which they will be governed, it is not open to one of the members to run off to court to get a change in the rules.

This "jurisdiction" is the challenge that faced Wall as he tried to obtain a legal remedy overturning the church's decision. He could argue that the process used by the church was unfair or that the church denied him his property and civil rights. However, the church would say it was a private, religious organization and the courts had no business in its affairs any more than a court could tell Scout troops where to meet. Secular courts have no jurisdiction in the internal operations of religious organizations. Judicial review is only available to challenge public decision-makers acting under legislation.

The "justiciability" of this dispute was also in doubt. Applicants to court must have a legal interest. There is no *Charter of Rights* claim or contract between the Jehovah Witnesses and Mr.Wall**.** The church was merely a voluntary association, not even a legal entity. Should not the church and its members have the legal right to disassociate from Wall?

Judicial Outcome

Having exhausted all recourse in the church internally, Wall went to court, but the Supreme Court of Canada unanimously dismissed his application for judicial review of his expulsion. The Court said judicial review is reserved for public bodies (not churches) to ensure they act within the law. Courts can quash illegal decisions as a check on state decision-making. The church is a private actor with no statutory authority.

Further, the Court concluded there is no underlying free-standing right to natural justice in private associations and in private matters. There was no contract between Wall and the church. Mere membership in a congregation does not establish a legally enforceable contract. His loss of church clientele from expulsion was not a breach of Wall's legal entitlements or property rights.

What about justiciability – whether Wall's claim presents an issue fit to be determined by the courts? The Supreme Court said that depends on each case:

> *"the court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter…The present issue is of a religious nature that pertains to fairness and process of the church's suspension of Wall. Historically, courts lack legitimacy and capacity to determine such issues."*

Conclusion

Supreme Court of Canada left Wall with no remedy but it left the rest of us considerable wiggle room on justiciability. Ultimately, these are fact-driven cases captive to human instincts and sensibilities.◆

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A Significant Human Rights Event for the Lubicon People

Linda McKay-Panos

Linda McKay-Panos, Bed. JD, LLM is the Executive Director of the Alberta Civil Liberties Research Centre in Calgary, Alberta.

In 1899, Treaty 8 was negotiated with several First Nations groups in Northern Alberta—North East Saskatchewan, Southwest parts of the Northwest Territories and later Eastern British Columbia—resulting in land surrender to the Crown. However, members of the Lubicon Lake Band were left out of the negotiations. This launched several decades of claims and disputes between Lubicon people and the federal and provincial governments. While the Lubicons continued to live in their traditional ways, the province of Alberta leased areas of the disputed lands for oil and gas development and provided permits for harvesting lumber using clear cut methods. These activities had negative impacts on the Lubicon people. The dispute became known across Canada and the world when Amnesty International and the United Nations became involved.

The situation faced by the Lubicon Cree was one of the longest unresolved human rights issues in Alberta. While a reserve was promised to the Lubicon people in 1939, 40 years after Treaty 8 was negotiated, it was never established. The subject of the dispute was 10,000 square kilometers of oil-rich forested land, which is north of Lesser Slave Lake and east of the Peace River. Traditionally, the Lubicon Cree lived almost entirely off the land. Considerable oil extraction, which started in the 1970s in the region, together with extensive logging, had significant reported impacts on the health, way of life, and culture of the Lubicon Cree. Yet, they never consented to this development on traditional lands for which they claimed to have never surrendered their rights.

Since about 1985, there were several attempts at negotiations with the federal and provincial governments regarding Lubicon land rights, but these talks all broke down. Hopes for a solution were raised in 1990 when the United Nations Human Rights Committee (UNHRC) concluded that

this situation endangered the way of life and culture of the Lubicon Cree. Further, the Committee said that "so long as they continue", the threats to the Lubicon way of life are a violation of the Lubicon's fundamental human rights (United Nations Human Rights Committee Communication No. 167/1984: Canada 10/05/90 CCPR/C/38/D/167/1984. *Ominayak and the Lubicon Lake Band v Canada*.) The UNHRC was assured by the Canadian government that it was negotiating a settlement that would respect the rights of the Lubicon Cree. Despite this, a settlement was not reached at that time.

> *"The situation faced by the Lubicon Cree was one of the longest unresolved human rights issues in Alberta. While a reserve was promised to the Lubicon people in 1939, 40 years after Treaty 8 was negotiated, it was never established."*

The United Nations relied upon Canada's desire to maintain its international reputation as a great respecter of human rights. However, bringing the Lubicon Cree situation to the attention of the international community in 1990 did not seem to produce the desired results.

The Lubicon Cree, however, did not let the initial disappointment deter them and approached the UNHRC again in 2003 and 2006. As noted by Alphonse Ominayak, Lubicon band counsellor, "They have to deal with this as soon as possible so we can get on with our lives before everything is totally destroyed. People are hoping the government will live up to its responsibilities" (Cotter).

The Lubicon people were able to negotiate agreements with two private oil and gas firms, giving the band a veto over some oil and gas drilling on the claimed land. The Lubicon claimed that they were able to negotiate these agreements despite the Alberta government's urging the firms not to negotiate with the band (John Cotter, "UN Wants Ottawa to resume talks with Alta's Lubicon band" 2 November 2005 [Cotter]).

On November 2, 2005, the UNHRC responded to the representations of a delegation from the Lubicon Cree, who had appeared before it in Geneva on October 17, 2005, to ask for further comment on the situation. In its report, the UNHRC said: "The Committee is concerned that land-claim negotiations between the Government of Canada and the Lubicon Lake band are currently at an impasse…. The state party should make every effort to resume negotiations. It should consult with the band before granting licences for economic exploitation of the disputed land" (United Nations Human Rights Committee, Considerations of Reports Considered Under Article 40, Canada 2005: CCPR/C/CAN/CO/5). These are quite strong statements which raised the hopes of the Lubicon Cree that the negotiations would resume and result in an appropriate settlement.

In late October, 2018, a historic land claim agreement was signed between Chief Billy Joe Laboucan, Premier Rachel Notley and Federal-Crown Indigenous Relations Minister Carolyn Bennett. The agreement sets aside 246 square kilometers of land in the area of Little Buffalo. It also provides $113 million compensation from both provincial and federal levels of government. See: CBC News "Alberta Band settles long-standing

land claim for $113 million and swath of land"[CBC News]. The enormity of this event seems to have been largely overlooked as many Canadians seem to be mesmerized with what is going on south of the border.

While the current settlement can never address the terrible living conditions suffered by the Lubicon Cree for decades, the Lubicon people are hopeful that it will improve the lives of future generations (CBC News). This significant human rights event was a long time coming but should be celebrated nevertheless. ◆

Limits on Recourse for Donors Once a Gift is Made

Peter Broder

It is an under-appreciated nuance of Canadian charity law that s. 92(7) of our *Constitution* actually gives the provinces the bulk of regulatory authority over charities. Provincial governments often don't exercise their jurisdiction in this area, so the federal government's Canada Revenue Agency (CRA) – which grants tax privileges to charitable groups – has become in many instances the default regulator.

However, though the CRA can and does exercise lots of oversight under the guise of federal powers over taxation matters, its ability to delve into the day-to-day operations of charities are limited. One province, Ontario, has a longstanding and significant regulatory structure to monitor and enforce appropriate use of charitable property. British Columbia has recently become more active in its regulation of this area.

In provinces without an office dealing with such matters, the Attorney-General retains an inherent jurisdiction over charitable property. This allows a provincial Attorney General to initiate court proceedings where charitable property needs to be protected.

Ontario's Office of the Public Guardian and Trustee (OPGT) is mandated under the *Charities Accounting Act* (*CAA*) to administer an annual reporting requirement and with various sanctions and remedies where charities misuse or misappropriate charitable property. One of its *CAA* powers is to investigate a charity's finances.

A recent case, *Fass v. CAMH*, highlights the OPGT's role and the limitations in that role. The case is being appealed to the Ontario Court of Appeal. At issue was an attempt by a donor, who had made a large gift to the Centre For Addiction and Mental Health (CAMH), to trigger an investigation by the OPGT into how the institution had used the proceeds of the donation. The gift had, pursuant to a written agreement, been subject to certain conditions, which the donor

suggested that CAMH had not fulfilled. The parties disputed how closely the charity had abided by the terms of the agreement.

At common law a gift must be a voluntary transfer of property for which conditions on the use of a gift at the time it is donated. For example, scholarship funds may be the donor receives no "consideration" (i.e., does not get anything of value in return). A donor can, however, set certain established with a requirement that a prize be awarded to the student with the highest marks in a particular academic program.

Sometimes, however, scholarship funds or similar gifts are based on conditions that run afoul of human rights legislation, such as when they are awarded on the basis of racial characteristics. In those circumstances, a court may find the condition to be contrary to public policy, and the terms of the scholarship may be changed.

Of course, many conditions do not trigger human rights concerns. In such cases, options for enforcing or overturning terms attached to a gift are much more limited. Sometimes where the conditions of a gift are not being followed, the threat or initiation of litigation can prompt a change in behaviour in an organization that has received a gift.

In the United States these matters are more apt to be litigated, and famously, in one American case, the heirs of the donors brought suit and got a large institution to redirect use of the resources in a way more in keeping with the original intention of the gift. In 2002, the heirs of the A&P Grocery fortune sued Princeton University over alleged misuse of a donation endowing graduate education for students preparing for government careers. The matter was settled out of court, but the heirs got at least part of what they were seeking with respect to use of the gift.

Some donors bring court proceedings asking for return of a gift where a condition has not been met. But circumstances where a gift will be ordered returned owing to problems with a condition are uncommon.

In *Fass v. CAMH*, rather than seeking return of the gift or asking the courts to compel a change in the organization's behaviour, the donor made an application for an order to have the OPGT directed to investigate use of the donation and publicly report on its findings. One section of the *CAA* provides for a judge to make an order for an investigation where he or she believes it is in the public interest.

Morgan, J. in *Fass v. CAMH* found that in the circumstances of the gift in question an order for an investigation would not be in the public interest. He noted that the concerns of applicant went beyond financial management, and had to do with how the funding was used. He further noted the potential disruption and cost of any investigation, and that the Order being sought was driven more by the complainant's personal interest than by that of the public. The Order was denied.

The Appeal raises two key questions:

1) whether the public interest is served by an investigation even if the applicant's private interests are also served; and

2) whether a charity can be investigated for its proper use of charitable property with respect to a specific charitable purpose designated by a donor or only for its proper use with respect to the

organization's stated charitable purpose(s).

Given the popularity of donor agreements when large gifts are made, the outcome of the appeal will be closely watched. ◆

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New Resources at CPLEA

The following resources were funded by *Alberta Real Estate Foundation*.

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.

In this issue of LawNow we are highlighting 3 new publications of interest to renters and landlords in Alberta. These resources can be found on CPLEA's topic specific landlord and tenant website. LandlordandTenant.org offers plain language information for Albertans on renting law in Alberta.

New Landlord and Tenant website FAQs

- Who is responsible for utility payments?
- What are my obligations a a co-signor?
- Can I ask my landlord to lower my rent?

LAWS FOR LANDLORDS AND TENANTS IN ALBERTA

For a listing of all CPLEA publications see: www.cplea.ca/publications/

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