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Vulnerable Families

Vol 39-2: Vulnerable Families

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The Calculation of Child Support: A Basic Guideline

Posted By: Mark G. Jones

The Federal Child Support Guidelines provide a framework for the payment of child support that a parent pays to support a child financially after a separation or divorce.

What are the Federal Child Support Guidelines?

As stated in Paragraph 1 of the Guidelines, their purpose is:

> (a) To establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
> (b) To reduce conflict and tension between spouses by making the calculation of child support orders more objective;
> (c) To improve the efficiency of the legal process by giving courts and spouses guidance and encouraging settlement; and,
> (d) To ensure consistent treatment of spouses and children who are in similar circumstances.

The *Federal Child Support Guidelines* apply to children of the marriage who are under the age of majority or who are "the age of majority or over but [are] unable, by reason of illness, disability or other cause to obtain the necessities of life." The Government of Canada guide suggests that "Generally, the courts recognize the pursuit of post-secondary education as a valid 'other cause'."

The tables included with the *Federal Child Support Guidelines* are laid out, by province/territory, in the following format (the following example is for Alberta and one child and for illustrative purposes and

brevity the following excerpt shows annual Income (as defined within the Guidelines) from $30,000 to $49,999):

Federal Child Support Tables/
Tables fédérales de pensions alimentaires pour enfants

Income/ Revenu ($)		Monthly Award/ Paiement mensuel ($)		
From/ De	To/ À	Basic Amount/ Montant de base	Plus (%)	Of Income Over/ Du revenu dépassant
30000	30999	241	0.66	30000
31000	31999	248	0.60	31000
32000	32999	254	0.66	32000
33000	33999	261	0.54	33000
34000	34999	266	0.58	34000
35000	35999	272	0.60	35000
36000	36999	278	0.88	36000
37000	37999	287	0.86	37000
38000	38999	296	0.86	38000
39000	39999	305	0.86	39000
40000	40999	314	0.96	40000
41000	41999	324	0.90	41000
42000	42999	333	0.92	42000
43000	43999	342	0.84	43000
44000	44999	350	0.86	44000
45000	45999	359	0.86	45000
46000	46999	368	0.86	46000
47000	47999	377	0.98	47000
48000	48999	387	0.94	48000
49000	49999	396	0.90	49000

The *Federal Child Support Guidelines* include tables, by province / territory, for one, two, three, four, five, or six or more children and the tables are in $1,000 ranges from $0 to $150,000 of annual income. As an example, using the excerpt of the Alberta table disclosed above, the Monthly Award in Alberta where there is one child and the spouse's income is $36,500 is calculated as follows:

$278 + 0.88% * ($36,500-$36,000) = $282 per month ($3,384 per year)

Or, you can do the calculation one step at a time:

Income over 36000: $36,500-$36,000 = $500
Amount to add: $500 x 0.88% = $4
Payments = $278 + $4 = $282 per month
$282 x 12 = $3,384 per year

How is Income Calculated?

Income is defined by the *Federal Child Support Guidelines* as Total Income (line 150) as disclosed on a spouse's personal income tax return, which includes all employment income, taxable capital gains,

taxable dividends, etc. The *Federal Child Support Guidelines* stipulate adjustments to Total Income, the most common of which are summarized as follows:

	Personal Tax Return line reference	*Federal Child Support Guidelines reference*
Line 150 Total Income per Personal Income tax return	150	Paragraph 16
Adjustments:		
Minus employment expenses allowable under the Income Tax	212,229,231	Section III, para. 1
Minus any child support received (if included in Line 150)	128	Section III, para. 2
Minus any spousal support received from the other spouse and any Universal Child Care Benefit included in Line 150	128, 117	Section III, para. 3
Replace taxable amount of dividends with actual amount of dividends received	120	Section III, para. 5
Replace taxable capital gains with the actual amount of capital gains in excess of actual capital losses	127	Section III, para. 6
Minus carrying charges and interest expenses allowable under the Income Tax Act	221	Section III, para. 8

In general terms, the above noted adjustments revise a spouse's Total Income as reported on their personal Income Tax Return to a cash balance, less child and spousal support received, if any. The application of the above is illustrated by way of the following example.

Example:

Spouse A and Spouse B are both resident in Alberta and have two children from their marriage under 18 years of age. Spouse A and Spouse B are divorced, the children are resident with Spouse B, and Spouse B is to receive child support from Spouse A in accordance with the *Federal Child Support Guidelines*. Spouse A's personal income tax return discloses the following:

Spouse A - Personal Income Tax Return	Tax return line number		
Employment Income	101	$	40,000
Employment insurance benefits	119		3,000
Taxable dividends (18% gross-up for this example, For 2014 taxable dividends are eight 118% or 138% of cash dividends received)	120		1,180
Interest and other investment income	121		2,000
Taxable capital gains	127		4,000
Total Income	150		50,180
Registered Retirement Savings Plan deduction	208		(5,000)
Union dues	212		(500)
Carrying charges	221		(1,000)
Net Income	236	$	43,680

Given the above scenario, the calculation of Income under the *Federal Child Support Guidelines* would be as follows:

Total Income	$	50,180
Replace taxable dividends with actual amount		
Deduct: taxable dividends		(1,180)
Add: actual dividends received		1,000
Replace taxable capital gains with actual capital gain		
Deduct: taxable capital gains		(4,000)
Add: actual capital gains		8,000
Less: union dues / employment expenses		(500)
Less: carrying charges		(1,000)
Income per the *Federal Child Support Guidelines*	$	52,500

The rates per the *Federal Child Support Guidelines* for Alberta for two children and income between $52,000 and $52,999 A spouse can request (up to once a year) the other spouse's tax returns and other information relevant to the calculation of income under the *Federal Child Support Guidelines*, and the resulting calculation of the monthly child support payment are shown below:

Income/ Revenu ($)		Monthly Award/ Paiement mensuel ($)		
From/ De	To/ À	Basic Amount/ Montant de base	Plus (%)	Of Income Over/ Du revenu dépassant
52000	52999	424	0.96	52000

$424 + 0.96% * ($52,500 – $52,000) = $429 per month ($5,148 per year)

Or you can do the calculation one step at a time:

Income per Guidelines that is over $52,000: $52,500 – $52000 = $500
Amount to add: $500 x 0.96% = $5
Payments: $424 + $5 = $429 per month
$429 x 12 = $5,148 per year

Further, the *Federal Child Support Guidelines* (section 14) indicate that a change of circumstances (i.e. a change in the annual income of a spouse) can result in a change in the amount of a child support order. In this way, the Guidelines provide a mechanism for a spouse to be able to monitor income of the other spouse to ensure that the calculation of child support remains relevant and reflective of current income levels.

Under a split custody scenario, the *Federal Child Support Guidelines* (section 8) state that "where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses." That is, if the calculation of income of one spouse in the split custody scenario

results in a monthly child support amount of $800 per month per the tables and the calculated child support amount of the other spouse is $500, the difference of $300 per month (payable by the higher earning spouse) would be the child support order under section 8 of the *Federal Child Support Guideline*s.

Conclusion

This article provides a basic outline of the *Federal Child Support Guidelines*. Some situations can be relatively straightforward but others can be a great deal more complicated. It is important to note that the *Federal Child Support Guidelines* include various means to allow a court to vary the calculated child support amount for the particular situation, or the court may consider a written agreement between spouses as to a spouse's income for the purposes of the *Federal Child Support Guidelines*. More complicated situations may include: self-employment; special or extraordinary expenses; undue hardship; and consideration of the standard of living of the spouse.

Further, where related companies are involved (i.e. a spouse receives employment income from a company that the spouse owns), the matter becomes significantly more complicated due to the inherent complexity of the discretionary, non-arm's length nature of the spouse's relationship with his/her company. The impact of these scenarios can be complicated and it is best to seek the appropriate advice.

Legal Requirements When Travelling Abroad with a Minor

Posted By: Magdalena Ganczak

Whether it is summer vacations, winter holidays or visiting relatives for a long weekend, traveling abroad has become common for children of all ages. This travel, however, does not always occur with both parents or with every legal guardian of the minor. In such circumstances, it is highly recommended that if one of the parents or legal guardians is not present at the time of border crossing, they show proof to the border officers that the non-accompanying adults with legal rights over the minor have consented to the international travel.

The first question to be addressed is: who is considered a minor? A person is considered a minor if they are under the age of majority and depending on the province, this may be anyone under 18 or 19 years of age. In Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Prince Edward Island, a minor is anyone under the age of 18. In the territories and remaining provinces of British Columbia, Nova Scotia, New Brunswick and Newfoundland, you are considered a minor until you turn 19 years old. So, whether you are traveling with an outspoken teenager or an infant, the recommendations in this article will apply equally to all who are legally considered a minor.

The second question to be addressed is: what will I need, if anything, when travelling abroad with a minor? The Department of Foreign Affairs, Trade and Development strongly recommends that when a minor is travelling with only one parent or guardian , the travelling parent/guardian should have with them a consent letter from the other parent/guardian authorizing the travel . The consent letter acts as proof to the border officer that the parent or guardian who is not in the presence of the travelling minor is aware of and is agreeing to the child's international travel.

The details of what should be stated in the consent letter can be found on the Government of Canada website: Recommended consent letter for children travelling abroad. Here, one can find both a template of what type of information should be stated in the letter and an interactive form where a parent can pick and choose what information to have in the letter and then print out the final document. Either format is acceptable. However, to avoid any potential problems at the borders, it is important to provide as much detail as possible. The form can then either be witnessed by someone who is over the age of majority (18 or 19 years old depending on the province) or certified by lawyer, notary or commissioner of oaths. The letter should be certified as it gives border officers greater security that the consent is genuine. Once a form has been filled out and certified or witnessed, the accompanying adult should carry the original form with them when travelling. Again, even though there is no requirement for an original letter, the more authentic the consent the less questions will be asked by immigration officials at border crossings. An original, detailed and certified consent letter will remove the border officer's doubts as to whether all of the individuals who have legal rights to a child have given consent for that child's travel.

In some circumstances, a parent or guardian might not be required to have a consent letter, or it might be impossible for them to obtain one. First, if the parents are separated or divorced, a court order may already be in place which outlines that a consent letter may not be required if one parent is travelling with the child. In these circumstances, the accompanying parent or guardian should carry a copy of the court order with them to show to the border officer. It is important, however, to make sure that the travel is in accordance with what has been ordered. For example, if the court order only allows travel to a specific country or for a specific time frame, travelling outside of those criteria would render the court order inapplicable and a consent letter should then be presented.

Second, a parent or guardian may not have contact with the other parent for a prolonged period of time and can't locate them to obtain authorization to travel. Where a parent cannot be contacted or reached, or if his/her whereabouts are entirely unknown, it is advisable to obtain a court order which reflects these circumstances and gives the parent with custody the ability to travel without requiring the consent of the other parent. This order would in turn be presented to border officials at the time of travel and would eliminate any concerns of whether consent from the other parent is required.

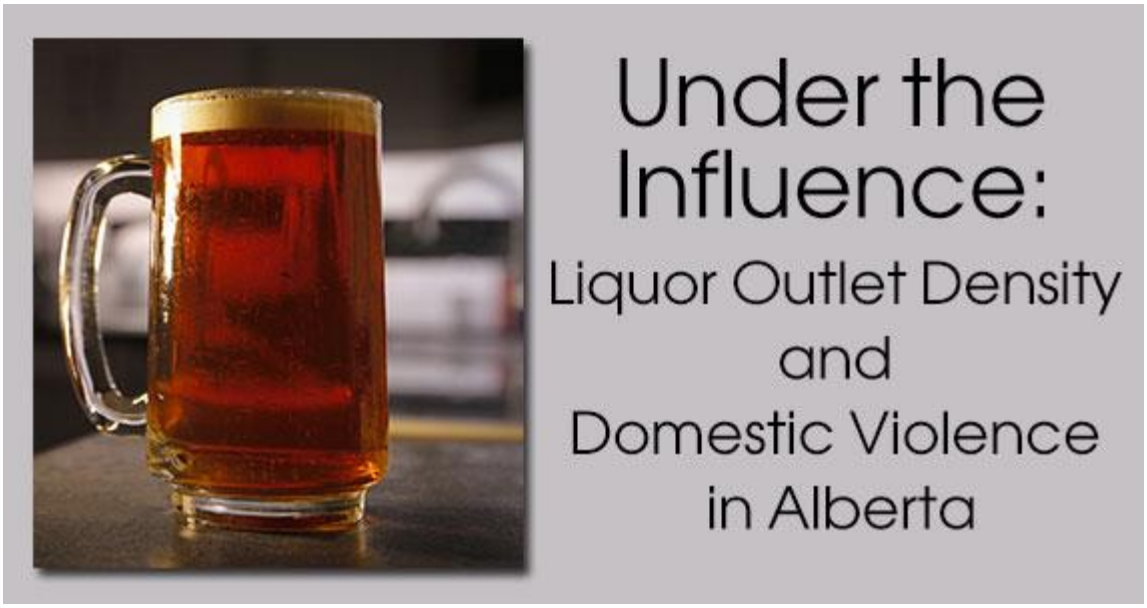
Third, if a child's parent is deceased, the border officer should be shown a copy of the death certificate. In the above mentioned scenarios, a consent letter is not required to travel with a child; however, other relevant documents should be presented to the border officer to show that there are no other legal guardians and if there are, his or her consent is not required for the minor to travel.

In addition to a passport and a consent letter, the Government of Canada recommends that a child travelling with a single parent carries a long form birth certificate. Since a child's passport does not state the names of his/her parents, a long form birth certificate creates a link between the child, the accompanying parent, and the person who has consented to the child's travel abroad. The long form birth certificate will eliminate doubt and confusion and provide further evidence that consent was indeed given by the parent of the child.

Whether the child is travelling abroad for a day trip or a two- month vacation, if they are going to be travelling alone or with only one of the parents or legal guardians, in addition to a passport and a long form birth certificate, they should have a consent letter from the non- accompanying parent or guardian. Immigration officials at airports and border crossing have the authority to prevent a child from entering the country if they are not satisfied that the child's parents or legal guardians have authorized the travel. Even though there is no legal requirement but only a strong recommendation for a consent letter, having proof of consent from the other parent or guardian will reduce complications during border crossings and facilitate ease of travel.

Under the Influence: Liquor Outlet Density and Domestic Violence in Alberta

Posted By: Lana Wells



We have too many liquor outlets in Alberta. Okay, we said it. This is a conversation that most Albertans don't want to have.

Privatization Effects

In 1993, Alberta became the only Canadian jurisdiction to fully privatize the sale of alcohol. Since then, we have gone from 200 liquor outlet stores to over 2,000.

Evidence associates high levels of liquor outlet density with increasing rates of alcohol consumption and violence, including domestic violence. This correlation is evident in Alberta, where rates of domestic violence are among the highest in Canada (Statistics Canada, 2011).

After Alberta's liquor industry was privatized, rates of violence involving alcohol rose dramatically, jumping 20 per cent in the year after privatization. Rates of spousal and non-spousal homicides involving alcohol also increased, bringing Alberta's rates above the national average (Government of Alberta, 2007).

In an analysis of 6,407 domestic violence cases in Calgary spanning from 1998 to 2009, Tutty et al. (2011) found that police identified alcohol use in 61% of the accused and 28% of the victims at the time of the incident.

Alberta's rates of drinking and heavy drinking are higher compared to other Canadian provinces, "particularly among males aged 15 to 39" (Government of Alberta, 2007: 18). Combined with

international research findings (Popova et al., 2009; Stockwell et al., 2011), these trends suggest a link between privatization, increased liquor outlet density and domestic violence rates.

How Alcohol Consumption Increases Domestic Violence

The relationship between alcohol use, gender inequity, and domestic violence is well established (de Visser and Smith, 2007; Peralta and Steele, 2011). In addition, alcohol reduces inhibitions and impacts cognitive functioning, thereby reducing one's ability to control aggressive behaviour.

The availability of alcohol alone would not cause violent behaviour; however, when combined with pre-existing gender expectations which render violence and drinking as acceptable male behaviours, it can be a contributing factor (Peralta and Steele, 2011).

Increasing evidence links high alcohol outlet density to domestic violence, as well as health issues, mortality, crime, suicides and homicides (Campbell et al., 2009; Gorman et al., 2001). In fact, alcohol outlet density is one of the strongest – and in some cases the single greatest – predictor of violent crime in several U.S. jurisdictions.

Calling on Alberta's Municipalities and Citizens

In Alberta, municipalities can take the lead on tackling the effects of liquor outlet density at the neighborhood level by creating better alcohol density control measures. The implementation of such measures in other jurisdictions has been associated with reduced rates of violence (Mair and Mair, 2003 [11]; WHO, 2005).

Though not a panacea solution to domestic violence, density controls are a promising strategy in a toolkit of possible government and community actions to mitigate domestic violence.
At the local level, land use bylaws are the main vehicle through which municipalities can impact outlet density. For example, municipal regulations for Calgary and Edmonton require a minimum distance between liquor stores of 300 and 500 metres respectively.

Whereas Calgary applied the regulation to new applications only, Edmonton attempted to address existing liquor outlets, stipulating that if two or more alcohol outlets were within 500 metres of one another, they were considered non-conforming and were expected to relocate or consolidate (City of Edmonton, 2007). While moving in the right direction, these policies need to be supported by more robust measures.

Municipalities could take a stronger stance by introducing a moratorium on new licenses in communities with higher liquor outlet density. In areas that already have a high concentration of liquor stores, municipalities could consider relocation and consolidation as a means of addressing density retroactively. Municipalities could strengthen zoning regulations to address density by using a

combination of population- and geographic-based formulas to restrict the number and location of alcohol outlet licenses.

The Alberta Gaming and Liquor Commission (AGLC) is also part of the solution. The AGLC could better collect, analyze and update existing data about current alcohol outlets using a combination of geographic- and population-based formula. It could make information on outlets more accessible to help citizens challenge new applications for liquor outlets in high density areas. It could also work with municipalities to educate community members about the avenues available to them for voicing issues and concerns related to new alcohol licensees and alcohol outlet density in their neighbourhoods.

Citizens should be encouraged to participate in alcohol liquor license application hearings. The Alberta government could facilitate this by amending Section 129(1) section 57(1) of the *Gaming and Liquor Act* (2010) to include a requirement stating that anyone applying for a new retail liquor outlet license must notify the public of their intent.

Beyond Density Controls

There is no doubt that simply controlling liquor outlet density will not eradicate domestic violence. The root causes of domestic violence are much more complex and require a full-scale revamping of public policy and interventions, but also individual norms and belief systems.

However, density controls are a promising solution that can be implemented to reduce a range of social harms, including domestic violence, at the community level. Community mobilization and municipal regulations that limit alcohol outlets, especially in high density areas, can send a strong message about the kind of neighborhoods and society we want for ourselves and our families.
For a more robust discussion on this issue, please see our research report at http://preventdomesticviolence.ca/research/role-alcohol-outlet-density-reducing-domestic-violence-alberta

Can Domestic Abuse Victims Qualify as Refugees?

Posted By: Maciej Lipinski

A Comment on Matter of A-R-C-G et al

The recently-released decision of the United States' Board of Immigration Appeals ("the Board") in the *Matter of A-R-C-G et al.*, ("*Matter of A-R-C-G*"), 26 I&N Dec. 388 (BIA 2014) may signal the United States' growing openness to granting asylum to women who flee from domestic abuse. While the decision itself may be considered overdue, its reasoning takes a strong critical stance against nations that do not make reasonable efforts to protect women from violence. This reasoning stands in contrast to the more conservative approach that is usually applied by courts in both the United States and Canada.

If the Board's reasoning in the *Matter of A-R-C-G* is adopted by courts in the United States and elsewhere, then the threshold for making successful refugee claims will have shifted significantly in favour of future claimants who flee from abusive relationships in nations that are unwilling or unable to offer adequate protection.

Background

The Matter of A-R-C-G dealt with a Guatemalan woman who had fled from a years-long abusive marriage to seek refugee status in the United States. The refugee claimant in this case ("the Claimant") had fled from Guatemala after experiencing what the Board characterized as "repugnant abuse" at the hands of her husband. The abuse included weekly beatings, throwing paint thinner on her, and rape. The local police had been called following several incidence of this abuse, but had refused to interfere as these acts were considered to have been part of a marital relationship.

Test for Asylum

As in Canada, refugee claimants in the United States must prove three elements in order to be granted asylum on the basis of domestic violence in their home nation. A woman who faces domestic abuse must first prove that she qualifies as a Convention refugee based on: (1) membership in a particular social group; and (2) a well-founded fear of persecution on the basis of that membership. Where the persecution is perpetrated by a non-state party (e.g., an abusive spouse), the refugee claimant must also prove (3) the government's inability or unwillingness to provide protection.

In Canada, claims arising from domestic abuse are often denied because of insufficient proof of the third element. In the United States, however, claimants have often been denied on the basis of the first element since the United States applies a more complex test of what constitutes a particular social group.

Decision

The United States Immigration Court (the "Immigration Court") determined that the claimant did not qualify as a Convention Refugee. The Immigration Court determined that the domestic abuse suffered by the Claimant in the Matter of A-R-C-G constituted "criminal acts" rather than persecution on the basis of membership in a particular social group. The Immigration Court characterized this abuse as having occurred "arbitrarily" and "without reason," regardless of the Claimant's membership in any particular social group.

Because the claimant was thus found not to qualify as a Convention Refugee, the Immigration Court did not address the Guatemalan government's willingness or ability to protect her.

The *De Novo* Review

Following an appeal from the decision of the Immigration Court, the Board undertook a de novo review to determine whether "married women in Guatemala who are unable to leave their relationship" constituted a particular social group for the purposes of determining Convention Refugee status. Unlike Canada, the United States requires refugee claimants to overcome numerous evidentiary hurdles in order to establish the existence of a particular social group. These hurdles involve establishing that the group's members (1) share a common immutable characteristic; (2) are defined with particularity; and (3) are socially distinct in the society in question.

The Board found that each of these requirements was met in the Matter of A-R-C-G. This finding broke new ground in American jurisprudence, as no previous published Board decision had recognized married women facing domestic abuse as a particular social group.

In addition to finding that the claimant fell within a particular social group, the Board also found that the abuse suffered by the claimant had risen to the level of persecution on the basis of her membership in that group. Having thus found that the claimant met the requirements to qualify as a Convention refugee, the Board left it for the Immigration Court to determine whether Guatemala was unwilling or unable to protect the claimant from persecution.

Analysis

While Canada has long recognized women fleeing from abusive relationships as a particular social group, these women nevertheless face significant hurdles to receiving asylum in Canada. Canadian courts have adopted less complex tests than the United States for determining the existence of a particular social group, and women who face domestic violence were recognized as a particular social group many years ago in *Narvaez v Canada (Minister of Citizenship and Immigration)*, [1995] 2 FCR 55.

Despite having been long-recognized as a particular social group, women escaping domestic violence encounter a significant hurdle in proving their home State's unwillingness or inability to protect them from an abuser. To satisfy their onus of proof, claimants must advance evidence to rebut a presumption that foreign States are willing and able to protect their citizens.

At present, Canadian courts and tribunals have adopted a high threshold for determining when claimants have satisfied this onus. Even where evidence has shown police unwillingness to interfere in a marital relationship and a lack of specific laws against domestic abuse in the claimant's nation of origin, claimants have failed to satisfy their onus of proof (see *X (Re)*, 2011 CanLII 99772 (CA IRB), 2012 CanLII 94152 (CA IRB)). Where the onus has been satisfied, there is often an additional source of persecution beyond domestic abuse (see 2011 CanLII 99020 (CA IRB)).

This high threshold was also recently apparent in the case of Jamila Bibi and a possible honour killing on her return to Pakistan. Ms. Bibi was deported from Canada two weeks ago.

Conclusion

The Board's decision in the *Matter of A-R-C-G l*ays the groundwork for a more claimant-friendly approach to determining whether foreign States are capable of protecting women who suffer domestic violence. In the course of determining that the claimant qualified as a Convention refugee, the Board's decision in the *Matter of A-R-C-G* went further than necessary – venturing to make findings that closely resembled an analysis of Guatemala's ability to protect married women who face domestic violence.

The Board found special significance in the Guatemalan police's unwillingness to intervene in an abusive marital relationship, and cited a CBC report to support the Board's finding that Guatemala has a prevalent culture of "machismo and family violence." Based on these findings, the Board determined that violence against women in Guatemala was commonplace and the prosecution of such crimes by state authorities was "problematic."

In Canada, the adoption of a corresponding approach to evidence of State indifference to domestic violence would open important avenues for allowing any individual who flees such violence to make a case for refugee status.

For now, much remains to be decided. If the Immigration Court adopts the Board's findings to determine that Guatemala is incapable of or unwilling to protect the Claimant, then it will become more open for Canadian courts and immigration tribunals to adopt a similar approach. From there, Canadian courts and tribunals might focus greater scrutiny upon foreign States' responses to domestic violence while offering more protections to those who suffer such violence.

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The Unified Family Court: A Road-Tested Justice Strategy for Alberta

Posted By: John-Paul Boyd

In my recent article, "What, Why and Where: Untangling Jurisdiction in Family Law," I explained how litigants navigate the thicket of jurisdictional choices involved in a family law dispute. First there's choosing the right law, because the federal and provincial governments have overlapping jurisdiction over some but not all family law problems. Then there's choosing the right court, because in many provinces and territories there are two trial courts with overlapping jurisdiction over some but not all family law problems. Making matters worse, not all courts can deal with all laws and the two trial courts usually have different rules, different processes, different forms and different fee structures.

This can all be very confusing for litigants without lawyers. Frankly, it's confusing for many lawyers as well. However, in some parts of some provinces, namely Manitoba, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Ontario and Saskatchewan, there is just one court for family law disputes, a court that has the jurisdiction to deal with all family law problems and all of the laws that might apply to them. In some provinces, like Saskatchewan, government has solved the jurisdiction nightmare by simply assigning all family law disputes to a special division of the superior court. Other provinces, like Ontario, have created a special hybrid court, a "unified family court," to deal with everything.

Despite the holdout of large, wealthy provinces such as Alberta and British Columbia, the idea of unified family courts is not a new one. Manitoba, Ontario and Saskatchewan each launched pilot projects in 1977, British Columbia initiated a short-lived project in 1974 and a committee of the Alberta Law Society recommended the establishment of a unified family court in that province in 1968. In addition to reducing public confusion by creating a one-stop shop for family law disputes, the basic premises behind the idea of unified family courts are these:

- Family law is a unique species of civil law that deals with complex problems and future-oriented problem-solving. A unified court will result in its judges developing significant specialized expertise in a difficult area of law.
- A unified court will allow all of the problems arising from the end of a relationship to be dealt with in one place, reducing the likelihood of simultaneous proceedings, litigation harassment, tactical delays, and conflicting court orders.
- Social services related to family breakdown will be integrated more effectively and efficiently into the court system and judicial processes.
- A unified court will adapt and evolve rules specific to its needs and those of the families before it, and improve access to justice by establishing simplified forms and processes.
- A unified family court managed by a specialist bench will produce outcomes for families that are better tailored to their individual needs and circumstances.

Makes sense, doesn't it? This is the rationale for a unified family court given in Alberta in 1976 by a special committee composed of the province's Chief Justice, judges from the superior and provincial courts, with representatives from the Law Society of Alberta and what was then known as the Department of the Attorney General:

> *Family law deals with the problems of husbands and wives arising from the breakdown of marriages. It deals with problems of the protection and support of children arising from the breakdown or lack of family relationships, and the problems arising from the unlawful conduct of children and juveniles. These are among the most numerous and the most serious and important problems with which society must deal, and it is imperative that society provide strong courts and efficient social services in order to deal with them.*
>
> *The Committee is concerned that the numerous and varied problems affecting families are not being satisfactorily dealt with under the present divided court structure. The fragmented jurisdiction makes improvement very difficult. The Committee is convinced that the time has come when important changes and solutions can be implemented only if a Family Court is created with original exclusive jurisdiction over the entire field of matters affecting the family.*

However, despite recommendations for unified family courts made in 1968, 1972, 1976 and 1978, little progress was made toward their implementation in Alberta until 1999 when the government decided to solicit public input on a range of justice issues. A consultation paper(PDF) released subsequently stated:

> *One of the messages the Government received was to simplify the justice system. Delegates felt that the system created delays, discouraged access, and, in some cases, resulted in citizens being denied justice.*

These messages led to the founding of the Unified Family Court Task Force in 2000, and from there, surprisingly, to yet another recommendation to establish a unified family court in the province in 2003,

followed by an actual proposal to the federal government to cooperate in its establishment. Here's how one commentator, lawyer and academic Michelle Christopher, described the rationale for a unified family court a year later:

> *Access to justice has long been a concern to the public, particularly in family law disputes, where parties lack the deep pockets to provide funds to sustain the type of prolonged and costly litigation that is common in corporate and commercial law contexts. Leaving aside for the moment considerations of whether it is in fact even appropriate to litigate family law matters…*

— well said! —

> *… it has been argued that family law litigants are at a distinct disadvantage in trying to proceed without legal counsel, because the jurisdiction for family law problems is not limited to one level of court, or in Calgary, even to one court building! The public has long complained, and with good reason, that it is difficult to know whether their matters will be heard in Provincial Court or in the Court of Queen's Bench. …*
>
> *The public is not expected to be entirely conversant with issues of legislative jurisdiction, which require federal matters such as divorce to be heard in the first instance in the Court of Queen's Bench. The Provincial Court of Alberta has jurisdiction to hear all matters of "purely local and provincial concern," including child welfare and domestic relations (non-divorce, guardianship, custody and access) matters relating to the children of unmarried or never-married parents, or separated parents who are not yet divorcing, except if the proceedings are to establish paternity, in which case the Court of Queen's Bench has jurisdiction. If you are a grandparent seeking access to your grandchild, your matter will be heard in the Provincial Court. In the case of child support, matters are also heard in the Court of Queen's Bench, unless you are bringing an application for the reciprocal enforcement of a child support order from another province, in which case you will be heard in the Provincial Court, and so on. You get the picture. Except that it's totally confusing to members of the public, and does affect access to justice.*

Although Christopher's critique focuses somewhat more heavily on access to justice concerns, her comments are not terribly far removed from the observations the special committee made almost three decades earlier. Sadly, the Alberta government's efforts came to naught, as time has since told. Family law litigants have remained plagued by the confusion and inefficiencies caused by two courts of concurrent family law jurisdiction.

The complexity of the family justice system has a direct impact on the ability of litigants to proceed without counsel. In a 2014 survey of 167 judges and family law lawyers conducted by the Canadian Research Institute for Law and the Family and two prominent academics, all Alberta respondents said that special challenges always or usually arise because of unrepresented litigants' unfamiliarity with the rules of court and the law of evidence, and 96.9 percent said that challenges always or usually arise because of litigants' unfamiliarity with court processes.

Nature of challenge	Always	Usually	Sometimes	Rarely
Unfamiliarity with the rules of court				
Alberta	38.7%	61.3%	0.0%	0.0%
Rest of Canada	48.6%	43.9%	5.6%	0.9%
Unfamiliarity with hearing and trial processes				
Alberta	34.4%	62.5%	3.1%	0.0%
Rest of Canada	36.9%	55.3%	3.9%	1.9%
Unfamiliarity with the law of evidence				
Alberta	50.0%	50.0%	0.0%	0.0%
Rest of Canada	61.3%	34.9%	2.9%	0.0%

Interestingly enough, unified family courts do indeed seem to produce some of the outcomes upon which they are premised. According to a 2006 report prepared by the Research Institute and Nicholas Bala, a professor of law at Queen's University, for the federal Department of Justice, most family law lawyers practicing in regions with unified family courts say that they have simplified court procedures, provide easy access to family justice services and produce outcomes tailored to individual needs. What they're not so good at is providing a speedy resolution to family law disputes. This is what the 164 lawyers surveyed said about four key performance benchmarks:

Objective	Strongly Agree	Agree	Disagree	Strongly Disagree
Simplify procedures	16.5%	31.1%	18.3%	8.5%
Provide easy access to family justice services	17.1%	36.0%	14.6%	6.1%
Provide timely resolution of family law disputes	11.6%	26.8%	23.2%	11.6%
Produce outcomes tailored to individual needs	11.6%	33.5%	19.5%	6.7%

There have, however, been three important developments in the last year or two which suggest that hope is not lost for an Alberta unified family court. First, the 2012 report of the Family Justice Working Group (PDF) of the national Action Committee on Access to Justice in Civil and Family Matters, recommended that each jurisdiction establish its own unified family court with:

> *…unified legal jurisdiction, specialized courts, simplified rules and procedures, a range of dispute resolution methods, and ancillary, integrated legal, community and social services.*

The Action Committee reports have sparked, and had a profound impact upon, a number of justice reform efforts that are presently underway across Canada, including, and this is the second

development, Alberta's Reforming Family Justice Initiative. The Initiative is led by Justice Andrea Moen of the Court of Queen's Bench and Assistant Deputy Minister Lynn Varty from Alberta Justice and aims to produce recommendations for a family justice system that is "open, responsive, cost-effective and puts the needs of children and families first, while assisting families with the early and final resolution of disputes." If there is ever going to be an opportune time for significant change in Alberta, now would seem to be it.

Finally, the Minister of Justice, Jonathan Denis, told the Calgary Herald in January 2014 that "the government is studying"— again? — "the possibility of establishing a unified family court to hear all family law matters." This statement was followed in May by some rather unfortunate remarks from former Premier Dave Hancock that although "a unified family court would be more efficient than the existing system," there is "a war between the Provincial Court and Court of Queen's Bench as to who gets control."

Thankfully, Premier Hancock's perhaps ill-considered comments triggered statements from both Provincial Court Chief Judge Terrence Matchett and Court of Queen's Bench Chief Justice Neil Wittmann to the effect that they both support the idea and have a "mutual willingness" to consider a unified family court. The Chief Judge told the Herald that:

> *I really think it's time to reconsider the unified family court process and I think we should look at what the other jurisdictions are doing.*

and the Chief Justice said:

> *A unified family court is on the table because everything is on the table. … A lot of the people in the public are very rightly and justifiably uncertain of what court they should come to. … It's a disservice to the people of Alberta.*

I couldn't agree more. The Chiefs' statements evidently resulted in some forelock-tugging on the part of the former Premier, who told the Edmonton Journal in a July interview that:

> *It would be more efficient if we had — I'm going to say this out loud and get in trouble — a unified family court, so that there was one court that dealt with all of the issues with respect to child, family, divorce and property. … It would be more effective and efficient, and it would be better justice.*

Report after report has commented on the barriers that inhibit access to justice, and prominent among them is the labyrinthine complexity of a judicial system involving two courts with concurrent but incongruent jurisdiction, with different rules, processes and forms. This barrier assumes a new significance in light of the ever-increasing numbers of litigants involved in civil court proceedings without counsel, numbers which represent anywhere from 50% to 80% of the court docket depending on the jurisdiction you're looking at.

A simpler, more streamlined process, with a new and heightened emphasis on integrated social services, managed by a bench of specialist judges, may not be the only or the best answer for Albertans, but it's a concept that has proven to work elsewhere and surely deserves to be considered. It's worth remembering that a unified family court has been recommended to the provincial government by various groups of learned lawyers and judges at least five times since 1968; perhaps now, in the present atmosphere of justice reform and crisis, is the time to pilot a unified family court in Alberta.

Possibly, Maybe, Perhaps: Empty Promises Spell the Death Knell of the Unpaid Internship

Posted By: *Ana Kraljevic*

Unpaid internships are prevalent in Canada, with as many as 300,000 people currently working for free for some of the wealthiest and biggest transnational corporations. It has sparked nation-wide debate that has resulted in the naming and shaming of many businesses and corporations, including Bell Canada, the Vancouver Fairmont Hotel, and even the office of a Toronto City Councillor. A growing body of individuals, from Ontario Labour Minister Yasir Naqvi, to employment lawyers, to disenfranchised youth, has raised a clamour against the legality of unpaid internships arguing that it is tantamount to exploitation.

How is this phenomenon even happening? Isn't the lowly intern at least entitled to minimum wage? Not according to the Ontario *Employment Standards Act (ESA)* which prescribes that the obligation of employers to pay minimum wage applies only to "employees", not interns.

Section 1(2) of the *ESA* carves out a number of exceptions wherein one is not subject to the minimum legislative standards.

Person receiving training

(2) For the purposes of clause (c) of the definition of "employee" in subsection (1), an individual receiving training from a person who is an employer is an employee of that person if the skill in which the individual is being trained is a skill used by the person's employees, unless all of the following conditions are met:

1. The training is similar to that which is given in a vocational school.

2. The training is for the benefit of the individual.
3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained.
4. The individual does not displace employees of the person providing the training.
5. The individual is not accorded a right to become an employee of the person providing the training.
6. The individual is advised that he or she will receive no remuneration for the time that he or she spends in training. *ESA* 2000, c. 41, s. 1 (2).

Although the word "intern" is never mentioned in the *ESA*, according to Section 1(2), if you are not considered to be an employee because all of the foregoing conditions have been met, then you are, by default, considered an intern.

Since all six conditions are conditions precedent to being deemed "not an employee", employers have a high standard to meet before they can classify someone as an intern and have a legal excuse for not paying him or her. Given that there is no independent entity monitoring internships to ensure that they meet the stringent criteria necessitated by s. 1(2) of the *ESA*, it is little wonder that so many employers are flouting the law and getting away with it.

In his Blog, ***Law of Work***, Professor Doorey of Osgoode Hall Law School breaks down each of the elements of the test that legally qualify someone as an intern and offers a commentary as to whether the lofty policy reasons underlying each provision are being applied and mirrored in the real world. I will take a similar approach and examine each of the elements in turn.

1. The training is similar to that which is given in a vocational school.

This provision relates to the whole crux of the law, which is to exempt from the ESA individuals who receive valuable training in a field that they would otherwise acquire at school while receiving academic credit. The magazine publishing industry is the usual suspect in this case since many "interns" are eager to acquire experience and networking opportunities in lieu of journalism school. Proponents of unpaid internships defend the practice by saying that, without it, many individuals would be unable to launch their careers and would be missing a key stepping stone to bridging the gap from university to paid work.

The problem here is that the internships do not necessarily ford that gap, with some youth reportedly completing a series of internships and finding themselves no closer to securing a job. The process is akin to dangling a carrot in front of the noses of Ontario's youth, when that carrot is a moving target. Moreover, is there even a sound reason for the necessity of a gap between school and employment?

We don't see professional school graduates content to work for free in hospitals, schools, and law firms. Why should there be a stratification of employability based upon the degree that one has

earned? Is the work provided by a journalist inherently less valuable than that of a teacher? An accountant?

It points towards the phenomenon whereby interns have become the "new Canadian underclass," (a phrase coined by a writer for iPolitics). Andrew Langille, a Toronto labour lawyer, echoes this sentiment saying, "the message to youth is: you're worthless, you aren't deserving of a wage, and I can exploit you with impunity."

While internships may pave the way for paid opportunities in "niche" occupations, it may also deter many talented people from pursuing their passions if their financial circumstances preclude them from completing stints of unpaid training. If this occurs, we won't necessarily have the best and the brightest filling these positions, we will have only those individuals who have a strong support system in place which puts the well-heeled children of wealthier families at a distinct advantage.

While there are valuable internships that are lauded by many, there are also many reports of internships almost completely devoid of valuable training. As Professor Doorey points out, many interns are making coffee, running errands, cold-calling, doing data entry and numerous other menial, monotonous, and low-value tasks that impart little to no knowledge and offer nothing in the way of widening the intern's repertoire of skills. These types of internships certainly run counter to the very spirit and objective of the internship experience. They largely just rub salt in the wound. At least if the individual was getting paid, they could justify this type of low-value experience as providing some consideration, but when the intern is forced to do tasks that no vocational school would offer in its curriculum, and on a completely gratuitous basis, it crosses a new threshold of exploitation.

2. The training is for the benefit of the individual. AND

3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained.

Numbers 2 and 3 are to be interpreted in concert so as to make it clear that the internship is meant to benefit the intern, not the person providing the training. Indeed, point 3 indicates that the relationship between the intern and the person providing the training is characterized as a particular type of symbiosis wherein benefits accrue to one party with the other party receiving little to no benefit. In scientific terms, this would be classified as commensalism. However, news reports have indicated that a parasitic relationship is more prevalent. The "intern" performs "real work" that spares the employer the pesky task of actually having to pay employees, and the intern is left with nothing to show for it.

Media reports are rife with this type of complaint. Two unpaid interns working on the Oscar-winning film Black Swan successfully sued Fox Searchlight pictures. A New York district judge found that the interns provided value and benefit to the company by virtue of their performance of low-level tasks that did not require any specialized training.

A Canadian example, Jainna Patel, a math and statistics graduate from McMaster University, found that her five-week stint in the Bell Mobility Professional Management Program was similarly lacklustre in comparison to what she expected to gain from the experience. She was enticed to "intern" for Canada's telecommunications giant with promises of gaining valuable training. She ended up spending long hours transcribing video, conducting telephone surveys, and filling in spreadsheets. She was also asked to stay after hours as late as midnight. After realizing that she was doing menial tasks and receiving little training, Patel quit the internship and filed a labour complaint with the federal government.

4. The individual does not displace employees of the person providing the training.

This provision is meant to address concerns grounded in economic policy – substituting paid employees with interns will eliminate jobs, slow job creation, and contribute to the youth "underclass" phenomenon.

5. The individual is not accorded a right to become an employee of the person providing the training.

This provision is presumably tied into the fourth provision, which is to prevent the intern from displacing a paid employee, but it doesn't make any sense if the intern is actually interested in working for the company providing the training. This provision protects the employer from any obligation to extend a job offer to the intern at the conclusion of the training, but leaves interns particularly vulnerable.

6. The individual is advised that he or she will receive no remuneration for the time that he or she spends in training. *ESA 2000, c. 41, s. 1 (2).*

This provision actually gives employers the incentive to disguise what would otherwise be characterized as work as an unpaid internship. It is patently unjust, and for a slew of reasons, not the least of which is the crippling student debt that Ontario's youth are burdened with upon graduation. Today's youth are more educated than previous generations, taking longer to finish their degrees, and are spending longer periods out of the paid workforce in the hopes of increasing their marketability to future employers. Meanwhile, there is a great mismatch between the value of post-secondary degrees and the employment opportunities that are available once they leave the comfortable bubble of academic life.

When we retreat into 19th century labour practices in the twenty-first century, it's a sign that the unpaid internship is serving as a fig leaf for the exploitation of youth workers desperate to find a job in the aftermath of a recession. More and more university graduates are struggling to transition into the work force and find paid employment that will provide them with much needed practical experience, not to mention a stream of income to reduce their debt load. What is disconcerting is that this phenomenon has prompted some to label Generation Y as "entitled" for their absurd expectation that their years of hard work and investment might actually lead to a career and allow them to place a real foothold onto independence. In reality, a huge segment of Ontario's youth has been practicing the

virtue of delayed gratification in the hopes that the denial of a paycheque today will be the harbinger of opportunities for tomorrow.

Is this a quid pro quo that Canada can condone? Based on recent events, it looks as though the days of the unpaid intern are numbered. The Ministry of Labour has ordered The Walrus and Toronto Life to eliminate their internship programs following a spate of complaints lambasting it's unfair labour practices. While some have denounced the decision as throwing the baby out with the bath water, it nonetheless sends a strong message to companies and employers that Ontario's youth will no longer be taken advantage of. Perhaps now we will see unpaid internships turning into entry-level positions which will thankfully bring Ontario's youth under the protective auspices of the ESA.

Unpaid Internships: The Views of a Survivor!

Posted By: Grady Mitchell

Last week a Craigslist post made the rounds of my social circle in Vancouver. It advertised an exciting opportunity for a peppy, earnest young person to become a “Barista Intern”, to learn to handle, and I quote, “thirst and hunger requirements.” Needless to say, it was torn apart and taken down not long after.

It may or may not have been a joke (please let it be a joke). If the ad was sincere, it’s concerning for obvious reasons. If it was a joke, it’s concerning because it’s not that far off. A few months before barista-gate, an ad floated around for a bussing internship at a restaurant, a great chance to “learn the fast-paced world of cuisine.” Unpaid, of course.

I’ve done, and thoroughly enjoyed, two internships in publishing. Although both were unpaid, they delivered on everything they promised. Sure, I had to take out garbage and copy and paste mailing lists, but I also learned the inner workings of a magazine and I got to see my work in print. I interviewed interesting people, attended exclusive events, and collected a surprising amount of free alcohol. In both cases it was clear pretty much from day one that neither magazine was going to hire me. Not because I wasn’t fit for the job, simply because they didn’t have the money (or at least that’s what I tell myself). While I was never hired on as staff, I did receive freelance assignments from both publications post-internship.

I was able to accept two internships because I’m exceptionally lucky; I have two supportive parents who helped me through the unpaid days. That’s rare, and it’s where the question of internships becomes particularly troubling. It pushes success from an issue of merit to one of privilege as well.

Many people simply can't afford an internship. They can't cover rent in the large, expensive cities where internships are typically offered, while working full-time without pay. It seems unreasonable that it has become the expectation that graduates, after four years of intensive education in their craft, must work another year or two for free to prove themselves. It adds to the already staggering financial burden of freshly-graduated students wrestling with heavy debt. It skews the odds towards upper middle class, and probably white, applicants.

Financials aside, there's also the mental aspect. When you're trudging home in the dark and cold of a mid-winter evening, picking up a box of KD or ramen for dinner, it's tough to feel like success is right around the corner. You begin to wonder if your work, and all the time and effort you've put into improving it, holds any value, to anyone, at all.

From my experience talking with friends, that doesn't seem to be the case in other industries. In sectors like finance and engineering, internships are paid, often well, and a job is usually more or less assured, barring any catastrophic screw ups. Sure, those industries are throwing around more money in general, but in light of that it doesn't seem unfair for publishing interns to receive, at the very least, minimum wage.

It's easy to blame the companies, even if you can understand their point. Of course a cash-strapped organization is going to take advantage of free labour. The difference is in the ones who are honest about what an intern can expect, and those who dangle mirage incentives in front of young workers to squeeze the most out of them. The implications of that exploitation are starting to show. Last year an Edmonton intern died after falling asleep at the wheel, driving home after an all-night shift he was forced to work by the radio station where he interned, under threat of having his college credit denied. In April 2013 tech startup Hootsuite had to backpay its current and former interns and afterwards nixed the practice of unpaid internships.

These days I'm working as a freelancer, but I'm hardly out of the woods yet. I've adopted a staunch policy of politely declining all internship offers, despite fielding several. I've had a magazine ask me to work free of charge for a month, at which point they would backpay me based on their assessment of my performance. During my second internship I was offered a paid staff job by a publication I freelanced for on the side. Not wanting to leave my internship halfway, we agreed I would come back in two months and discuss the job. When I returned the salaried staff gig had been downgraded to a four-month summer internship with a $200 stipend (not monthly – $200 for the entire summer). It was all mine, they said, if their first choice applicant decided to turn it down.

It's beyond frustrating when companies so obviously try and snatch work for free, especially through guilt-tripping (you owe us!), fear mongering (you're a nobody, who'd hire you?), or empty promises (future work!). I've found that, at a certain point, it comes down to making a mental switch. I'm no longer an intern, I'm a working professional (even if it doesn't always feel that way). The best way to break the doom cycle of internships before I hit 40, it seems, is to refuse to take part at all.

Unpaid Interns have Little Protection under the Law

Posted By: *Stephanie Jansen*

Imagine spending years in university, only to graduate and find out that in order to secure a job, you would have to work an undetermined amount of time for free. At the end of the internship, there will be no assurance of employment; instead, you can chalk it up to getting some good experience and, hopefully, a reference.

This is precisely what many students are finding themselves faced with: the increasingly competitive job market forces graduates to essentially extend their education by taking a job high in expectations, and low in compensation. Worse, because of the lack of regulation around internships, many students find themselves in situations where they do not know their rights, and are unsure of what they can reasonably expect or demand.

In some cases, internships are a required part of obtaining a degree. But, in many reported cases, internships have preyed on young people. New graduates tend to choose an internship with the hopes it will result in reference letters, but the work students are being asked to do can sometimes be qualified as mistreatment by the employers. Filing a complaint is risky and can result in the reference letter being revoked. Worse, the profound lack of regulations and enforcement has contributed to the mishandling of an entire employment industry. The absence of oversight has become a hot issue in the federal government, due in part to a tragic death of an Edmonton student.

Andy Ferguson was one of those students. Studying radio and television at NAIT in Edmonton, Andy had a four-month unpaid internship for Astral Media. Their stations include “The Bear” and “Virgin Radio.” This practicum was mandatory to graduate, but Andy was also working as a paid intern at the same radio stations. In other words, he was working up to sixteen hours at a time in both positions. After one of those very shifts, Andy crossed the centerline while driving and hit a gravel truck head on at 6:00 in the morning following an overnight shift. He was killed.

Federal laws do not protect interns at this time. Each province has its own statutory provisions to deal with employment standards, though many are unspecific about internships. For the purposes of understanding the ambiguity of the laws around internships, here is a very brief review of provincial statutes.

Provincial Law – A Survey

British Columbia: *Employment Standards Act*

Unpaid internships are illegal unless the internship meets one of the two requirements: the internship must be hands-on training as part of a formal education program or the internship is part of professional training (like law or architecture).

Alberta: *Employment Standards Code*

Labour laws in Alberta do not include unpaid work by students or interns in provincially regulated workplaces. The definition of employee in the Employment Standards Code is vague in that it doesn't pointedly include interns. Still, internships are not illegal as long as they are part of a formal education program. There is vagueness around whether interns should be entitled to the minimum wage of $10.20 per hour.

Saskatchewan: *Saskatchewan Employment Act*

The law provides for a minimum wage for most employees, but doesn't clearly state whether interns are entitled to the wage.

Manitoba: *Employment Standards Code*

Unpaid internships are illegal unless they are part of an approved work experience program, or they provide training for certain professions.

Ontario: *Employment Standards Act*

Unpaid internships are illegal unless they are part of an approved program, the internship provides training for certain professions (i.e. law or dentistry), or the internship meets six conditions that are required to be considered a "trainee." The training must: 1. Be similar to what would be given in a vocational school, 2. Be for the benefit of the individual, 3. Ensure there is no benefit derived by the employer while the intern is trained, 4. Not displace employees of the person providing the training, 5. Not accord a right to become an employee of the organization providing the training, and 6. Be upfront about remuneration for the time spent in training. (Editor's Note: See the article "Possibly, Maybe, Perhaps" in this issue for a more detailed discussion of the Ontario legislation.)

Quebec: *An Act Respecting Labour Standards*

Unpaid internships are illegal unless the internship is part of a program provided by an approved educational institute, the internship is with a non-profit organization with social or community purpose, or it is an internship that is associated with a vocational program.

New Brunswick: *Employment Standards Act*
An hourly minimum wage is provided for most employees, but the definition of employee is defined as a person who performs work for wages. It is unclear that this applies to interns.

Newfoundland and Labrador: *Labour Standards Act*
A minimum wage of $10.00 per hour is provided for most employees. An employee is defined as a person who works under a contract of service for an employer. Because the definition is broad, it could include interns. Yet, if the internship is part of a formal educational program, it can be unpaid.

Nova Scotia: *Labour Standards Code*
A minimum wage has been set at $10.15 per hour. An employee is defined as a person employed to do work. Internships could be included in this definition. If the internship is a part of a formal educational program, no hourly wage is required.

Prince Edward Island: *Employment Standards Act*
The hourly wage is set at $10.00 for most employees. An employee is a person who performs any work, but also includes someone who is being trained by an employer. It is unclear whether unpaid interns qualify for minimum wage.

Federal Law: Canada Labour Code & Bill C-620 – Intern Protection Act

The federal regulations apply to organizations that are subject to the Canada Labour Code, and include airlines, broadcasters, the federal government and cellular phone companies. There are no exclusions for internships, and this has created uncertainty around whether internships are legal under federal regulations.

In response to this confusion, and in direct response to the Ferguson family tragedy, an NDP Member of Parliament named Lauren Liu has introduced a private member's bill entitled C-620, The Intern Protection Act. This bill is an Act to amend the Canada Labour Code and to add a section that would protect intern's rights by changing the definition of employee to include "a person who receives training, with or without remuneration, from the employer." Additionally, the proposed legislation adds that employers cannot provide training without remuneration unless all listed conditions are met. They are:

- the training must be approved by a post-secondary or vocational school, and the completion of the training must contribute to a degree or diploma, or the training is comparable to that provided by the schools;
- the training is primarily for the benefit of the employees and must improved the job or career aspects in the field of the internship; and

- The employee being trained cannot replace any paid employees and the activities performed must differ from regular employees.

All of these terms must be complied with in order for an organization to hire someone without pay.

Additionally, the bill proposes that if the employer provides unpaid training in compliance with these conditions, they must notify the employee what the terms of the training are, including length of the program, and what the employee will be doing; the hours or work expected; the fact that there will be no pay; and they must keep a record of the hours worked by the employee.

Although the new Act would only apply to federally regulated organizations, it would extend workplace standards and protections to all unpaid interns, and set clear rules and conditions for the use of any unpaid internships.

Ultimately, the proposed private member's bill aims to prevent abuse of interns and to help young Canadians avoid exploitation from employers. According to the "The Link," an online independent newspaper from Concordia University, MP Liu suggests that the bill would provide interns with the same protections as other employees by limiting the workweek to 48 hours, provide the interns with the right to refuse dangerous work and protect them from sexual harassment.

While the purpose of internships is usually to gain valuable experience, to date, they have not fulfilled their mandate. A bill like the Intern Protection Act is very important, but the statistics around these types of bills passing are disappointing. In the past one hundred years of Canada's Parliament, only 229 private members' bills have passed. Here's to hoping this one is number 230.

Viewpoint 39-2: When facing terror, there are limits to what law can achieve

Posted By: Craig Forcese

If the attack on Parliament and on Canadian Armed Forces members constituted a failure by the state to exercise its fundamental 'night watchman' function, it was probably not a failure of law. It may not necessarily have been a failure of law enforcement. It was certainly a failure of omniscience. And that may mean it cannot be cured.

We have taught and written about national security law for a dozen years, and inevitably see what happened through the lens of how Canada and the world responded to 9/11 and the 1985 Air India bombing that killed 331 people, the majority of whom were Canadians. This experience suggests that there will be second-guessing about "intelligence failures" and "failing to connect the dots." There will also inevitably be a demand for legal "fixes" designed to forestall recurrences.

To be sure, there is a need to learn lessons from the two recent terrorist attacks. Why was there enough evidence to keep Martin Couture-Rouleau off flights but not to prosecute him? We presume there is a need to revisit the Air India Report that devoted an entire volume to discussing the challenges of converting secret intelligence into public evidence.

We also await the government's pending terrorism bill. In an attempt to increase public understanding, we have posted our responses to legal FAQs raised by this week's events. The existing tools are expansive. But blaming law will be a natural reaction. The Criminal Code grows in girth not because the evil of humans is ever mutable, but because high-profile manifestations of that evil demand a new political response of some sort. For federal law makers, that often means enacting new criminal or security laws. It will be next to impossible for parliamentarians to resist the lure of new legal enactments, some responsive to these recent events and some more distantly related.

So we will likely embark on discussions of new legal surveillance powers, and possibly new forms of "preventive detention". But along the way, we should not lose site of the fact that policing and intelligence powers are only one part of the equation. A number of states (including Canada) deploy various "soft" measures designed to discourage persons from becoming foreign fighters (or "radicalized" and prone to violence).

Academic research that we have seen suggests that these civil-society-oriented approaches are fruitful and necessary. We cannot prosecute or detain our way out of the radicalization problem. Although this truth has become surprisingly politically contentious, the sociology of anti-terrorism cannot be ignored. Outreach and partnerships in Canada's diverse Muslim community is necessary. We should also be aware that heavy handed approaches, especially those focusing on speech, might have the unintended consequence of being counter-productive.

Any new law project or proposed power must be evaluated on its own merits. This requires time for deliberation. Early days suggest Canadians and their law makers appreciate the need to build restraint into the foundation of new powers. Hopefully new legislation will recognize (as was not done in the post 9/11 legislation) that oversight and review of security in Canada is in disarray and that public confidence requires effective accountability that can keep pace with increased and integrated security activities. There will also be questions asked of the police and security services and their operational decisions. In a democracy, they should not be immune from criticism, but we should have the humility to recognize that their many successes are often invisible and that their failures are tragically obvious to all.

And if we are to question operational matters, we need to consider what it would mean to pre-empt the prospective actions of every, single individual bound on doing harm and willing to die to cause it.

Fully securing an open society is like squeezing water. Certainly, likely targets can be "hardened", but at the risk of diverting risk to other locales and persons. To wish for perfect security is to ask for an all-seeing state. That may soon be within technological reach, but the state secured in that manner is not one that many people would recognize, or choose.

The unsatisfying answer is that risk can be mitigated but not eliminated. The laws we enact and the security activities we authorize should not assume more.

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Why Canada Should Have a Museum for Human Rights

Posted By: Linda McKay-Panos

Recently, the Canadian Museum for Human Rights opened in Winnipeg. It is the first national museum built outside of Ottawa and the only one in the world that is dedicated solely to human rights. The museum was originally envisioned and supported by the late Israel and Babs Asper. Governments (federal, provincial and municipal), individuals and other organizations have provided additional funding and support. The museum contains exhibits pertaining to both modern and ancient examples of human rights documents. Current galleries include: What Are Human Rights? Indigenous Perspectives; Canadian Journeys; Protecting Rights in Canada; Examining the Holocaust; Turning Points for Humanity; Breaking the Silence; Actions Count; Rights Today; Inspiring Change; and Expressions. The Museum also collects research and publications on human rights topics.

The Canadian Museum for Human Rights is a "member of the Canadian Heritage Portfolio and reports to Parliament through the Minister of Canadian Heritage" (Mission Statement). The purpose of the Canadian Museum for Human Rights, as set out in the Museums Act, is:

> *[T]o explore the subject of human rights, with special but not exclusive reference to Canada, in order to enhance the public's understanding of human rights, to promote respect for others and to encourage reflection and dialogue.*

The opening of the Museum for Human Rights has not been without controversy. From the choice of architecture for the building, to the location of the building being an important archeological site, to the way that Aboriginal rights exhibits do not use "genocide" when referring to residential schools, to the very contents or lack of contents of materials dealing with the issues addressed, have all been raised as concerns. Hopefully, these and other controversies inspired by the Human Rights Museum's opening and existence, will serve to encourage very much needed dialogue on human rights in Canada.

These controversies, and other concerns raised, and the passion around them, demonstrate the significance of human rights for Canadians. While it is important to celebrate the positive achievements Canadians and others have made to human rights, it is likely more important to address some of the serious human rights violations that are part of Canada's history and current times. It is hoped that the museum will provide a springboard for dialogue, research and contemplation about Canada's human

rights record and events. Acknowledging the negative policies, laws and events that occurred in our history serves several significant purposes. First, it provides acknowledgment of the pain suffered by those who were abused and their descendants. Second, acknowledgment by others who have inflicted the abuses, and/or members of the current society, is vital step in the healing process. Finally, we must honestly review the effects of offending policies, laws and practices so that we might learn from them and not repeat them in the future.

I am reluctant to list Canada's ignoble historical events, as I do not wish to offend anyone by failing to mention some. However, some notable violations include:

- many sections of the Indian Act;
- creation of residential schools for Aboriginal children;
- internment of Ukrainian Canadians in World War I;
- chinese Head Tax and Chinese Immigration Act of 1923;
- internment of Japanese Canadians in World War II
- refusal to accept Jewish refugees during World War II;
- forced relocation of Inuit people during the Cold War;
- top Secret plans to identify and intern Canadian communists and sympathizers during the Cold War; and
- criminalization of "homosexual" behavior.

There are many, many others.

Although the opening of the Human Rights Museum has sparked controversy, it remains a very worthwhile endeavour. Stuart Murray, the museum's president and CEO, put it well when he said:

> *"You have to shine a light in some dark corners in Canada's history because we have to know, I think, where we came from to know where we're going".*

A helpful Guidance on Ineligible Individuals, but questions remain

Posted By: Peter Broder

Andrew Coyne recently drew much attention when he mused in the National Post about the merit of abolishing the charitable tax credit so registered charities could have free rein to engage in political activities. However, the credit is arguably at far greater risk from the abusive tax shelters that have been seen over the last decade or so. Those shelters saw the siphoning off of hundreds of millions, if not billions, of dollars in resources from charitable work and into private pockets.

The schemes were structured in various ways, but basically entailed a donor receiving more money from his or her claim of a donation tax credit than the value of what was actually given to a charity or other qualified donee by way of a gift.

The federal government responded to the abuse aggressively. As well as an extensive audit initiative and litigation of cases associated with the schemes, it brought in a range of legislative measures. One key statutory change was a new deeming provision. It set the value of certain donations at the cost to the donor, rather than the fair market value (unless that was lower), if the property donated had been acquired less than three years prior to the donation, or had been acquired with a view toward its being donated.

As well, in its 2011 budget the federal government established the category of "Ineligible Individuals" and provided the Canada Revenue Agency (CRA) with discretion to refuse registration, revoke registration or apply other sanctions where an "ineligible Individual" potentially controlled or managed the resources of a registered charity or group that sought registered charity status.

The definition of Ineligible Individuals includes:

- tax shelter promoters whose schemes have led to a registered charity's status having been revoked within the last five years; as well as
- those who govern, direct or manage a charity that has been subject to revocation for a serious breach of Income Tax Act (ITA) requirements within the last five years.

This makes it an effective tool for CRA to deal pro-actively with tax shelter abuse. That's to the benefit of the sector, since exploitation of the donation credit provisions of the ITA on the scale seen in the early

years of the 21st century could undermine public confidence in preferential tax treatment of charities and donations to them. It also massively diverts resources from genuine charitable work.

Unfortunately, the measures extend far beyond just tax abuse situations. A person with a conviction for a criminal or "relevant" offence or someone who governed, directed or managed any registered charity whose status was revoked on the basis of what may reasonably be considered to have constituted a serious breach of the ITA requirements for registration are all caught under the definition. Given the number of possible "relevant" offences and the number of registered charities that have their registration revoked for cause each year, that potentially puts a large group of people under scrutiny and an immense amount of discretion in CRA's hands.

In August, CRA released a Guidance on how it will administer the legislation. The approach CRA sets out is quite reasonable in the circumstances and does its best not to saddle organizations with cumbersome compliance requirements.

CRA makes clear it has discretion as to whether to sanction a charity connected to an ineligible individual, and that it will examine situations on a case-by-case basis to determine how to respond. It also indicates that it will deal with the organization, rather than the individual in question when it has a concern. Organizations that are not contacted do not have to meet any specific compliance obligations.

The new Guidance features a self-assessment questionnaire so someone can evaluate if he or she falls within the definition of an Ineligible Individual, but does not require the organization to pre-screen staff or volunteers. It also allows the organization to make representations as to its due diligence or other measures to limit the scope of responsibilities or activities of someone meeting the definition, or to provide information indicating that CRA is incorrect in asserting that an individual is ineligible.

That said, there will be challenges as the new regime is implemented. Among the issues that that spring to mind are:

- given the notice protocol proposed by CRA, what obligation does the charity have with respect to protecting the impugned person's privacy in its follow up with the individual and CRA? and,
- if it becomes necessary to remove the person or alter the position or practices associated with him or her, can this be done without breaching corporate, labour or other laws to which the charity's operations are subject?

Given this, it would seem prudent for charities prior to having, or when they have, an Ineligible Individual situation arise, to seek legal counsel to ensure it is or can be dealt with appropriately.

But getting back to Mr Coyne, his column is at least partly rooted in his skepticism about the appropriateness of a tax agency overseeing the operational aspects of organizations. As has been noted here before, it is much more rarely that the government places – and the CRA enforces – constraints and

transparency obligations on corporations or other taxpayers that enjoy the benefits of tax credits. This makes for, at best, a very unlevel playing field.

Under the Canadian Constitution, jurisdiction over the operational aspects of charities actually resides primarily with the provinces. The federal registered charity regime confers tax benefits over groups that are defined, at common law, as charities. Given the federal government's broad taxation powers under the Constitution, there is no doubt that the federal government can and ought to protect the integrity of the tax system. But that is different from delving into the day-to-day decisions of charities. That's why measures such as the ineligible individual provisions ought to be drawn as narrowly as possible.

In this regard, the 2011 Budget measures overreach. A better approach would have been to focus exclusively on preventing donation tax shelter abuse – a big enough problem in itself – and not burden the sector with trying to divine the meaning of, and the CRA trying to administer consistently and fairly, provisions which ought to be of no concern to the tax agency nor, indeed, the federal government.

Considering Jurisdiction in Interprovincial Custody Applications

Posted By: Sarah Dargatz

Canadians are mobile and it is not uncommon for families to move between provinces. It is also not uncommon for parents to live in different provinces after a separation. So, if they need to go to court to settle a parenting dispute, which province should make this decision? This is a question of which court has "jurisdiction" over the matter. (For more detail about jurisdiction see the family law column: What, Why and Where: Untangling Jurisdiction in Family Law)

It may be tempting for a parent to simply apply to the court closest to them. Across Canada the laws regarding children are very similar: the "best interests of the child" is the primary consideration. Therefore, arguing about jurisdiction can sometimes be a distraction from the true issue: what is the best parenting regime?

Take, for example, a case I witnessed last month. The children had lived with Mom since birth in B.C. After the parents separated, Dad moved to Alberta. The children visited Dad for the summer holiday and he believed that the children should continue to live with him for the whole year. He brought an application for custody in Alberta in late July. When the matter was heard in court in mid-September, Mom's lawyer argued successfully that Alberta was not the proper jurisdiction so Dad's application failed. The parents had to start the court process all over again in B.C. Had Dad simply brought his application in B.C., a decision about where the children should live might have already been well on its way to a resolution. This also created instability for the children: they started the school year off in Alberta, were then sent back to B.C., and are likely still waiting for an outcome. Choosing the most appropriate jurisdiction from the start, even if it is inconvenient to one parent, can set the family on the path to getting the best and quickest decision about their children.

Often, legislation will set out when a court can take jurisdiction, but not always. Regarding parenting of children, married parents would usually apply under the Divorce Act. Sections 4 and 5 of the Divorce Act allows a court to hear and determine custody and access applications (also called "corollary relief") if either parent is ordinarily resident in the province at the commencement of the proceedings, or if both parents accept the jurisdiction of the court. If each parent brings an application, the first application will go ahead. However, s. 6 of the Divorce Act allows a parent to make an application to transfer the issue

of custody and access to a court in another province if the child of the marriage is most substantially connected with that other province.

Unmarried parents in Alberta usually apply for parenting orders under the Family Law Act. However, the Family Law Act does not state when a court has jurisdiction over the parenting of children. Therefore, the common law rules regarding forum non conviens (a Latin term meaning "the forum which is not convenient") apply. The family legislation of other provinces, such as Ontario, allow a court to take jurisdiction where the child is habitually resident in that province.

Whether the test is habitual residence, real and substantial connection, or forum non conviens, the factors are very similar. When jurisdiction is challenged in parenting matters, the court will consider the following:

- where the child was born;
- where the child has spent most of his or her life;
- where the child last lived with both parents;
- where the child has lived since the separation with the agreement of both parents;
- where the child's extended family lives;
- where the child has the strongest bonds;
- where the child has connections to school, health care providers, and other members of the community;
- where the parents have established a life by setting up a home, finding employment, and engaging in a social life;
- where there are other court orders already in place;
- whether there is a difference between court processes that will affect how quickly and inexpensively the issue can be resolved; and
- whether there is a difference between the laws that will affect the welfare of the child.

Many of these points come down to the basic question: where is the best evidence located?

Another important consideration is whether or not a child was unilaterally removed from one place to the other. Generally, if a child was removed from a province without the consent of the other parent, the court will not allow that parent the benefit of taking jurisdiction over the matter. However, in cases where a child may experience harm if returned to a particular place, such as in situations of family violence, the court may make concessions to address these concerns.

When confronted with interprovincial parenting disputes one parent is sure to be inconvenienced. However, in the long run, there will likely be a better outcome, reached more quickly and inexpensively, if applicants turns their minds to which place has the best evidence and bring an application there.

Employees on Probation

Posted By: Peter Bowal

Since it takes away an employee's usual rights, a probationary period must be expressly agreed to by the employee. It cannot be implied into the relationship. The [employer] must clearly indicate what will happen if the relationship ends before the probation terminates.

– Easton v. Winslow Properties Corp., [2001] O.J. No. 447

Introduction

When we hear the term that an employee is "on probation" it sounds like the employee committed a crime. However, "probation" comes from the verb "to prove." Many employers choose to start new workers in probation to prove themselves, allowing the employers to evaluate performance and assess the suitability of the new hires for long-term work.

Employment contracts often stipulate a period of probation, during which new employees can be dismissed without notice or cause. This article describes the law of probationary employment.

Legislation

While there is no specific legislation creating employment probationary periods, most provincial employment standards legislation states that termination notice is not required when an employee has been employed for three months or less. Likewise, employees do not have to give notice of quitting if they have worked for an employer less than three months.

It is important to remember that this is the statutory minimum, and the common law (judge-made) notice principles about reasonable notice are more generous.

Common Law

In 1955, an arbitrator in Re United Electrical Workers & Square D Co., Ltd. [6 L.A.C. 289] described probation thus (at para. 8):

> *An employee who has the status of being "on probation" clearly has less job security than an employee who enjoys the status of a permanent employee. One is undergoing a period of testing, demonstration or investigation of his qualifications and suitability for regular*

employment as a permanent employee, and the other has satisfactorily met the test. The standards set by the company are not necessarily confined to standards relating to quality and quantity of production, they may embrace consideration of the employee's character, ability to work in harmony with others, potentiality for advancement and general suitability for retention in the company.

However, judicial decisions and arbitrations on the issue are not consistent. For example, in MacLennan v. Freedom Ford Sales 2002 ABPC 87 (CanLII), the court found the employee was hired indefinitely and that his termination without notice and pay was justified because a probationary period was implied in the employment contract.

The Ontario Superior Court of Justice disagreed in Easton, finding the phrase "Probationary Period" in the employer's letter offer ambiguous, "without further explanation (it) does not make the plaintiff a probationary employee." Rather, employers must describe "a period when the employee must demonstrate that she is suitable for regular employment as a permanent employee" and that she was "to go through a period of assessment to determine whether she is suitable for the job."

Employers must give probationary employees a reasonable opportunity to prove their suitability and fairly evaluate their performance. In Rocky Credit Union Ltd. v. Higginson, 1995 ABCA 132 (CanLII), the Alberta Court of Appeal said:

To establish justification for the dismissal of a probationary employee, the employer need only establish that (1) he had given the probationary employee a reasonable opportunity to demonstrate his suitability for the job; (2) he decided that the employee was not suitable for the job; (3) that his decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance, but character, judgment, compatibility, reliability, and future with the company.

Courts will not require that the employer establish actual cause, just that the employer concluded the employee was unsuitable, on the above criteria. In assessing suitability employers cannot set the bar so high that it is not reasonably possible for a probationary employee to succeed. The Prince Edward Island Court of Appeal agreed in Alexander v. Padinox Inc., 1999 CanLII 4542 (PE SCAD).

The most recent case on that point is Cao v. SBLR LLP,[2012] O.J. No. 3328. Cao, hired as an accountant after signing a three-month probationary contract, was fired after one month for not meeting performance standards. The employee manual indicated that employees experiencing performance issues would be told about their performance and be given suggestions for improvement. Ms. Cao was terminated one month into her job without this feedback. The small claims judge said employers dismissing probationary employees must act "fairly and with reasonable diligence" in determining whether or not the employee is suitable to the job. The probationary employee must be afforded a reasonable opportunity to demonstrate ability to meet the employer's standards. The judge concluded Ms Cao was wrongfully dismissed because her employer could not demonstrate inadequate work

performance and did not follow its own policies of helping employees improve job performance. Ms. Cao was awarded four months' salary.
In 1998, a Quebec court awarded a senior Montreal executive almost six months' salary and $8,000 in moral damages after the employee was fired only 11 days into his six-month probation period.

Once the probation has expired, an employer cannot extend it without the employee's consent: Lowery v. Calgary (City of), 2002 ABCA 237 (CanLII) The day an employee makes it past the probation period, regular notice or cause is required for dismissal: Schwartz v. Selkirk Financial, 2004 BCSC 712 (CanLII).

Human rights legislation applies to the benefit of probationary employees before they are dismissed. Employers must investigate discrimination allegations even if this means extending employment beyond the probationary period: Bertrend v. Golder Associates, 2009 BCHRT 274 (CanLII).

Conclusion

The law of employment probation has become more nuanced in the last few decades as judges acknowledge that employees are real people.

Given the uncertainty about whether probation is an automatic, implied condition in every new job start, both parties should be protected by a clear statement of the existence and duration of any probation period in the employment contract. Merely inserting a reference to a probationary period may not be sufficient.

If there are specific qualifications, skills or certifications essential to a job, they should be referenced in both the job posting and the contract. Employers must always follow their own manuals and policies even with probationary employees. These documents are legal promises made to employees.

An employer who fails to follow its own policies when dealing with employees, sets the performance bar too high, or otherwise is too harsh in assessing probationary employees' suitability risks being found to have acted in bad faith.

Employment probation has come a long way in the law. The employer, as well as the employee, has quite a bit to prove.

Whatever Happened To . . . Can. Aero v. O'Malley

Posted By: Peter Bowal

Ethics disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation . . .

– Can. Aero v. O'Malley,[1974] SCR 592

Introduction

Beginning in 1948, Canadian Aero Service Ltd (Canaero) was in the business of aerial topographical mapping and geophysical exploration.

Most of the work in the geophysical survey industry at the time related to mapping developing countries, and most of these projects were funded by government grants and loans from wealthy nations such as Canada and the United States. In July 1966 Guyana convinced the Canadian government to fund a survey project in Guyana.

Thomas M. O'Malley was the President and CEO; J. M. (George) Zarzycki was the widely respected chief engineer, Vice-President and director; and James E. Wells was a lawyer, former employee and long term director at Canaero. The three friends cooked up a plan to quit Canaero and start a new competing business. In August 1966 they formed a new company, Terra Surveys Ltd. O'Malley became the President of Terra; Zarzycki was named Executive Vice-President. Wells became a major shareholder. Terra would pursue profitable business opportunities for these three men.

Canaero and Terra were two of the five companies later invited to submit a bid for the Guyana project. Eventually, the Terra proposal was selected because it "covered the operation in much greater detail than might be normally expected."

When Canaero discovered what O'Malley and Zarzycki had done, it sued both of them, along with Wells, for damages related to the value of the contracts lost to Terra and the Guyana project in particular. Was there any legal duty owed by O'Malley, Zarzycki, or Wells to Canaero, especially after they had resigned?

The legislation under which Canaero incorporated in 1948 had no provision that mandated directors' legal duty of care to their company. A director was anyone in the company performing a management role, regardless of the title used. O'Malley and Zarzycki had not been elected to their positions of President and Vice-President by a board of directors or shareholders. They had to obtain approval from Canaero's parent company for travel expenditures over $100 and had no power to dismiss senior personnel.

The trial judge dismissed the claim on the basis that the three men were employees and, accordingly, not liable to Canaero. The Ontario Court of Appeal dismissed the appeal.

Fiduciary Duty

A fiduciary duty is one of the most onerous legal obligations devised by judges in the category of equity. It is imposed on people who are in substantial control of the property or lives of others (beneficiaries). Fiduciary duty, which relates to loyalty and faithfulness in the context of a serious imbalance of power, requires those who control beneficiaries to put the interests of those beneficiaries ahead of the fiduciary's own interests. In this way the law protects the interests of vulnerable beneficiaries. Failure to comply with that duty may lead to an order to fully return all gains attained in the breach.

Corporate officers and directors have complete control over the property and business activity of the companies they are appointed to manage because the corporation itself is a mere legal fiction that can do nothing on its own. Companies cannot stand up for themselves but act only through human beings. Modern corporate legislation acknowledges the special role of managers. For example, the Canada Business Corporations Act states:

> ***122***(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Fiduciary duty in the corporate world encompasses prohibitions against managers taking corporate opportunities for themselves, insider trading, making contracts with the beneficiary company, conflicts of interest, competing with the beneficiary company, abuse of confidential information, taking secret profits and other forms of self-dealing.

In the Supreme Court of Canada

Lawyers for O'Malley and Zarzycki relied upon the eight-year-old Supreme Court precedent, Peso Silver Mines Ltd. v. Cropper [1966] SCR 673. In that case, a prospector selling speculative claims approached

Peso, a mining exploration company. Peso routinely received two to three pitches per week to buy mining claims. Peso's Board of Directors analyzed this offer and rejected it.

The prospector then approached Cropper, one of Peso's directors and two other people from the company to buy the claim, which they did. Peso sued the director Cropper for breach of fiduciary duty, but the Supreme Court of Canada said the director had no liability in that case. Cropper had rejected the opportunity in good faith as a director of Peso. When he was approached later in his individual capacity he was not working for Peso. That was the opportunity accepted.

The Supreme Court distinguished the Canaero case thus:

> *What is before this Court is not a situation where various opportunities were offered to a company which was open to all of them, but rather a case where it had devoted itself to originating and bringing to fruition a particular business deal which was ultimately captured by former senior officers who had been in charge of the matter for the company.*

The Supreme Court viewed these senior management positions as de facto directorships and found O'Malley and Zarzycki in breach of their fiduciary duty to Canaero. The Court said, "there is no doubt that Terra Surveys Limited was conceived as a company through which O'Malley and Zarzycki could pursue the same objects that animated Canaero."

Moreover, these managers had taken advantage of Canaero. The Court said the Terra proposal would not have been as detailed if Zarzycki had not been at Canaero. The details of the Guyana operation he learned at Canaero through his numerous visits to the country contributed to the success of Terra's proposal. Since no one from Terra had visited Guyana between the opening date of bids and the date of Terra's proposal, all details about the project had been gained by Zarzycki from his time with Canaero. Canaero had paid for his salary and trips to Guyana to gather information to advance the Canaero bid. At the time of their resignations, these Canaero managers knew of Canaero's continuing interest in, and bid for, the Guyana project. They incorporated pieces of it in their Terra bid. The Court concluded that for them to use such information in a competing bid was a breach of fiduciary obligation.

Conclusion

Terra's Guyana project was worth $2.3 million. Its profit was $125,000, which were the monetary damages O'Malley and Zarzycki were ordered to pay Canaero, plus court costs. Wells had no fiduciary duty to Canaero because he had left the company a year earlier, well before Canaero started work on the Guyana project.

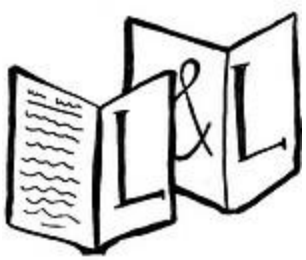
This *Canaero* case did not provide an exhaustive checklist of fiduciary rules, although factors will include the managerial position held, nature of the business opportunity, and the knowledge possessed. Resignation of the managers will not end their fiduciary obligations.

Fiduciary issues continue to arise in various forms in the business world. They all started with the 1974 *Canaero* case.

After this case, Zarzycki left the photogrammetry industry and worked as a director of topographic survey for the Canadian government. He passed away on June 15th, 2012.

The Gallant Yet Illegal Cause: Canadians in the Spanish Civil War

Posted By: Rob Normey



It was in Spain that men learned that one can be right and still be beaten, that force can vanquish spirit, that there are times when courage is not its own reward. It is this, without doubt, which explains why so many men throughout the world regard the Spanish drama as a personal tragedy. – Albert Camus

I recently prepared for a presentation I was to make after our film showing of Los Canadienses in the ongoing series, "Do the Rights Thing: Standing Up For Human Rights in History". The documentary depicts the remarkable tale of the 1,600 or so brave young Canadians who volunteered to fight in Spain shortly after they learned of the attempted coup against the democratically elected government in that country. In thinking of how significant the Spanish Civil War was for an entire generation of Canadians who reached adulthood in the 1930s, I thought back to a climactic scene in Hugh MacLennan's novel The Watch That Ends the Night (1959). Many critics consider the novel of this five-time Governor General winner to be his finest.

The novel was one MacLennan had to struggle over many years to write. It is his most personal and contains a great deal of autobiographical detail and a vivid portrait of Montreal in the 1930s, when he, like so many others, strained and persevered to survive in the midst of the Great Depression. In an era before there was any social safety net, many found it difficult, if not impossible, to make ends meet, and the spectre of unemployment and a restless, vagabond existence hovered over fearful Canadians. Paradoxically though, side by side with the darkness and desolation, was a dream shared by many that a much better society based on equality and social justice could be built. Some writers and intellectuals called for revolution or, at the very least, significant reform. One of these radicals is MacLennan's hero and most compelling character, Jerome Martell. Martell is a doctor who shares a number of traits with the radical doctor who remains a major presence in any history of the era, Norman Bethune. However, in reading the introduction to the recent re-issue of The Watch That Ends the Night by McGill-Queen's University Press, I learned that MacLennan himself considered that Martell had far more affinities with Frank Scott (his pen name being F. R. Scott), poet and constitutional scholar, lawyer and guiding light in the newly formed socialist party, the CCF.

While the novel is certainly no roman a clef and does not simply graft the lives of Bethune and Scott onto the fictional character, it is fascinating to consider his lineage nonetheless. The climactic scene I

was referring to involves a fund-raising rally in 1936 that Dr Martell organizes to aid the beleaguered Spanish Republic and to provide money and equipment to create a medical unit that would save many lives. McLennan imaginatively shapes the event to emphasize its dramatic potential but he did have in mind an actual rally organized by Frank Scott and attended by Norman Bethune and certain Spaniards who were passionately committed to fighting for and saving the Republic from the fascist forces of General Franco. Franco was aided immensely by Hitler and Mussolini, who had cynically signed a Non-Intervention Pact with Britain and France only to immediately ignore it. Western powers continued to abide by it, thereby blockading the Republic and its forces.

The rally as narrated in the novel is disrupted partway through when pro-Franco students and other demonstrators rush the stage at the moment Martell is giving an impassioned plea for support to the sizeable audience. The actual historical event was likewise disrupted by an unruly mob of 300 pro-Franco French-Canadian students and could not proceed as planned. One of the Spaniards brought to speak emphasized the horrible consequences of Franco's military operations for ordinary Spaniards and stated that "Spain is not only fighting for her own democracy but for that of the world." Scott later indicated that he had just witnessed the most moving tableau he had ever seen. That evening the large general meeting that had been planned had to be cancelled, according to the police, the municipal and provincial authorities, because they could not guarantee the safety of the speakers. In reality it was also, we know from their later actions, because they generally favored the fascist forces wishing to destroy the Republican government and its supporters. An outraged Norman Bethune said that the lives of at least a thousand innocent women and children had been sacrificed by the authorities. He exclaimed that "the right of free speech has been denied us… in a free country."

The following day Scott issued a statement on behalf of the Committee to Aid Spanish Democracy, protesting the injustice of the situation. He concluded: "Canadian democracy is in a precarious condition if a sane and considered statement for a lawful government is prevented from being given in a British country by threats of violence from irresponsible elements." Scott displayed a healthy dose of fortitude throughout the affair and continued to work for the Committee to provide aid for the democratic forces in Spain. He did this despite knowing that in Catholic Quebec his stand on the issue was unpopular with many and risked enabling his detractors to label him a "radical" who should cease all political activity or be fired from his position as law professor at McGill University. Fortunately, this did not happen and the brilliant and multi-talented scholar and lawyer went on to place a prominent role in challenging laws that violated civil liberties and promoting greater protection for fundamental rights and liberties, including asserting regularly that an entrenched bill, or charter, of rights was essential for a modern liberal democratic nation.

In the novel the character of Jerome Martell is less fortunate than Scott was and is ultimately discharged from his position as surgeon at the hospital where he worked. He does volunteer to go to Spain and establish a blood transfusion unit, as did Norman Bethune in reality. But within the context of the novel, the ultimate defeat of the Spanish Republic, followed by vicious reprisals ordered by Dictator Franco, represents a serious tragedy for progressives in Canada and elsewhere**. The Watch That Ends the Night**

is indeed something of an elegy for an entire generation of believers in the prospect of building a better world.

There is a more positive way of looking at the experiences of the radicals and progressives of the 1930s and indeed I urge readers to pick up a marvelous history of the event, Mark Zuehlke's A Gallant Cause. It is a compassionate and wholly absorbing account of the Canadians who volunteered to fight in Spain and recounts the great efforts made by the young men who found a way to travel to Spain to oppose the growing fascist menace. Zuehlke describes how the federal government, led by Prime Minister Mackenzie King, came to enact the Foreign Enlistment Act. This legislation made it illegal to serve in a foreign military service, and was clearly aimed at preventing the many who wished to fight to protect the Republic from travelling to Spain to do so. It was adopted in 1937 by order-in-council and mirrored legislation passed months earlier in the United States. At some risk, the men Zuehlke writes about made a determined effort to bypass the many restrictions (including the fact that passports issued thereafter specified that travel to Spain was not permissible). They were compelled to make their way to Spain by a circuitous and arduous route.

Frank Scott wrote a moving poem after the conflict, in the early 40s, entitled "Spain 1937" and it ends:

> *Here was destruction before flowering,*
> *Here freedom was cut in its first tendrils,*
> *The issue is not ended with defeat.*