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Charity Law











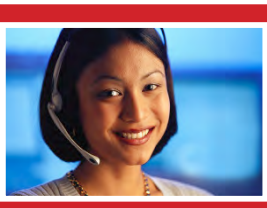


Canadians don't just donate money to charities, they also create, oversee and staff them. These folks, especially those who run smaller charities, could use some help understanding what the law expects of them.

Feature: Charity Law

Special Report: The Law and Sports

Departments

Publisher Diane Rhyason

Editor/Legal Writer Teresa Mitchell

Production Assistant Kristy Rhyason

Layout, design and production
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Charity Central is a Canada-wide charity law education initiative of the Legal Resource Centre of Alberta, made possible with a financial contribution from the Canada Revenue Agency (CRA). This initiative supports registered charities by enabling us to create free, plain language resources in a variety of formats and offering online and face-to-face learning opportunities.

These resources, available in English and French, meet the diverse needs of registered charities in fulfilling their legal obligations. Our target audiences are:

- small, medium and large charities;
- staff, board members and volunteers involved with charities; and
- professionals and educational agencies that support the charitable sector.

The first phase of the initiative began in 2008 and has resulted in resources that provide support to the charitable sector in meeting CRA's requirements for:

- fundraising guidance;
- issuing receipts for donations; and
- maintaining books and records

in compliance with a registered charity's obligations under the *Income Tax Act.*

Office in a Box

One of Charity Central's most popular products is "Office in a Box." Office in a Box is a system that helps to organize and archive a charity's most important information. It can also be used as an educational and accountability tool for board members. The primary audience for Office in a Box is small and rural charities, but it serves as a valuable guide for larger charities too. There are different versions of Office in a Box available for Alberta, Manitoba and Saskatchewan. For a free download to make your own Office in a Box, visit www.charitycentral.ca/office/all. To order a completed box, visit our online store at http://sitebuilder.securenetshop.com/legalresourcecentre/store_front.

What people are saying about Office in a Box:

"If every non-profit/charity has it and reads it, it answers a lot of questions and offers a lot of resources. I follow all the links… tremendous information!"

"This is an excellent resource! It should be mandatory for anyone registered."

Road to Accountability

For our current project, "Road to Accountability," we have created plain language resource materials and we provide information and education about accountability and transparency for registered charities and not-for-profit organizations. The following resources are just a sample of the wide range of materials that Road to Accountability offers.

Road to Accountability Handbook

The Road to Accountability Handbook introduces the concepts of accountability and transparency, and shares some best practices.

What people are saying about the Handbook:

"This handbook is by far the best tool we have to really keep us in line!"
"It's a wonderful resource to help answer questions and give guidance."
"Very logically organized, will be a good tool."

Self-Diagnostics Pack

The Self-Diagnostics Pack helps registered charities assess their current accountability and transparency practices, access more information and develop action plans.

What people are saying about the Self-Diagnostics Pack:

After the board completed the Self-Diagnostics Pack, " it opened my eyes as to what is really needed and what we are missing. I was amazed that we really are on the right path, just missing a few steps."
"Wonderful for us to use to know where we are at and what needs to be done."
"We will share this with board members who weren't present so they have a better understanding of all the implications of being a charitable organization."
"The Pack helped us recognize areas we are deficient in and need more work."

Both of these resources can be downloaded at www.charitycentral.ca or ordered from our online store: http://sitebuilder.securenetshop.com/legalresourcecentre/store_front.

Additional Resources

Additional resources available on Charity Central's website, www.charitycentral.ca, include a financial information kit, privacy policy and fundraising activities checklists, an administrative calendar, learning modules, and much more.

We want to hear from you!

If you have questions that are still not answered, give us a call! Charity Central operates a toll-free helpline (Alberta only) at 1-888-587-4438. We welcome feedback and comments on how registered charities are using our resources. You can send us a note at info@charitycentral.ca.

To keep up-to-date with what's happening at Charity Central and in the world of charity law, subscribe to our monthly email newsletter. Click on "Stay Connected" on our website to find a link to subscribe as well as a plethora of other social media links, such as Facebook and Twitter.

Teresa Mitchell

A Most Expensive Ticket

Feedblitz, a blog written by Osgoode Hall law students, reports on an interesting B.C. case.

"A speeding ticket might not be collected through just a monetary fine any more – instead, a speeding vehicle may actually be seized and resold on the market. This scenario might seem unbelievable to the public, but remains enforceable under British Columbia's beefed-up *Civil Forfeiture Act*, which was amended in 2008. On September 27, two men in their early twenties were caught street racing in North Vancouver, B.C. They were accelerating at speeds up to 200km/h in a 60 km/h zone. Just prior to being stopped by the police, complaints were called in by other motorists about an 'active' dangerous street racing event and its potential harm to pedestrians. 'When a vehicle has killed or injured someone, it is too late', said Solicitor General Rich Coleman. 'Our laws now work to take vehicles away from reckless drivers before they hurt someone, because they are demonstrating no regard for the safety of themselves or others on our roads. 'Upon apprehension, both drivers were handed 15-day driving bans and their vehicles were impounded on location – a $335,000 Ferrari Scuderia and a $75,000 BMW M6. Two months after being stripped from its driver, the Ferrari was sold to a local dealership at a set price of $235,000. The proceeds would be distributed as follows: 20% to the government; 50% to the part owner who was not involved in the incident and 30% to the driver. This translates into a speeding ticket costing a minimum of $47,000. This is the first time that the law was strictly enforced at this level, and represents – to put it lightly – a most expensive speeding ticket indeed."

The Definition of a Mother

A Court of Queen's Bench justice in Saskatchewan recently ruled that a woman who gave birth to a baby girl in 2009 is not the child's mother. The child was conceived through sperm from one partner in a same-sex marriage and an ovum from an anonymous donor. "Mary" carried the baby to term. The same sex couple and Mary asked the province's Registrar of Vital Statistics to remove the birth mother's name from the child's birth certificate. Justice Jacelyn Ann Ryan-Froslie agreed. She wrote: "It is clear from the definition of 'mother' contained in the *Vital Statistics Act 2009*, that Mary, the gestational carrier, is Sarah's mother for the purposes of that act as she is the woman from whom Sarah was delivered. Naming her as Sarah's mother on the registration of live birth raises a presumption that she is also Sarah's biological mother. In this case, I am satisfied that on a balance of probabilities, that Mary, the gestational carrier, is not Sarah's biological mother. I am also satisfied that neither (John nor Bill) nor Mary ever intended that Mary would assume any parental rights or obligations with respect to Sarah. As such, a declaration that Mary is not Sarah's mother is warranted."

Hell's Angel Can't Stay

A Federal Court of Canada judge recently ruled that Mark Stables, who has been a permanent resident of Canada since he came from Scotland as a seven-year-old child, and who has no criminal record, cannot stay in Canada. Justice de Montigny ruled that the government has the right to expel him because he is a high-ranking member of the Hell's Angels. Mr. Stables argued that the Hell's Angels is not a criminal organization, but the Judge stated that the evidence is overwhelming that the Hell's Angels is "first and foremost" an organization dealing in drug trafficking, extortion, theft and murder. He wrote: "This is not a case where the applicant did not know the nature of the organization until it was too late – either he did not care or chose to be willfully blind to its activities. Clearly, the framers of the *Charter [of Rights]* could not have intended that the applicant's membership in the Hells Angels could be protected through his freedom of association and expression, despite the overwhelming criminal history of the organization." *The Immigration and Refugee Protection Act* allows for a person to be barred from Canada for "organized criminality".
Stables v. Canada (Citizenship and Immigration) 2011 FC 1319 (CanLII)
http://www.canlii.org/en/ca/fct/doc/2011/2011fc1319/2011fc1319.html

Disinherited Daughters

Four daughters who received nothing from their late father's estate asked the British Columbia Supreme Court to vary his will. William Werbenuk left his substantial estate to his only son, making no provision for his daughters. The Judge stated that what was at issue was whether based on contemporary moral standards, adequate provision for proper maintenance and support was objectively considered by the father towards his daughters. Justice Wong accepted evidence by the daughters that their father ruled the family home, and his wife and daughters by terror. The son, on the other hand was "favoured and indulged." Justice Wong noted: "It is a testament to the strength of character and resilience of the plaintiffs that they rose above their upbringing and manifestly cared for their father." He ruled that modern contemporary standards reject the father's declared intention to disinherit his daughters, and that they had a valid moral claim to share in the family wealth. He wrote: "The provisions of William Werbenuk's will were not those of a judicious testator acting in accordance with society's reasonable expectations of what a judicious parent would do in the circumstances by reference to contemporary community standards. The Judge divided the estate between the five siblings.
Werbenuk v. Werbenuk Estate, 2010 BCSC 1678
http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1678/2010bcsc1678.html

Five Steps to Transition: the *Canada Not-for-Profit Corporations Act*

Margot Patterson and Tom Houston

Introduction

The new *Canada Not-for-Profit Corporations Act* (*CNCA*) came into force in the fall of 2011, bringing with it a new framework for the governance and incorporation of associations, charities and other federal not-for-profit organizations. The *CNCA* will replace Part II of the *Canada Corporations Act* (*CCA*), which has set the rules for not-for-profit organizations since 1917.

The new legislation is long and detailed, for a reason. It is intended to provide a comprehensive "rule book" that will, among other things, replace a great deal of the detail that is now required in bylaws, and allow latitude for a corporation to either accept the default requirements in the legislation, or set rules to fit its own circumstances and practices. Overall, the *CNCA* will create a more streamlined framework for Canadian not-for-profit corporations, which should be well worth the initial transition process.

As under the previous legislative regime, the rules respecting corporate governance and the rules respecting registered charities are kept separate. The *CNCA* does not grant registered charity status under the *Income Tax Act*, nor does it directly address any other tax-related issues.

The Transition Period

Not-for-profit corporations currently incorporated under Part II of the *CCA* will have three years to transition to the *CNCA* to avoid dissolution. Please see the "5 Steps to Transition" below.

Bylaws

Industry Canada will no longer review and approve bylaws. Corporations will be required, however, to file bylaws and amendments with Industry Canada within twelve months of member approval. The *CNCA* will give corporations significant latitude to adopt bylaws that suit their specific needs.

Because the *CNCA* sets broadly applicable default rules, a corporation's bylaws can be minimal, containing as little as the conditions for membership and notice of members' meetings.

It will therefore be up to each corporation to decide whether it will simply review and amend its bylaws to ensure compliance, or create new minimal bylaws and rely primarily on the *CNCA* as its legal "rule book". The advantages and disadvantages for each corporation depend on its individual circumstances.

Directors' Fiduciary Duties

Directors will be subject to the same duty and standard of care as directors of business corporations: an explicit duty to act honestly and in good faith, in the best interests of the corporation, and to exercise the care, diligence and skill of a reasonably prudent person in similar circumstances.

Directors will be subject to the same duty and standard of care as directors of business corporations: an explicit duty to act honestly and in good faith, in the best interests of the corporation, and to exercise the care, diligence and skill of a reasonably prudent person in similar circumstances.

Members

Members will have enhanced rights under the *CNCA*, including:

- the right of voting members to submit **notice of a proposal** to the corporation of a matter to be raised at a members' meeting;
- the right to **requisition a meeting** for a specific purpose;
- the right of **non-voting members to vote separately from voting members** on matters that impact their membership rights, including certain fundamental changes; and
- the right to **access corporate records** to monitor the board's performance.

Remedies are available to members to enforce these rights. These include court-ordered investigations (to review alleged wrongdoing), compliance orders (e.g. to share information with members), and "business-style" derivative action and oppression remedies.

Meetings

Currently, under the *CCA*, directors' and members' meetings cannot be conducted by way of a unanimous written resolution; however such meetings are permitted in certain circumstances under the *CNCA*.

Corporate Obligations

1. Annual meeting

The *CNCA* requires annual members' meetings to elect directors, appoint a corporate accountant and review financial statements. The *CNCA* sets out options for providing notice of members' meetings and for absentee voting.

2. Reporting to Industry Canada

The new reporting obligations are designed to be simpler than the current *CCA* requirements. The most significant of these is the requirement simply to file copies of bylaws, without the need for review and approval by the Minister of Industry. The following are the key ongoing filing requirements for a corporation operating under the *CNCA*:

- annual return;
- changes in directors;
- copies of bylaws/amendments;
- articles and amendments made thereto;
- change of registered office address; and
- financial statements and accountant's report (soliciting corporations).

The new reporting obligations are designed to be simpler than the current *CCA* requirements. The most significant of these is the requirement simply to file copies of bylaws, without the need for review and approval by the Minister of Industry.

Financial Accounting and Disclosure

1. Soliciting or Non-Soliciting Corporation?

A "soliciting corporation" is one that receives more than $10,000 in a financial year, in the form of donations from third parties, government grants or financial assistance, or donations from another soliciting corporation. Once acquired, "soliciting corporation" status lasts for three years. A corporation on the threshold of this status should therefore monitor its revenues annually to determine whether it has become a soliciting corporation, and to determine how long the status will apply to it. A non-soliciting corporation is – quite simply – not a soliciting corporation.

2. Review and reporting requirements

Soliciting corporations are subject to different rules for certain key matters. For example, while a non-soliciting corporation is permitted to have only one director, a soliciting corporation must have a minimum of three, two of whom must not be officers or employees of the corporation. Soliciting corporations are also subject to more stringent financial review and reporting requirements.

The level of corporate gross revenues is also relevant to these review and reporting requirements, as the following chart demonstrates. Note, for example, that the first category of corporations set out in the chart (soliciting corporations with less than $50,000 in gross annual

revenues, non-soliciting corporations with less than $1 million) is exempt from audits, provided that the members have unanimously voted not to appoint an auditor, unless the articles or bylaws require otherwise.

Type of Corporation /Gross Annual Revenues	Defaults and Options for Financial Review
Soliciting corporation <$50,000 Non-soliciting corporation < $IM	Members may unanimously vote not to appoint a public accountant; can have its financial statements reviewed or audited.
Soliciting corporation between $50,000 and $250,000	Must have a financial review by a public accountant; can have its financial statements reviewed or audited.
Soliciting corporation> $250,000 Non-soliciting corporation> $IM	Must have a financial review by a public accountant; must have its financial statements audited.

3. Exemptive Relief

The *CNCA* permits a corporation to apply for exemption from the financial reporting obligations where a case can be made that the potential detriment to the corporation outweighs the benefit to the members or, in the case of a soliciting corporation, to the public.

Fundamental Changes

The *CNCA* sets out specific rules for the directors and members of the corporation to approve "fundamental changes", which include such matters as:

- changing the name of the corporation;
- amending articles and bylaws;
- altering the corporation's activities, or changing its mission statement or "statement of purpose";
- changing conditions of membership, or the rights of any class or group of members; and
- changing the means of giving notice of a members' meeting to voting members.

A director, or a member who is entitled to vote at an annual members' meeting, may make a proposal for a fundamental change.

Five Steps to Transition under the *CNCA*

The approach and the time each corporation takes to fulfill the following transitional steps will depend on factors such as the type, size and complexity of the corporation, how familiar the board and members are with its current procedures, and whether the corporation is combining its *CNCA* transition with an overall governance review. While all corporations will have three years to transition, each one should ensure that its transition plan can accommodate the consultation it will need with members, and legal and financial advisers as may be required.

1. **Review the current Letters Patent and Bylaws**, consider the corporation's current structure and procedures, and determine whether the corporation will either retain or remove the provisions that are no longer required.
2. **Prepare Articles of Continuance (transition)** using Form 4031 to be made available online by Industry Canada.
    - If the corporation is also a registered charity, the draft Articles of Continuance should be sent to the Canada Revenue Agency for pre-approval before filing them with Industry Canada – note that CRA pre-approval can take 6-8 months.
3. **Revise the bylaws** following a review of the new requirements, default provisions, and choices open to the corporation under the *CNCA*.
4. **Obtain member approval** at a members' meeting duly called under the existing rules, with approval by two-thirds of the members.
5. **File with Industry Canada** the Articles of Continuance (transition), Initial Registered Office Address, first board of directors and amended bylaws.

The introduction of the new regime, however, will provide an opportunity for thousands of not-for-profit corporations to revisit their governance structure and make important choices.

Your Choice: Corporate Housekeeping or a "Clean Sweep"

The *CNCA* will affect some 19,000 not-for-profit associations, charities, and professional, cultural, religious and other groups currently incorporated under an Act that is over ninety years old. The old regime has become familiar territory.

The introduction of the new regime, however, will provide an opportunity for thousands of not-for-profit corporations to revisit their governance structure and make important choices. The new legislation is flexible enough to permit corporations to consider the transition as a form of good "corporate housekeeping", to tidy the rules up a bit, but to continue on with many of the rules they are currently accustomed to. On the other hand, some corporations may choose to do a "clean sweep", using the transition as an opportunity to change their names, mandates, and structures.

The entry into force of the *CNCA* this year will start the three-year transition clock. Get ready to review the legislation and ask questions – to get information, opinions, and advice – on how each not-for-profit corporation will respond to the new rules.

Margot Patterson and Tom Houston are lawyers with Fraser Milner Casgrain LLP in Ottawa, Ontario.

So you want to be a board member?

Think twice before you say yes

Brian Seaman

If you are thinking about serving on a board of directors for your favourite charity the next time a spot becomes available, it would be a wise idea to ask a few questions first and also consider what your obligations will be as a board member before putting your name forward. Otherwise that acquaintance from your local health club or friendly colleague at the office trying to recruit you may be just a bit disingenuous about what's required from you.

Don't worry, the meetings never last more than a couple of hours at most and you only have to show up two or three times a year should give any prospective member good reason to ask a few questions and check the organization's bylaws and minute books. The chairperson or recruitment committee for a charity should regard recruitment for board membership with proper care. The prospective board member should be informed of the following:

- the time commitment, i.e. how many meetings will he or she have to attend and how long the meetings typically last;
- the obligation to act at all times in the best interests of the charity; and
- any fund-raising he or she will be expected to do and to what extent a personal and/or professional network will be called on to this end.

The days are long gone when a member of a board might expect to fulfill minimum performance expectations by simply showing up to a meeting now and then to help assure a quorum.

A board of directors, even for a charity or non-profit organization (NPO), serves three main functions as:

- a legal body;
- a functional or administrative body; and
- a symbolic body.

The days are long gone when a member of a board might expect to fulfill minimum performance expectations by simply showing up to a meeting now and then to help assure a quorum. Now, there are expectations of performance and due diligence; the law will hold a board of directors accountable for any failure to properly monitor how the affairs of a charity or non-profit organization are being run. Due diligence is a legal term that will, of course, mean different things depending on the professional or business context. In the context of a charity or NPO, due diligence means that the board member must conduct herself or himself in accordance with the standard of care of a reasonable board member. This will include ensuring that the charity's executive director performs her or his job in accordance with the mandate of the charity and also that the financial affairs of the organization are in order.

There are very few reported cases addressing instances where the boards of charities or NPOs have been sued. However, the fact that there are even a few should be reason enough for prospective board members to take note that they could be subject to legal actions in instances where, for examples, an employee feels she or he has been wrongfully dismissed, or where the charity or NPO has been failing to conduct its affairs in accordance with its mandate. Here are two recent examples.

In *Thiessen v. Borden Hospital Foundation Inc.* – a 2011 decision of the Saskatchewan Court of Queen's Bench – a dispute among board members turned nasty when one of the board members wound up suing the rest of the board and the NPO foundation itself over a disagreement as to how foundation funds were to be spent on a new building.

In *Hadjor v. Homes First Society* – a 2010 decision of the Ontario Superior Court of Justice – a dissenting board member for a charity that ran a low-income housing project brought an application to set aside an amendment to the charity's bylaws that had been passed by the rest of the board members. Even though in both these cases, the courts found against the dissenting board members, the fact that boards of charities or NPOs can be subject to lawsuits is reason enough for a prospective board member to regard membership as something much more than simply an opportunity to volunteer some spare time to a pet cause. This potential for legal liability is why a wise board should carry *Errors and Omissions* insurance for its members.

Charities are granted a tax exempt status by the Canada Revenue Agency (CRA) for a reason. They serve the public interest and are not in the business of generating surplus revenue which is then re-invested back into the organization to permit it to grow, or paid out to shareholders as dividends. Instead, the revenue charities receive via donations is doled out to an array of benevolent organizations that include homeless shelters, women's shelters, arts societies, the Canadian Cancer Society (for example) and a variety of other support and lobby groups in the health services field. The public interest is therefore served by holding charities accountable for how money is raised and dispensed. The boards of charities play a critical role in monitoring this process. Board members have a legal duty of care toward their charitable organization that is met by meeting regularly, ensuring a quorum for the meetings and keeping accurate minutes. All decisions the board makes must be in the best interests of the organization and without even the appearance of a conflict of interest.

A critical function of an effective board is to stay on top of the finances. Board members should learn how to read the financial statements for their organization. Although the actual preparation of the charity's budget and annual fund-raising campaigns is the proper purview of the executive director and staff, the board's role is to act as a constructive critic during the budget planning process. Then, once the budget has been approved for the coming year, the board should evaluate how the plan is being implemented without being involved too closely in micro-management.

The relationship between an executive director and the board of directors is a delicate and nuanced one that requires a high level of trust, the willingness for each party to know when to follow and when to lead, and strong, effective two-way communication. For an executive director to adequately perform her/his tasks, the organization needs to have a detailed job description that sets out expectations for performance and provides for annual performance reviews. The viability of any given charity or non-profit agency depends on a solid relationship as well between the executive director and the chairperson of the board. The chairperson, ideally, should be regarded in the capacity of a special advisor to the executive director.

Finally, since the successful running of a charity will depend in no small measure on the active contribution of all board members, both the executive director and board chairperson must give diligent and careful consideration about who should be recruited for membership. To this end, it is prudent to have an active nomination committee with a complete understanding of the charity's mandate, its strategic plan, and its ongoing operations. Prospective candidates for board membership should be persons of solid character and standing within their professions and community who can bring value to the table. Once prospective candidates have been vetted by the nomination committee, they should be given a package of information that includes the bylaws of incorporation, minutes of recent board meeting, board rosters,

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the ongoing program(s) the charity has, and relevant budget information. The only way for prospective board members to arrive at informed decisions as to whether membership on a given charity's board will be the right fit is for such prospects to move forward with their eyes wide open.

Diligence and transparency at the outset go a long way to ensuring that the fit is right for everyone concerned: the individual board member, the board as a collectivity, the management of the charity, the donors and benefactors of the charity who must feel confidence in the organization in order to part with money every year, and last, but certainly not least, the recipients of the aid or largesse of the charity.

For more information about the benefits, but also the potential risks about sitting on the board of directors of a charity or a non-profit organization, see *Sitting on a non-profit board: A risk management checklist* at http://www.practicepro.ca/practice/pdf/Non-profit_board_risk_management_checklist.pdf.

Brian Seaman is a lawyer and researcher with the Alberta Civil Liberties Research Centre in Calgary, Alberta.

Conflicting Loyalties

Peter Broder

The proclamation of the *Canada Not-for-Profit Corporations Act* (*CNCA*) last October marks a major updating of several aspects of governance for federal non-share corporations. It incorporates welcome refinements to existing law related to director liability and offers a statutory due diligence defence against alleged breaches of duty of care by directors. However, one area where the new statute isn't much help is in dealing with conflicts of loyalty.

Like its predecessor statute, the *Canada Corporation Act* (*CCA*), and equivalent legislation at the provincial level, the *CNCA* focuses on pecuniary conflicts of interest. While from time-to-time a director of a charity or not-for-profit organization may have a material interest in a contract or other business dealing in which the corporation is involved, it is probably more frequently the case with charities and not-for-profits that potential conflicts arise owing to a director or officer feeling or acting on a loyalty to a group other than the charity or not-for-profit corporation.

As with the *CCA*, under the *CNCA* a director is obliged to act in the best interests of the corporation. The courts have held that one element of a director's fiduciary duties is a duty of loyalty. This includes:

- disclosing any dealings with the corporation and actively avoiding impropriety or dishonesty;
- giving full allegiance to the corporation's mission;
- resigning where personal prejudices or beliefs inconsistent with that mission might interfere with duties owed to the corporation;
- respecting confidentiality; and
- supporting execution of board decisions.

Sometimes an apparent, rather than actual, conflict of loyalty will exist because the decision-maker owes a duty or has an affiliation to different groups, but the interests of the groups co-incide rather than diverge.

The ability to put one's personal and other interests aside when acting as a director is essential to being able to fulfil this duty.

Conflicts of loyalty usually arise where, in considering a matter, a member of a decision-making body owes a duty or is influenced by an affiliation with an entity for which the matter is being decided. An affiliation may be formal or informal.

Sometimes an apparent, rather than actual, conflict of loyalty will exist because the decision-maker owes a duty or has an affiliation to different groups, but the interests of the groups co-incide rather than diverge. In such a case, there may technically be no reason for directors to remove themselves from consideration of the matter. However, concern over public perceptions may cause organizations to insist that they do so.

The "best interest of the corporation" test used in the *CNCA* was developed largely in the context of for-profit corporations, and historically was associated with acting in a way that essentially maximized shareholder financial return. In the last few years, however, the Supreme Court of Canada has opened up more scope to consider the impact of board decisions and corporate conduct on stakeholders other than shareholders. *Peoples Department Stores Inc. (Trustee of)* v. *Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68 and *BCE Inc.* v. *1976 Debentureholders*, [2008] 3 S.C.R. 560, 2008 SCC 69 both deal with not equating the best interest of the corporation strictly to maximizing return to shareholders .

This does not mean that directors can now exchange the traditional "best interests of the corporation" test used for board decisions with an approach focusing wholly on the needs or desires of specific constituencies. Instead a balancing is called for. In taking decisions, directors can give some – not exclusive – consideration to interests beyond those of shareholders.

How far this extends, or how it applies, to incorporated charities and not-for-profit organizations remains little explored by the courts, and is generally not contemplated at all in the legislation under which these groups are established and operate.

In practice, some charity and not-for-profit corporations structure themselves in a way that is at odds with director independence from the start. Many groups are constituted on the basis that various stakeholder groups will be "represented" on the board of directors.[1] Sometimes boards are made up exclusively of directors chosen by the organization's core constituencies. The composition of the boards of foundations associated with institutional charities, such as universities and hospitals, typically includes directors and/or staff of the institution.

In practice, some charity and not-for-profit corporations structure themselves in a way that is at odds with director independence from the start. Many groups are constituted on the basis that various stakeholder groups will be "represented" on the board of directors.

Other groups may open the door to potential conflicts when, as operating charities or not-for-profits, they include funders on their boards, or as funders seek directorships of operational groups. Sometimes two organizations will agree, as part of a strategic partnership or other collaboration, to cross appointments, believing that this will assist in their working together.

Regardless of how such relationships arise, they are a reality in the charity and not-for-profit sector. Indeed, they are likely to become more common in the face of economic pressures, increasing stress on partnership and the popularity of collaborative work among the young. In small communities, where the volunteer pool is sometimes quite limited, some crossover may be inevitable. So, given that there is a limited legal framework to provide guidance on how this issue ought to be handled, it falls to individuals and organizations to find how best to deal with it.

At the organizational level a number of measures can be taken.

- A good first step is not to set up a governance structure where directors or other decision-makers are likely to be influenced by external affiliations or loyalties whenever faced with a decision.
- If it is considered essential or desirable for particular constituencies to have a say in organizational strategy or direction, one alternative is to set up an advisory council or other mechanism for these stakeholders to influence the mandate or work of the group.
- Board members can also be given responsibility for liaising with constituencies and reporting on feedback from stakeholders as part of the board's regular agenda.
- The organization can also endorse on-going staff-to-staff dialogue.

It is not always possible to adopt a governance model where stakeholder representation is rejected. Indeed, sometimes the composition of a board is mandated by the legislation under which an organization was established. For example, a statute might provide for representation of particular constituencies on a body overseeing a port or airport. In another context, if an organization

It is not always possible to adopt a governance model where stakeholder representation is rejected. Indeed, sometimes the composition of a board is mandated by the legislation under which an organization was established.

has a long-standing policy of staff representation on its board, it may not be feasible to alter that practice.

Even where there is no imperative or history of recruiting board members with external affiliations, directors may still face situations where competing loyalties arise as the organization and the composition of its board evolves. In such situations, having a written policy:

- helps directors determine what the organization considers a conflict of loyalty and sets out the procedure for dealing with conflicts when they occur;
- helps the organization to assess conduct based on principles rather than situations; and
- helps the organization deal with circumstances that arise repeatedly. For example, a funder may as a matter of practice occasionally seek an opportunity to serve on the board of an organization it funds – perhaps to provide expertise that the organization couldn't obtain easily elsewhere. It may do so without necessarily wanting to scrutinize how the funding it provides is used. The policy can set out expectations about the status of such directors during funding decisions; for example, not participating in the deliberations when funding is under discussion.

It is not always possible to adopt a governance model where stakeholder representation is rejected. Indeed, sometimes the composition of a board is mandated by the legislation under which an organization was established.

More generally, it may make sense to incorporate procedures for dealing with conflicts of loyalty into the organization's policy regarding pecuniary conflicts of interest since there are often similarities between how these two types of conflicts are identified and treated, and in protocols for responding to the failure of a director to disclose a conflict.

As conflicts of loyalty may be tricky to recognize, it may be useful to have a procedure for a board member who thinks he or she may face a conflict to obtain advice. Establishing a protocol for a board chair or board member other than the conflicted director to raise a potential conflict, rather than having matters brought up on an *ad hoc* basis, may improve board dynamics. Since in many situations there may not be an adverse interest as between the organization and the entity to which the director has another loyalty, the policy should also set out whether any recusal requirements or other processes apply when the conflict is apparent rather than actual.

Another element of the policy that should be considered is the reporting and remedying of failure to disclose or deal appropriately with a conflict. As well as legal consequences that apply, organizations may wish to impose other sanctions. Although typically the laws under which charities and not-for-profit organizations are constituted do not permit removal of directors except through a special resolution of the members, the policy can provide for the directors triggering a general meeting of members to consider the conduct or taking other measures to express disapproval.

Another element of the policy that should be considered is the reporting and remedying of failure to disclose or deal appropriately with a conflict.

Legal penalties and organizational measures, however, can only go so far in dealing with these types of conflicts. Cases where directors clearly have legal duties to two groups that conflict with each other are rare. Much more common are situations where the director has a legal duty to act in the best interest of a corporation but has some formal or informal affiliation that calls in question whether his or her decision-making could potentially be clouded by divided loyalties.

The person often best-placed to make a determination of whether inappropriate external factors are apt to be taken into account when a matter is considered is the director himself or herself. So, inevitably, boards have to rely on directors policing themselves, rather than trying to regulate their conduct. Given this, orienting directors to be alert for potential conflicts and encouraging board members to hold colleagues accountable for acknowledging and dealing with conflicts is crucial. All the more so, since the Supreme Court has erased any bright line test for conflicts of loyalty.

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It is perhaps not reasonable to expect the *CNCA* or similar statutes to provide a definitive answer on every governance question. That said, it is rather unfortunate that something so fundamental to how many charities and not-for-profits operate is not well dealt with anywhere in law.

We can hope that, over time, the courts will offer clearer guidance on how conflicts of loyalty ought to be handled. However, given the limited case law in many other areas of charity and not-for-profit law, the likelihood is that organizations and directors will need to find their own way on this issue for the foreseeable future.

Notes

1. See Clifford Goldfarb, "Dual Loyalties on Non-Profit Boards: Serving Two Masters", a paper presented earlier this year at Canadian Bar Association 2011 National Charity Law Symposium (Toronto: May 6, 2011).

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

There's a New Law in Town: The Impact for Sport Organizations

Hilary A. Findlay and Benjamin Jacobs

As they would have said in the Wild West: there's a new law in town – sport organizations take note!

The new federal *Canada Not-for-Profit Corporations Act (SC 2009 c.23)* came into effect October 17, 2011. There are about 19,500 federally incorporated not-for-profit agencies across Canada, all of which are affected by the legislation to a greater or lesser degree. There are more than

100 sport organizations – virtually every national sport organization (NSO) and multi-sport/multi-service organization (MSO), in addition to others – that are likely to be dramatically affected by this legislation. However, the legislation has a much broader effect than just that on NSOs and MSOs. Many provincial or regional organizations hold representative positions on the boards of these national organizations. Their status will also be directly affected. People who are members of a NSO or MSO may also see their membership status affected.

Sport organizations need to carefully consider the implications of this legislation. This may involve a steep learning curve, but a necessary one.

This is a very broad-based legislative change, that has been in development for many years. Organizations will have three years, or until October 2014, to transition from the current *Canada Corporations Act* to bring themselves into compliance with the new law. After that date, the *Canada Corporations Act* will cease to have effect and organizations that have not taken action to move to the new *Act* will find themselves without any legal status, and unable to function.

Act Now...

Sport organizations need to carefully consider the implications of this legislation. This may involve a steep learning curve, but a necessary one. There are a number of steps that need to be taken to create the membership and board models that will comply with the new law, and it will also be necessary to obtain Canada Revenue Agency approval if the sport organization has charitable status (which most NSOs and many MSOs do). These changes will require approval of members, and for many national organizations, members only meet once per year. Depending on an organization's calendar for annual general meetings, there may be only two or at most three opportunities available between now and the deadline date for achieving compliance.

In other words, although 2014 sounds like a long time off, the changes to be made are significant and the process of change should start now.

Changes for Sport Organizations Under the Legislation

There are three significant requirements that directly affect a number of national sport organizations. Based on a cursory view of the bylaws of NSOs, over two-thirds of them will have to make at least some governance changes in one or all of these areas.

1. Classes of Membership

Sport is truly unique among not-for-profit corporations, particularly in the area of membership and membership rights. Across the Canadian sport landscape, membership categories vary widely, as do the voting rights of these classes of membership. Some MSOs have no members at all (the Canadian Centre for Ethics in Sport, Canada Games, Commonwealth Games Association of Canada, Canadian Association for the Advancement of Women in Sport and Physical Activity are examples).

Other NSOs have multiple categories of voting and non-voting members, ranging from provincial and territorial bodies to athletes, coaches, officials, teams, leagues, and participants. It is indeed a diverse landscape. The new legislation will give all categories of members, whether they are voting or not, the right to vote on certain fundamental changes to the corporation. Philosophically, the new legislation moves not-for-profits closer to the corporate model by giving members (the equivalent of shareholders) greater influence over decision-making. This empowerment of members will dramatically affect many organizations.

Let's take a sport example:[1]

> A not-for-profit sport organization organizes a large sports league. The sport organization has two classes of membership – one for a small core group, in this case, its directors, which are given full voting rights, and a second class for all participants in the league, including athletes, coaches and officials, who have no voting rights under the bylaws. And in this situation, the membership of the participants expires annually, but can be renewed automatically each year upon registering and paying a membership fee.[2]
>
> Under the new legislation, the membership class of participants, even if they do not have voting rights, must be given the right to vote on changes to the corporation that affect classes of members. This means they must all receive notice of the vote and be given the chance to actually vote. As fundamental changes require a vote of all classes of members, just one class of non-voting members can have veto power over these changes.

More broadly, any membership class, even those with no voting rights, will have the right to vote on matters affecting their rights and thus may have a veto vote to any organizational initiative that fundamentally affects them. This is cause for concern in some national sport organizations, which have multiple categories of non-voting members.

Organizations are going to have to think very carefully about their membership structure and whether they wish to change it before they are required to come under the new legislation.

Organizations are going to have to think very carefully about their membership structure and whether they wish to change it before they are required to come under the new legislation. If they wait until after transitioning to the new legislative regime, it may be very difficult to make any change, given this potential veto held by the various membership classes.

2. Selection of Directors

Another critical area of change coming with the legislation affects the selection of directors to the organization. Most sport organizations select their directors through a vote of the general membership, through appointment of directors by various constituency groups, or through other *ex-officio* appointments, or they use a combination of these methods. The new legislation puts an emphasis on the **election** of directors by "members", as opposed to the **appointment** of directors.

Often, the appointment of a director is based on a person's position in another sport organization. For example, the presidents of provincial/territorial sport organizations may be appointed to the board of a NSO. This is known technically as an *ex-officio* appointment; that is, the appointment is based on position, not on the identity of the person. The new legislation prohibits *ex-officio* directors. As well, the new legislation restricts appointments of directors. Only one director may be appointed, for a single term, for every three directors elected in that year. Thus, if two directors are elected in a particular year, no director may be appointed. This will affect the appointment of directors, particularly if the election of directors is done on a "staggered basis" i.e., a certain proportion of directors is elected in a particular year so that the terms of all directors do not lapse in the same year.

The result is that a great many NSOs and MSOs are going to have to rethink the current structure they have to elect, appoint or otherwise constitute their board of directors. Over one-third of NSOs in Canada have *ex-officio* directors, and these will not be permitted under the new law.

The result is that a great many NSOs and MSOs are going to have to rethink the current structure they have to elect, appoint or otherwise constitute their board of directors. Over one-third of NSOs in Canada have *ex-officio* directors, and these will not be permitted under the new law.

3. Default Rules

Another issue that must be addressed revolves around the operation of the new legislation. The legislation contains many 'mandatory rules' that cannot be altered, as well as a series of some 35 'default rules'. These default rules will be applied unless an organization intentionally includes different provisions within its articles or bylaws. There are a number of these default rules each not-for-profit organization may want to seriously consider, including appointment of directors (default: all directors must be elected by members); absentee voting (default: no proxy); termination of membership; quorum for meetings; right of members to vote (default: one vote per member); and, meetings by electronic means (default: not permitted), etc.

Solution to Issues

At the end of the day, the new legislation has been well-received as bringing a more modern and efficient approach to not-for-profit governance and a greater presence to member involvement. Indeed, the old legislation had not received a substantial up-date since 1917. However, it will have significant practical implications for the way federally incorporated sport organizations operate. These implications will also create implications for provincial and territorial sport bodies, not because they are federally incorporated, but because they are part of the

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governance structure of national sport bodies. The role of provincial and territorial bodies in the governance of their sports may undergo some radical changes. Much of this work will take significant planning and will require the involvement of, and engagement with, an organization's membership. This is not a quick process.

The Ottawa-based Institute on Governance has stated that governance changes are about 20 per cent substance and 80 per cent process. Many organizations try to move too quickly, without fully appreciating the complexity of this kind of change. There is much to consider when embarking on substantial governance reforms, not the least of which is the readiness of people to make changes. Sport organizations (and other federal not-for-profit organizations) are advised to start the process now.

Notes

1. This is an example used in Prince, V. (2011). *Special Issues Under the New Not-For-Profit Acts Conference*. Ontario Bar Association, June 7, 2011, Toronto, ON (at p. 5).
2. We have written about the folly of this sort of membership renewal elsewhere (see *Case Law Comment: CURIE v. CGU Insurance Company of Canada* at www.sportlaw.ca), but it is still very prevalent among sport organizations.

Hilary A. Findlay is an Associate Professor and Benjamin Jacobs is a Master's Candidate with the Department of Sport Management at Brock University in St. Catherines, Ontario.

New Animal Welfare Charity Guidelines Support Traditional SPCAs

Tim Battle

After a consultation period, the Canada Revenue Agency (CRA) issued new guidelines for animal welfare charities in August 2011. These new guidelines help to clarify which animal welfare activities meet the established definition of charity, and also help to illustrate what Canadian society generally deems as charitable. The guidelines are contained in a document called "Promotion of Animal Welfare and Charitable Registration", Reference # CG-011 and can be found on the CRA website at: www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/nmlwlfr-eng.html.

While the document is new, the guidelines generally re-inforce traditional notions of charity. The guideline document doesn't change the rules, but outlines the types of animal welfare activities that meet the charitable standard and explains how the rules came about.

Benefitting the Public Good

A number of criteria need to be met for an organization to qualify as a charity. One criterion is that there must be a benefit to the public good. Traditionally, animal welfare charities meet this because it is generally acknowledged that they "promote morality and check man's innate tendency to cruelty and are thus of benefit to humanity."[1] In other words, even though they don't provide direct service to segments of the (human) public, it is recognized that the promotion of kindness to animals reflects well

on a compassionate society. This thought is captured by a quote often attributed to Mahatma Gandhi: "The greatness of a nation and its moral progress can be judged by the way its animals are treated."

This widely-held recognition of Societies for the Prevention of Cruelty to Animals (SPCAs; sometimes known as Humane Societies) reflects both the historical context and the current reality. While many SPCAs in the country were first established with the goals of helping both animals and vulnerable people, most now work exclusively on behalf of animals through such means as law enforcement and *humane education* programs. The connections between kindness to animals and respect for other people is woven into the fabric of humane education, which is often seen as encouraging compassion for animals, people and the earth we share. Today, websites such as everylivingthing.ca demonstrate this interconnectedness of nature and the value of compassion for every living thing.

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Indeed, this sentiment reaches far back into Canadian history, as is demonstrated in the violence-prevention work of Louise McKinney – who became the first woman in the British Commonwealth to hold elected office when she was elected as a member of the Alberta Legislature. As early as 1904 she championed the formation of humane societies and humane education as a means of reducing violence[2]. More recently, in 1980 Senator Fred McGrand proposed humane education in schools as a way of reducing violent crime: "One of the objectives of education from nursery school onwards must be to give children a balanced sensitivity to life – a humane education."[3] Current research continues to link animal cruelty to bullying, aggression and other undesirable and violent tendencies.

Categorizing Charity

Interestingly, the term *charitable* isn't defined in the *Income Tax Act*, but has been determined by common law. The courts have identified four categories of charity:

1. the relief of poverty;
2. the advancement of education;
3. the advancement of religion; and
4. other purposes beneficial to the community that are considered charitable at law.

Animal welfare activities typically fall under the second and fourth categories. Humane education activities advance education through such activities as how to care for animals, as well as lessons that build a sense of compassion. Other educational activities include research – such as how to reduce, refine or replace the use of animals in experimentation. As with other charities, activities that are political in nature can only occupy up to 10% of an organization's resources. Organizations that devote more than this to activities such as advocating legislative change risk losing their charitable status. This is what happened to the Association for the Protection of Fur-Bearing Animals (also known as Fur-Bearer Defenders) in 1999 when their charitable status was revoked due to their advocacy work

to change legislation. While they still operate as a non-profit organization they are no longer able to issue tax receipts.

Activities that fall into the "other" category include law enforcement, environmental protection, promotion of agriculture and promoting community moral development. Traditionally, SPCAs/humane societies have carried out these or similar activities. The CRA notes in the new guidelines document that while "relieving suffering" of animals is a charitable act, even when euthanasia is required, it cautions that the desire to save animals' lives is not always the humane, charitable choice:

> "For example, if a rescue centre consistently took in more animals than it had the resources to care for properly, this activity might cause more suffering than it relieves. In such a case, the CRA may decide that the organization's activity, regardless of its intent, is not relieving suffering in a way the courts have decided is charitable."

While most people think of "the SPCA" as a single entity, each SPCA or society is distinct and separate, with its own board of directors, mission statement, jurisdiction and authority.

Choosing a Charity

There are a great many organizations in Canada that call themselves SPCAs, humane societies, or other similar terms. While most people think of "the SPCA" as a single entity, each SPCA or society is distinct and separate, with its own board of directors, mission statement, jurisdiction and authority. The traditional SPCAs fit well into the charitable guidelines as presented. Donors should do some research to see that the organization does the work they intend to support.

Donors can see if an organization is a registered charity by searching the charity listings at www.cra-arc.gc.ca/chrts-gvng/lstngs/menu-eng.html. This will also provide some of a charity's financial information and activities. Potential donors can also use other standards such as the *Ethical Fundraising and Financial Accountability Code (Ethical Code)* of Imagine Canada. Only charities that have adopted the Code are allowed to display it on their publications and website.

Notes

1 Canada Revenue Agency, Guidelines for Registering a Charity: Meeting the Public Benefit Test. Reference Number CPS-024

2 *Famous Five: Five Canadian Women And Their Fight To Become Persons* by Nancy Millar, 2003

3 Bonnell, Hon. M. Lorne, Chairman, *Child at Risk: A Report of the Standing Senate Committee on Health, Welfare and Science.* Ottawa: Supply and Services Canada, 1980

Tim Battle has been Director of Education for the Alberta SPCA – a traditional animal welfare organization – since 1999. He can be reached at education@albertaspca.org.

International Sport/ Canadian Values: What If They Collide?

Hilary A. Findlay

… sport is a highly regulated and structured international activity and often has to be carried out within the rules of international organizations.

Is Canada not the keeper of its own national house? Well, maybe not! The 2010 Olympic and Paralympic Winter Games in Vancouver/Whistler provides a unique window through which to view the impact that international sport bodies can have on Canadian laws and policies, particularly where international decisions conflict with our national laws and values. The Games showed how the Canadian legal system can find itself without recourse to intervene where such decisions run contrary to Canadian laws, and where national sport organizations can find themselves in intractable circumstances. This article examines two Canadian sport cases that led to results inconsistent with important Canadian values.

Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC),[1] captured headlines leading up to the 2010 Winter Olympic Games, putting into question the inclusion of any ski jumping events – male or female. In this case, a group of 15 female ski jumpers challenged the International Olympic Committee's (IOC) decision not to include women's ski jumping in the 2010 Olympic program. The trial court found that the IOC's decision to include only ski jumping events for men was discriminatory.

How could something that was discriminatory under Canadian law, and which violated Canadian values, be allowed to be part of an event taking place on Canadian soil, organized by a Canadian group and which received significant public funding from all three levels of government?

The source of the discrimination, the court said, was historically rooted in a 1949 decision by the IOC. At that time, the number of Olympic sports was expanding rapidly and needed to be controlled. In response, the IOC established selection criteria to determine which sports would be part of the Olympic program. At the same time, the IOC decided that those sports already on the program would not have to meet the newly-established criteria. In other words, they were 'grandfathered'. Men's ski jumping was among this grandfathered group and thus was not subjected to the selection criteria, and never has been since then. Indeed, it would not satisfy such criteria even today.

However, notwithstanding a finding of discrimination under Canadian law, both the trial and appeal levels of court concluded that control over the decision of what sports to include in the Olympic program rested solely with the IOC and was beyond the reach of a Canadian court to intervene. The decision was perplexing to many. How could something that was discriminatory under Canadian law, and which violated Canadian values, be allowed to be part of an event taking place on Canadian soil, organized by a Canadian group and which received significant public funding from all three levels of government?

The more broadly interesting aspect of this case is that it re-inforces the extent to which national governments agree to relinquish substantial control when they agree to host the Olympic Games. In reaching their conclusions in the *Sagen* case, both levels of court recognized the strict contractual obligation of VANOC (the Vancouver Organizing Committee for the Olympic Games) to host and stage the Olympic Games under the exclusive direction and control of the IOC.

Once a city is selected to host the Olympic Games, the IOC requires the host organizing committee (in this case VANOC) and the National Olympic Committee (in this case the Canadian Olympic Committee) of the host nation, to enter into an agreement with the IOC. The contractual agreement is known as the *Host City Contract*. Under this contract, the IOC is recognized as having the exclusive authority to determine what events will be staged at the Olympic Games. It was therefore acknowledged by both levels of court that VANOC did not have any control over the Olympic program and, more specifically, over the decision not to include an event for women's ski jumping.

Similarly, it was also recognized by the courts that the Government of Canada, although not a party to the *Host City Contract*, was a significant financial contributor to the Games and a virtual financial guarantor of the Games to the IOC, but it, nonetheless, had no legal authority to manage or direct the activities of VANOC relating to the planning or staging of the Olympic Games. In fact, the federal government had already agreed to respect the IOC's exclusive control over VANOC and the terms of the *Host City Contract* when it assumed a broader contractual obligation far earlier, to comply with the rules of the IOC in bidding to host the Olympic Games. In short, the reasoning of both courts, and the ultimate outcome in *Sagen*, is illustrative of the extent to which countries defer, through contractual arrangements, to the authority and rules of the IOC when agreeing to host an Olympic Games; and by doing so, how countries may find themselves in a position of very limited influence over matters involving national interest, national laws and cultural values. The IOC controlled the content of the Olympic program, even if the absence of women's ski jumping from the Olympic program squarely contravened Canadian laws and values.

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A second Canadian case, *Nagra v. Canadian Amateur Boxing Association* (*Nagra*), [2000] O.J.No.850 (Ct.J.) serves as an example of the problems that can arise when the rules of international sport bodies, to which national sport bodies owe their allegiance, conflict with national laws. The conflict here involved the eligibility of Mr. Nagra, a Sikh boxer, to participate in the Canadian National Boxing Championships, which were governed by the rules of the International Amateur Boxing Association (IABA). The IABA maintained a so-called 'clean-shaven' rule. Not only was the Canadian Amateur Boxing Association (CABA), as the designated national governing body for boxing in Canada, required to enforce the IABA's rules, including the clean-shaven rule, it was required by the IABA to incorporate such a rule within its own policies. Following the tenets of the Sikh faith, Mr. Nagra was precluded from shaving his beard, and was thus ineligible to compete under both international and national rules so long as he was not clean-shaven.

Arguing that the clean-shaven rule discriminated against him on the basis of his religious beliefs, contrary to Canadian human rights laws, Mr. Nagra successfully obtained a court order requiring CABA to allow him to compete at the national championships. While this order was an apparent success for Mr. Nagra, it put CABA in an impossible situation. If CABA complied with the court order and allowed Mr. Nagra to compete, it would breach the international association's rules and risk being fined or suspended. As well, any athlete boxing against Mr. Nagra would be suspended under the so-called 'tainted athlete' rule of the IABA (that is, any athlete who competes with an

athlete ineligible or sanctioned under IABA rules will be similarly found ineligible and sanctioned). If, on the other hand, CABA disregarded the Canadian court order and continued to block Mr. Nagra's participation in the Canadian national championships, it would likely have found in contempt of the court order. The national sport association found itself caught between Canadian values and the force of a Canadian court order, and the directive of an international governing body, with which it had to comply.

Ultimately, in Mr. Nagra's case, an accommodation was negotiated between the national and international associations whereby the IABA agreed not to impose sanctions against CABA to the extent that a court order allowed Mr. Nagra to box in Canada. However, that court order was only enforceable within Canadian borders. It was the position of the IABA that Mr. Nagra would not be allowed to compete internationally unless he was clean-shaven. In other words, if Mr. Nagra qualified through the competition to box internationally, his victory would have been a hollow one as the IABA would have blocked his further participation internationally (in this case, at the Olympics). Mr. Nagra did not advance so it is not known where his case might ultimately have ended up.

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The *Nagra* case highlights two issues that arise where the rules of an international association conflict with decisions of national courts or tribunals (whether in the case of sport or otherwise).

- First, the national association can be placed in a completely untenable position between two seemingly intractable forces – the order of a domestic court and the directive of an international association.
- Second, the practical effect of a ruling of any domestic court or tribunal is limited to its jurisdiction. Once an athlete or national association moves beyond the bounds of the domestic jurisdiction of the court (i.e., outside of Canada in the *Nagra* case), the effect of any domestic legal directive is non-existent.

At the end of the day, what does this tell us? First, sport is a highly regulated and structured international activity and often has to be carried out within the rules of international organizations. The interesting thing for sport is that these international governing bodies are, in fact, private entities. To whom are they accountable? Too often the answer is, to no other body, except to the IOC. And, to whom is the IOC, a private body itself, accountable? Until relatively recently, no one.

This accountability question is one on which the IOC has been making advances. There is now an international Court of

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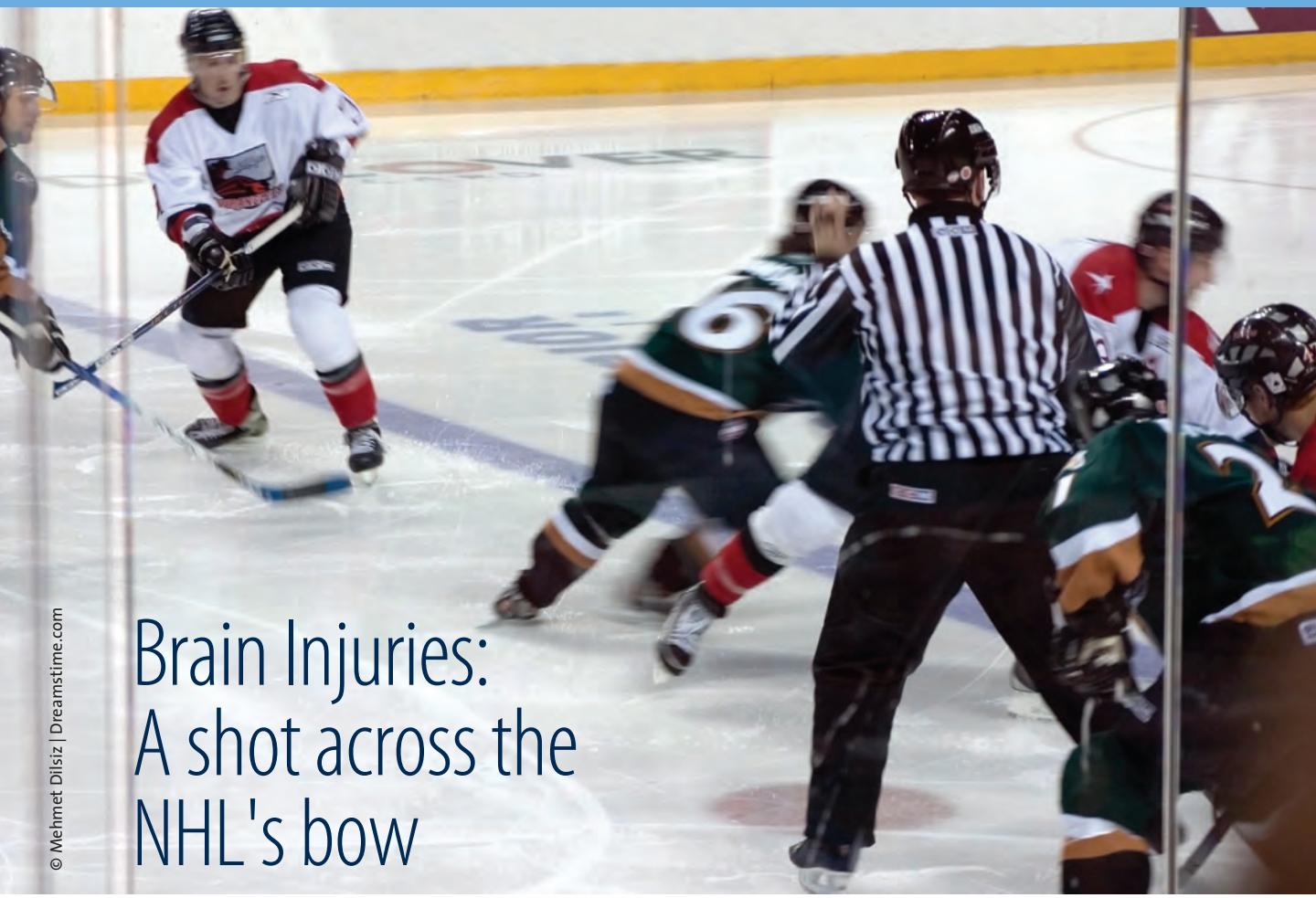
Arbitration for Sport (CAS), which has increasingly gained legitimacy as the "world court for sport". The IOC has, as well, instituted a code to govern Olympic sport. Included within the code is an anti-discrimination provision. Could the Olympic ski jumpers have used this provision and made a case before CAS? Could Nagra, or CABA on his behalf, have made such a submission? Absolutely. However, to date, few athletes, or national sport organizations on their behalf, have made such applications. Until some do, we will continue to see the sorts of cases that boggle our collective minds, cases such as *Sagen* and *Nagra*, that seem counter-intuitive to what we believe to be fair and just. Perhaps we need to be more aggressive in pushing for Canadian sport organizations, and advocates of sport, to challenge situations that clearly run counter to our uniquely Canadian, yet highly respected, laws and values.

Notes

1. *Sagen* v. *Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC),* 2009 BCSC 942 ["Sagen Trial Court"]; *Sagen* v. *Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC),* 2009 BCCA 552 ["Sagen Appeal Court"].

Hilary A. Findlay is an Associate Professor with the Department of Sport Management at Brock University in St. Catherines, Ontario.



Brain Injuries: A shot across the NHL's bow

Jon Heshka

Seventy-five former players sued the National Football League last month, alleging that the league failed to warn and properly protect them from the long-term brain-injury risks associated with football-related concussions. They say the NFL was negligent in failing to exercise its duty to enact rules regulating postconcussion medical treatment and return-to-play protocols and to enact reasonable rules to protect players against the risk of brain trauma.

No doubt the NFL lawsuit will raise eyebrows and blood pressure at the National Hockey League's head offices in New York. And if it doesn't, it should. Although hockey and football are different sports governed by different rules, the fact is they're cut from the same cloth of contact sports. Perhaps the threat of litigation will force the NHL to rethink its approach to head injuries.

While the NHL has been a leader in concussion management after a player has been injured, it has been painfully slow to implement changes that would reduce brain injuries in the first place. The

league was pressed last year to pass Rule 48, which prohibits lateral or blindside hits to an opponent where the head is targeted, or is the principal point of contact, and updated it for next season by not requiring that the hit come from the blindside for it to be illegal.

The NHL almost got it right. The flaw in Rule 48 still is that the head must be targeted. In other words, the contact must be intentional. That the infraction must be deliberate has led to the absurd situation where the league plays psychoanalyst and jurist in trying to get into the minds of the offending players to determine whether the head shot was done on purpose. Rule 48 is a step in the right direction. That the league has to play mindreader in administering justice is not.

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The NFL doesn't care about intent. It cares only about the harm suffered. If the head shot is deemed dangerous, the offending player is penalized. It doesn't matter whether he meant to do it. The International Ice Hockey Federation, the U.S. National Collegiate Athletic Association, the Ontario Hockey League and the Québec Major Junior Hockey League all prohibit any hit to the head regardless of whether it was intentional.

Despite the NFL's strict liability approach to dangerous head shots and $75,000 fines (in comparison to the NHL's $2,500 maximum fine for an illegal hit to the head), the league is still staring at the barrel of a very large lawsuit. Even though the NHL has been more proactive in its postconcussion management protocols, that may not be enough. Given the league's zealous willingness to keep head shots in the game, the NHL is vulnerable to a similar lawsuit.

Let's hope the NFL suit will prompt the NHL to get rid of head shots from hockey. Enrolment in youth hockey is declining. The reasons are myriad, but there's no doubt that hockey violence and its effect on kids' brains is a factor in their parents' decisions. The NHL's influence on youth hockey is unmistakable, and kids will mimic what's modelled. The league does a disservice by not doing more.

Real change in youth hockey and the pros will only occur after the NHL breathes in the smelling salts, gives its head a shake and eliminates head shots from the game. And if the league continues to skate its way around this issue, perhaps the long reach of the law in the NFL case can knock some sense into the NHL.

Jon Heshka is an Associate Professor specializing in sports law at Thompson Rivers University in Kamloops, British Columbia. This article first appeared in the Globe and Mail on August 2, 2011 and is reprinted with the author's permission.

Inside Baseball: Arbitrators as Umpires

Peter Bowal and Chris Hunter

The Business of Baseball

Baseball is the big summer sport in North America. From Little League to Beer League, amateur baseball and softball – organized and pick up – has entertained players and fans alike. It is a big part of our Canadian culture.

The economic success of the professional game has been more elusive. The elite pro game has abandoned Canada except for Toronto. The lower division semi-pro "farm teams" continue to play across Canada in various leagues, but occasionally they strike out as sustainable community-centred businesses.

Take Ottawa as a case in point. The Ottawa Lynx minor league team competed in the Triple A International League from 1993 to 2007 in their own stadium. It was the only International League franchise in Canada and it was consecutively affiliated with the Montreal Expos, Baltimore Orioles and the Philadelphia Phillies. Even after fifteen seasons, the Lynx could not attract enough fans and the team was sold to Allentown, Pennylvania where it started the 2008 season.

Then it was announced on April 28, 2008 that semi-pro ball would get another chance in Ottawa with the new Rapidz franchise in the Canadian-American (Can-Am) league. During that inaugural season, an average of just over 2,100 fans attended each game to cheer on their Rapidz, only slightly under the league average attendance of 2,300 per game. Yet, the Rapidz ownership group lost over $1 million.

The Rapidz won only a third of their games, not the worst record ever for a new team, but they still placed in the basement of the Can-Am standings at the end of that first playing season. Five months after the first pitch, on September 29, 2008, the Rapidz declared bankruptcy and ceased operations. The Can-Am league moved in and purported to take over the team but never returned for a second season.

This article is about the law of baseball that continues to develop from the business failure of the Ottawa Rapidz. The international league arbitration principles that are being developed will be transferrable beyond baseball but this Rapidz story and its baseball context offers a glimpse of the business model of these local teams operating throughout North America.

Ownership

The Rapidz ownership structure was complicated and interlocking. The Lease and League Affiliation Agreements disclose that the Ottawa Professional Baseball Inc. (OPBI) was the corporate entity under which the Rapidz operated. Zip.ca (Zip) and a subsidiary, Momentous Inc., together owned a 49% share. The remaining 51% of the OPBI was owned by Miles Wolff, the commissioner of the Can-Am league.

The Can-Am league granted the Rapidz the right to be the only professional baseball team to play out of Ottawa Stadium. Wolff got a $100,000 shareholders loan and indemnity from Zip in return for guaranteeing the first two years of rent to the city for use of the stadium. Zip tweaked the original “Rapids” name to “Rapidz.”

Who Has Control When the Business Fails?

Handed the financial losses of the first playing season, Zip applied under the Can-Am league’s by-laws to permit Rapidz to voluntarily cease operations. One season life spans of new sports teams, however, does not reflect well on any league. The request was denied. The Can-Am Board of Directors blamed “the member’s failure to take action reasonably necessary to operate as a going concern.” This was not the league’s fault.

Zip persisted in its withdrawal. The league terminated its membership and drew down the $200,000 letter of credit Rapidz Baseball pledged under the by-laws.

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Rapidz and Zip viewed litigation, both in contract and tort, against the league as its only option to recover the $200,000 letter of credit. Now the matter of how Rapidz withdrew from the league, and what penalties it incurred for doing so, had ripened into a full-blown lawsuit in an Ottawa courthouse.

The Can-Am league, headquartered in the state of North Carolina, decided not to play ball with that. It moved under Rule 21.01(3)(a) of the Ontario *Rules of Civil Procedure* to stay or dismiss the Rapidz action on the ground that no Ontario court possesses legal jurisdiction over the subject matter of the action. While Ontario courts had the power to toss the lawsuit, the league argued, they could have no role in deciding the substance of the dispute.

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The league's position was that its by-laws and agreements signed with Zip ousted the jurisdiction of any court of law. In the choice of forum and arbitration clauses with the league, Zip had agreed that all disputes with the league would be resolved by arbitration in North Carolina. The matter was one of private international law.

Judicial Decisions to Date

In 2009, Zip sued the league in the Ontario Superior Court of Justice for breach of contract and the torts of intentional misrepresentation, intentional interference with contractual relations and civil conspiracy against Can-Am, Wolff, and the City of Ottawa. Zip claimed that Rapidz did not violate the League Affiliation Agreement, that the league illegally denied their request for voluntary withdrawal, and that it wrongfully terminated the team's membership in the league.

Zip sought $3 million in consequential damages and $3 million in punitive damages. Zip said "the defendants intentionally initiated an interlocking sequence of indebtedness all to the risk and jeopardy of the plaintiffs" leading up to the league terminating their membership and called the $200,000 letter of credit. Zip sued Wolff in his personal capacity on the grounds of vicarious liability. Wolff counterclaimed in both Ontario and North Carolina for default on the shareholders loan and the stadium rent indemnification.

Reinforcing the territorial and jurisdictional divide, all principal defendants were in the United States while all plaintiffs were in Ontario.

Clause 27(a) of the Lease Agreement and clauses 6 and 7 of the League Affiliation Agreement were choice of forum clauses with an arbitration provision, mandating all unresolved disputes to arbitration in North Carolina. These common private contractual terms in sports leagues seek to eliminate Can-Am's legal disadvantage in litigation in a foreign jurisdiction from different laws and procedures. Sending such disputes to private arbitration is not only faster and less expensive than litigation, but arbitration usually reduces negative publicity arising from disputes that the international sports media would otherwise feast upon.

In order for the Ontario court to have any authority, the contractual choice of forum clause would have to be judicially overturned. Legal issues arose as to whether the choice of forum and arbitration clauses were rendered unenforceable by prior contract breaches on the part of parties demanding arbitration, and whether the defendants had submitted to and accepted ("attorned") the jurisdiction of the Ontario courts.

On October 26th, 2009, Justice Lynn Ratushny considered whether the Ontario Superior Court of Justice had jurisdiction over this dispute. She found that the league, as franchisor, was not a party to (and accordingly not bound by) a clause in the Lease Agreement appointing Ontario law to govern in this case. She said the forum selection clauses were clear and all parties agreed to them, referring to the *Z.I. Pompey Industrie v. ECU-Line N.V., 2003 S.C.C. 27* "strong cause" test where the burden of proof is on the plaintiff that there is a "strong cause" to not be bound by a voluntarily agreed to forum selection clause. There was no "strong cause" demonstrated here to disturb the parties' agreement. North Carolina courts were found to be fair and efficient and to have sufficient authority to handle the case. Justice Ratushny concluded Ontario courts had to defer to the arbitral process agreed to by the parties themselves.

> The Supreme Court will not decide the merits of the dispute, whether Zip should get its money back, but only which forum in which country has the power to do that.

The plaintiffs appealed to the Ontario Court of Appeal, which in 2010 unanimously upheld Justice Ratushny's order. A court should not consider whether a party breached a contract when considering whether or not to uphold a forum selection clause. This is because most disputes would involve a claimed breach of contract, making the agreement voidable virtually in every dispute and therefore destroying the purpose of a forum selection clause.

The appellate court found that Can-Am had attorned to Ontario jurisdiction by filing with the Ontario court a Notice of Intent to Defend and a Statement of Defence in which they defended the plaintiffs' claims on the merits. The Court of Appeal agreed with the plaintiffs that Ontario has jurisdiction because of "a real and substantial connection to Ontario," but that it should not take jurisdiction in this particular case because of the "strong cause" test reasoned by Justice Ratushny.

On October 29, 2010, the Ontario Court of Appeal agreed that Ontario should not take jurisdiction over this case. Zip was granted leave to appeal this case to the Supreme Court of Canada. Oral arguments will be heard on February 10, 2012.

The principal legal issue facing the top court will be whether the Ontario Court of Appeal, having concluded that the defendants attorned to the jurisdiction of the Ontario courts, then erred in finding that those same defendants could still rely upon the foreign forum selection and dispute resolution clauses.

Conclusion

By the time this case moves into extra innings in February 2012, this matter will have been in dispute more than three years. It seems ironic that a party to a quick alternative private dispute process can challenge the legal validity of that same process. It will take many years to merely decide whether the arbitration in North Carolina will take place, and at a very high cost to all parties, certainly more than the amount originally in dispute. In many ways, the case is already moot on the financial issues.

The Supreme Court of Canada, perhaps recognizing the growing importance of private international arbitration clauses, will set a precedent in the strength of arbitration and choice of forum clauses in private business-to-business dispute resolution where a party has taken steps to file legal process in its own defence, just in case the arbitration is invalidated.

These issues are central to the business practices of sports leagues operating in Canada and the USA. The Rapidz case gives us a peek into the financial and legal risks risks encountered by minor professional sports teams and leagues in Canada. The transience and instability of minor sports leagues operating seasonally throughout Canada is well known. Every major Canadian city has minor league sports teams that have come and gone. Greater liability risks and time and costs to settle intra-league disputes may act as a deterrent for league and team startups. Part of the attractiveness of developing professional sports leagues in Canada is the avoidance of costly public litigation.

Potential league governors and team owners, not to mention players, may be deterred if choice of forum and arbitration clauses become unworkable in the sports business. From a professional sports league context, trust would become much more important in the league-team relationship if dispute resolution cannot be controlled. This could make the prospect of developing a multi-national sports league less attractive from a legal (and therefore, business) perspective.

This very local Ottawa case is in some ways a very international case. The Supreme Court will not decide the merits of the dispute, whether Zip should get its money back, but only which forum in which country has the power to do that. The procedural decision, however, will have an impact well beyond the sports playing fields in Canada, to all businesses across industries with similar contractual arbitration processes.

Peter Bowal is a Professor of Law and Chris Hunter is a student at the Haskayne School of Business in Calgary, Alberta.

Occupation and the Right to Protest

Linda McKay-Panos

Starting in mid 2011, several cities across the world experienced the "Occupy Movement", which is directed primarily at social and economic inequality. In many Canadian cities "Occupy Canada" protestors set up camps, usually on public land. In some locations, officials have threatened to evict the protestors, citing public safety and health concerns. In others, officials have pointed to bylaws that prohibit overnight camping in public parks, or have attempted to address shelter and homeless issues faced by some of the protestors. How might the *Canadian Charter of Rights and Freedoms* ("*Charter*") apply to the Occupy Movement?

First, it is important to note that each situation needs to be legally evaluated on its own merits. However, there are some generally applicable legal principles. The *Charter* provides Canadians with freedom of expression and freedom of peaceful assembly (sections 2(b) and 2(c)) in public spaces. In addition, *Charter* section 7—the right to life, liberty and security of the person—has been used to successfully challenge a no-camping bylaw in Victoria (see: *Victoria (City) v Adams*, 2009 BCCA 563). It is important to note that the ruling in that case was based on several important findings of

fact, including that a significant number of people had no choice but to sleep outside, because there was no room at the homeless shelter.

Charter section 1 provides that there can be legal limitations on these rights, but they must be tied to a compelling and pressing objective and must be tailored narrowly in a way that restricts these rights as little as possible.

Some of the limitations on freedom of expression found by courts to be constitutional include criminal laws dealing with the incitement of hatred, obscenity laws, counselling suicide, and defamation laws. The common limiting factor in these legal limitations is harm. It is therefore necessary, in certain situations, to place limits on what people can say or do in order to protect the safety of others. There is no evidence that the speech made by Occupy Movement protestors has been hateful, obscene, defamatory (truth is a defence) or sufficiently harmful to justify its limitation. Thus, it is difficult to imagine that evicting protestors on these bases would be considered a reasonable limitation on freedom of expression.

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Some of the reasonable limitations on freedom of peaceful assembly include laws that protect public health and safety, such as those dealing with breaches of the peace, rioting, or causing a disturbance, and laws that protect parks from damage or harm, or that ensure that public spaces are available for public use and enjoyment. In order to recognize one of these limitations, the court would need evidence that harm or damage had occurred. For example, if there were less restrictive means than banning camping in the public space, then these would need to be used in order for the law to be found constitutional. Some examples of less restrictive means could include requiring the campers to take down tents every morning or to respect ecologically sensitive areas. Protestors could be required to obey existing bylaws that prohibit littering in parks and also prohibit various kinds of environmental damage.

Calgary officials have responded to some members of the Occupy Movement by offering to fast track access to housing for those who are homeless (see: CTV Calgary, 4 November 2011 "Occupy Camp Could be Gone Soon" online: http://calgary.ctv.ca/servlet/an/local/CTVNews/20111104/CGY_occupy_tents_111104/20111104/?hub=CalgaryHome). Yet, some of the protestors are not homeless. These are camping in or occupying public space to express their concerns about a variety of issues. City officials must then balance the Occupy Movement members' rights with the public's right to use and enjoy public spaces. Several cities have said that they will evict protestors or charge them with trespassing or other bylaw violations. However, since public spaces belong to members of the public, and the public is exercising constitutionally protected rights, many of these bylaws or other actions taken by authorities may not be constitutional. The Canadian Civil Liberties Association has said that using "largely

unconstitutional laws to threaten individuals who are peacefully exercising their democratic rights is entirely unacceptable" (Cara Zweibel, "CCLA Concerned about Possible Evictions of 'Occupy' Protestors" November 7, 2011 online: http://ccla.org/our-work/fundamental-freedoms/freedom-of-assembly)

It has been suggested that the solution to the issue of balancing protestors' rights to public spaces should not be addressed by "negotiations" with the police, but rather by dialogues between protestors and politicians, who have access to power and who can actually effect the desired social and legal changes (Trevor Farrow, (2003) "Negotiation, Mediation, Globalization Protests and Police: Right Processes; Wrong System, Issues, Parties and Time" 28 *Queen's Law Journal* 665 at 703). Perhaps officials wishing to move the protestors out of the public spaces should agree to engage in dialogue that could result in change.

Perhaps officials wishing to move the protestors out of the public spaces should agree to engage in dialogue that could result in change.

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

This feature profiles a famous Canadian case from the past that holds considerable public and human interest and explains what became of the parties and why it matters today.

Whatever Happened To . . . The Bata Shoe Company

Peter Bowal and Haley MacLeod

> [The Bata Shoe company has] a credit in the corporate bank of good citizenship upon which [it is] entitled to draw
>
> *R. v. Bata Industries Ltd., Marchant and Weston,* (1992) 7 C.E.L.R. (N.S.) 293

Introduction: The New Environmental Regulation of the 1980s

Today, the environment is increasingly coming under regulatory oversight. The first major environmental protection push in the western world began in the early 1980s when sweeping new regulations were ushered in to shift a much greater burden of care and potential liability onto the private sector. Businesses were put on notice that the "polluter pays" principle would be enforced. Stringent assessment; approval, licencing and reporting requirements; and personal liability of officers, directors and other agents of the corporation were created. Now, managers could be fined and imprisoned for the failures of the companies they managed. Various Canadian provinces drafted laws that set out managerial liability, such as this section from the Ontario *Water Resources Act*, R.S.O. 1990:

> Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

The enactment of these new environmental statutes stirred the anxieties of the Canadian business community. And few cases could have reinforced these anxieties more than the Ontario court case of *R. v. Bata Industries Ltd., Marchant and Weston.* The Bata Shoe Company ("Bata") became the test case for this new, strict environmental regulation in Canada.

The Bata Shoe Company

Thomas Bata Sr. founded the Bata Shoe Company in the Czech Republic on August 24, 1894. The founder's son, Thomas J. Bata moved corporate headquarters to Toronto in 1964. By the late 1980s, Bata had become the largest manufacturer and retailer of footwear in the world. Its plant was located in the village of Batawa, on the north shore of Lake Ontario. In 1984, the founder's grandson, Thomas George Bata, became the CEO. He also proved to be an effective and popular leader, overseeing international operations, setting up the Bata Shoe Foundation and receiving several honourary doctorates, the Order of Canada and, later, a lifetime achievement "Award for Responsible Capitalism."

The chemical waste storage problem had been identified by Bata employees as early as 1983 and was brought to the attention of Bata Manufacturing's environmental officer, at a health and safety meeting in 1984.

However, Bata did not perform well during the first four years of the 1980s, suffering losses which topped $6.4 million in 1984. To solve its problems, Bata hired Keith Weston. He re-engineered Bata, controlling almost every financial decision Bata Manufacturing made. In 1985, he became Vice-President and was elected to the Board of Directors. By the time he left in November 1988 for his next executive assignment in Malaysia, Mr. Weston had turned around the Batawa operation, from a loss of $6.9 million to a net gain of $0.9 million.

The Chemical Waste Storage Problem

The Batawa plant's main products were casual shoes and boots made of leather. These products required several hazardous liquid chemicals in the manufacturing process, some of which, like benzene, were carcinogenic. In the 1980s, regulations were enacted to specify correct storage and disposal of chemicals.

The chemical waste storage problem had been identified by Bata employees as early as 1983 and was brought to the attention of Bata Manufacturing's environmental officer, at a health and safety meeting in 1984. According to testimony at trial:

> [The union safety officer] described an outside drum storage area in which chemicals were stored in "45 gallon drums, five gallon pails, whichever." Some of the 45-gallon drums were "badly corroded with holes in top of them," "some pails with no covers," "residue on skids and on the ground." The drums were not clearly labeled as to their contents, and the old labels that were not discernable were not necessarily reliable indicators of what material was currently in the barrel.

On July 4, 1986 Thomas G. Bata, on behalf of Bata International, issued an advisory to managers of new safety and environmental procedures. Keith Weston asked the environmental officer to get a quote from a contractor in order to deal with chemical waste problem. Evidence at trial showed that environmental disposal contractor Tricel "observed some 200 drums, some 5-gallon pails and a 5,000 gallon horizontal storage tank above the ground" and quoted $56,000 to clean up the mess. Weston asked for another quote, which came in at a more pleasing $28,000 at the end of 1987. That

contractor was hired to remove the waste chemicals and clean up the site, but a year later, this was still not done. While preparing for his transfer to Malaysia, Weston prepared an internal budget for his successor in which he allocated $100,000 for the clean-up of this chemical waste. Eventually, Bata got the waste cleaned up at a much higher cost, as shown in the table below.

1986	$56,000	Quote from Tricel
1992:	$97,173.70	To remove waste in 1990
	$11,000	Preliminary environmental study
	$240,000.00	Environmental engineering study ordered by the Ministry
	$100,000.00	To complete clean-up ordered by the Minister
	$448,173.70	Sub-total

This sub-total does not include professional fees involved in dealing with the Ministry and the cost of conducting the 27-day trial and two appeals. The complex trial and appellate litigation could easily have cost $600,000 more.

These costs do not account for any consumer boycotts of Bata products, increased scrutiny from Canadian or international regulators or any other damage to Bata's corporate image, goodwill and business. The substantial direct costs of employees co-operating with Ministry investigators and preparing for trial and appeal are not included. Intrinsic costs of uncertainty and risk throughout the whole process are equally not processed into the total cost picture.

After Keith Weston's departure, the Batawa environmental officer requested more quotes from Tricel to dispose of the chemical waste. The quotes were received, but not acted upon when provincial government ministry officials showed up.

Regulators Come Calling

On August 1, 1989, the Batawa plant received a surprise visit by two officials from the Ontario Ministry of Environment. They came to see the Bata Industries' Environmental Manager on a routine industry report matter. After driving through the open gate, these officials noticed an area that housed many containers. There were more than 100 leaking barrels, in various states of decay and corrosion due to exposure to the elements. They noticed large stains beneath the storage containers, many of which were rusting and uncovered.

They entered the plant and sought out the General Manager. While investigating, one official poked his finger through the top of a barrel and testified at the trial that he "could immediately smell the solventy aroma, solvent-like material in the drum." The plant's industrial waste had been allowed to seep into the land and contaminate the groundwater.

Charges Are Laid

Bata, the corporation, was charged under the *Ontario Water Resources Act* and the *Environmental Protection Act* with operating a non-compliant waste management system, failing to submit a waste

report, permitting discharge of a liquid industrial waste, failing to immediately notify the Ministry of Environment of the discharge, and causing adverse effect upon the natural environment.

Three of Bata's corporate officers were also charged with failing to take reasonable care to prevent this discharge and failure to notify. The directors charged were: Keith Weston, Douglas Marchant, the President of Bata Industries Limited (Canada), and Thomas G. Bata, Chief Executive Officer of Bata Shoes Organization (International) and Chairman of the Board of Bata Industries Limited (Canada). This was the first high-profile case in Canada where company officers were individually charged and faced fines and imprisonment for environmental offences committed by their company.

Conviction and Sentences

The company was convicted under the provincial environmental spill legislation and was fined $60,000 for the chemical waste discharge and groundwater contamination. In a probation order, it was also required to contribute $60,000 to establish a local toxic waste disposal program, and to publish and circulate internationally, the facts underlying this conviction in its newsletter.

The court determined that Thomas G. Bata served in a primarily advisory role. Of the three directors charged, he had the least hands-on contact with the Batawa operation and was at the site only once or twice a year. His role was to manage the organization on a global level. He had distributed a safety and environmental directive to the global operation. Accordingly, he was acquitted of all charges against him because he had reasonably exercised due diligence in his role. The court found that Mr. Bata had appointed a competent and experienced director and had demonstrated proactive environmental direction by circulating the directive to comply with environmental regulations. His concern for the environment was also evidenced by his approval of $250,000 for a new water treatment facility and $20,000 for the environmental management system for the Bata Engineering Division, both in Batawa, Ontario.

Douglas Marchant had been President and a Director of Bata (Canada) since January 26, 1988. He worked in the Toronto headquarters, but made regular monthly visits to the Batawa site, including tours of the plant. The chemical storage problem was brought to his personal attention around February 15, 1989. He was found guilty because he had personal knowledge of the spill six months prior to its discovery by the Ministry officials, but had taken no action to rectify the situation. The court stated: "He had a responsibility not only to give instruction, but also to see to it that those instructions were carried out in order to minimize the damage. The delay in cleanup showed a lack of due diligence."

Mr. Weston was also convicted, despite being in Malaysia almost one year before the contamination was detected. He and Mr. Marchant were each personally fined $12,000 for their part as directors because they had not taken all reasonable steps to prevent the contamination. The factors taken into account in setting these amounts were:

- this was a "first case" sentence;
- these individuals did not intentionally cause any damage;
- there would be no indemnification of these fines;
- there were grounds for treating them equally; and
- they demonstrated remorse.

The objectives of this sentence were the protection of the public and general deterrence. The finding of negligence (as opposed to wilfulness), the negative publicity, and the reversibility of the damage at considerable cost to the corporation and the good character of the parties charged were all mitigating factors.

The judge ordered the Bata company not to indemnify Messrs. Marchant and Weston for their fines. The prohibition against indemnification would last only as long as the probation order itself: two years.

Appeals of Sentence

The two managers appealed only their sentences (not their liability), asking for a reduction of the fines and amendments to the terms of the probation orders.

The appeals judge ruled that sentencing in environmental regulation cases should not be any different from those used for other *Criminal Code* offences. He concluded, however, that in this case, the mitigating factors far outweighed the aggravating factors. He did not disturb the $60,000 corporate fine, but he halved the $6,000 to fund the local waste disposal program on the ground that Bata deserved to have its community and environmental awareness better recognized. And, with respect to the individual defendants, he halved their personal fines to $6,000 each. The judge stated:

> ...bearing in mind the [trial] judge's own comments and description of the character of the two individual defendants.... He was satisfied (and this is probably more important than anything else) that they had learned a lesson and that they had adopted a positive role of promoting environmental concerns within the corporate structure in which they are presently involved.

On a further appeal on the question of whether the company could re-pay their two managers' $6000 fines, the Ontario Court of Appeal concluded that the company could indemnify its managers in this way. The objective of direct personal liability on operational managers is to motivate human beings to ensure that a corporation acts in accordance with the law. These provisions; the threat of personal fines and imprisonment of the managers would not permit them to hide behind the shelter of the corporate veil.

The objective of direct personal liability on operational managers is to motivate human beings to ensure that a corporation acts in accordance with the law. These provisions; the threat of personal fines and imprisonment of the managers would not permit them to hide behind the shelter of the corporate veil.

Thus, the laws governing responsibility for such matters as the environment, consumer protection and employee safety and wellness have gone far beyond the punishment of corporations, which are mere legal fictions that cannot go to jail. Law-makers hold corporate managers personally responsible to exercise due diligence to prevent wrongs on the part of the corporations they manage, including environmental offences. In the 1980 case of *R. v. United Keno Hill Mines Ltd*, the judge said: "This may impose hardships on some senior executives, but they are in the best position to act in protecting the public interest." Accountability of corporations, on the other hand, "and public corporations in particular, present a challenge in sentencing because they have no body to kick, no soul to damn."[1]

The *Bata* case served for many years as a significant precedent. It received considerable publicity and frightened corporate executives who did not want to find themselves in a position where they had to defend themselves in quasi-criminal court, pay fines out of their salaries, or even face the prospect of jail time. The *Bata* case single-handedly moved environmental issues to the top of the boardroom agenda.

Where Are They Now?

What happened to these parties? We recently spoke with the lawyer who represented the Bata Corporation, Mr. Bata and Mr. Marchant. He was only retained as counsel for that matter, and he has not kept in touch in the intervening two decades. We could not locate Bata's in-house counsel at the time, and he is likely now retired.

It is reported that Mr. Weston was assaulted in 1998 by a union leader in Bengal while on business there as Managing Director for Bata's branch in India. He was evacuated quickly to Calcutta, where he was briefly hospitalized. In 1999, he was promoted to regional executive of Asia for Bata International. His lawyer during the Bata litigation is now a judge in Ontario Superior Court.

In November 1999, Bata closed the Batawa plant, due to inability to compete as a shoe manufacturing facility in Canada. Its plant capacity was transferred to lower cost operations in other parts of the world. The *Globe and Mail* reported that it has since been zoned residential and converted into condominiums by the CEO's wife, Sonja Bata. In 1998, she opened the Bata Shoe Museum in Toronto.

The town of Batawa has since been taken over by the City of Quinte West. The current Director of Public Works for Quinte West told us that the Batawa water treatment plant was closed in 2010. Municipal water now comes from the neighbouring Frankford treatment plant. The Director was not aware of any lingering contamination from the shoe factory.

Mr. Thomas G. Bata, the founder's grandson, died in 2008 within two weeks of his 94th birthday.

The Bata shoe company continues today, although it has a considerably smaller presence in Canada than it had in 1993. Its main website makes no reference to this famous environmental case, but claims to be: "one of the world's leading footwear retailers with consumers, employees, business partners and shareholders in more than 70 countries. In keeping with the responsibilities that a world-wide organization holds, international and local social concerns are intrinsic parts of the Bata culture."

Notes

1 *R v. Northwest Territories Power Corporation* (1990) 5 C.E.L.R. (N.S.) 57 (NWT Terr. Ct.) The phrase is attributed to First Baron Thurlow (1731-1806) who stated: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?", quoted in M. King, Public Policy and the Corporation 1 (1977). See, also: J. C. Coffee Jr., "`No Soul to Damn: No Body to Kick': An Unscandalized Inquiry Into the Problem of Corporate Punishment", (1981) 79 Mich. L. Rev. 386.

Peter Bowal is a Professor of Law and Haley MacLeod is a B.Comm. student at the University of Calgary, in Calgary, Alberta.

Grandparent–grandchild contact: a right or a privilege?

Rosemarie Boll

The *Grandparents' Day Act*, Manitoba

> WHEREAS grandparents play an important, nurturing role in family life and are a valuable link between generations;
>
> AND WHEREAS grandparents should be honoured and appreciated for their guidance and wisdom;
>
> THEREFORE … in each year, the first Sunday in September after Labour Day is to be known throughout Manitoba as "Grandparents' Day."

Norman Rockwell's iconic painting of the beaming grandma and grandpa proudly serving the family Thanksgiving turkey is the *Grandparents' Day Act* made visible – but is it true to life?There are two basic assumptions about children, their parents and their grandparents:

1. parents have the fundamental right to decide the care, custody, and control of their children[1]

2. societies all over the world believe that an involved extended family, and particularly grandparents, can enhance children's lives.

Many families find a balance between these two principles. That balance can be seriously disrupted by marriage breakdown, divorce and re-partnering, death, longstanding family disputes, and cultural, religious, or lifestyle clashes. Any of these common situations can damage or end the grandparent/grandchild relationship. In cases of severe conflict, when can a grandparent's wishes override a parent's choices?

And how do grandparents define success, if their access order just makes the child the focus of endless conflict? By the time grandparents go to court, the family history is way past happy endings.

In highly-conflicted cases, the first premise out the window is the Norman Rockwell view of grandparents. Quite simply, not all grandparental contact is good for children.

Applying the right law is not straightforward.[2] Five provinces (Québec, British Columbia,[3] Alberta,[4] Manitoba,[5] New Brunswick[6]) and one territory (Yukon[7]) have passed laws which specifically include grandparents. Other provinces permit access applications by non-parents without naming grandparents. The federal *Divorce Act*[8] permits non-parents to apply for access.

The Québec *Civil Code* is strongly-worded:

> Article 611. In no case may the father or mother, without a grave reason, interfere with personal relations between the child and his grandparents. Failing agreement between the parties, the terms and conditions of these relations are decided by the court.

Contrast Québec with Alberta, where there is no assumption that children have a right to a relationship with their grandparents or that grandparents have a right to a relationship with their grandchildren.

But no matter what the law says, grandparents everywhere face the same dilemma: is court-ordered contact better for children than no contact at all? Most likely the child is already traumatized by a divorce, a death, or a bitter family quarrel – probably the event that triggered the estrangement in the first place. Should her life be even more disrupted by a court battle between her parents and grandparents? And how do grandparents define success, if their access order just makes the child the focus of endless conflict? By the time grandparents go to court, the family history is way past happy endings.

Over the past decade, judges have moved away from the assumption that grandparent/grandchild contact is good for children even when legal intervention is required to maintain it. This shift began in the United States with the 2000 Supreme Court case of *Troxel* v. *Granville*.[9] The Supreme Court said that as long as a parent adequately cares for her children, the state should not interfere. Parents have a constitutionally-protected right to make decisions about their children's contact with grandparents.

One year later, the Ontario Court of Appeal heard the case of *Chapman* v. *Chapman*.[10] Grandmother Esther applied for access to her two grandchildren, aged 8 and 10. The children's parents, Larry and Monica, lived together. They believed that Esther was a negative influence

on them and their children. The parents agreed some contact might be beneficial, but Esther wanted more time than Larry and Monica would allow. Esther asked for 45 hours of visiting time a year. Larry and Monica offered 27 hours. The trial judge granted 44 hours. The parents appealed.

Parents alone have a legal duty to care for their children, and this includes deciding about whom they see, how often, and under what circumstances.

The parents said they were fit, competent and loving parents and they, not Esther and not the courts should decide how often their children see their grandmother. The Court of Appeal agreed. Madam Justice Abella said the real question was whether "the disruption and stress generated by the grandmother's insistent attempts to get access on her own terms are in the children's best interests.[11] Although there was evidence that Larry and Monica were also unreasonable and inflexible, the family was functioning well.

Larry and Monica were dedicated parents who were protecting and nurturing their children. The law presumes that they (and every other fit and competent parent) act in their children's best interests, even if others do not see it that way. Unless parents demonstrate an *inability* to act in their children's best interests, their right to make decisions and judgments should be respected. Parents alone have a legal duty to care for their children, and this includes deciding about whom they see, how often, and under what circumstances.

The law is a blunt tool. It cannot fix family problems. Even the most favourable legislation (such as Québec's) may prove to be an empty legal remedy in cases of serious intergenerational conflict. The highly contested cases are the ones that end up in court, but even when grandparents 'win' the legal battle, success is far from assured.[12]

Notes

1. This column does not apply to child protection cases.
2. Law changes over time and differs between jurisdictions. Be sure to use up-to-date law where you live.
3. British Columbia *Family Relation Act*, Section 35 (1).
4. Alberta *Family Law Act*, Section 35(1).
5. Manitoba *Child and Family Services Act*, Section 78(1).
6. New Brunswick *Family Services Act*, Section 1.
7. Yukon *Children's Act*, Section 33(1).
8. *Divorce Act* Section 16 (1).
9. 120 S. Ct. 2054 (2000).
10. [2001] O.J. No. 705 (Ont. C.A.)
11. *Chapman v Chapman*, Paragraph 20.
12. For a thorough discussion of this topic, see the Department of Justice's *Grandparent-Grandchild Access: A Legal Analysis*, found at http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2003/2003_15/toc.html

Rosemarie Boll is Staff Counsel with the Family Law Office of Legal Aid Alberta, in Edmonton, Alberta.

Online Resources for Charities

Margo Till-Rogers

Canadians are a generous lot and, according to Statistics Canada, most of us donate to charities, volunteer our time, or help others directly at least once per year.

There are over 80,000 Canadian charities registered with the Canada Revenue Agency (CRA) and volunteers play a key role in the operation and running of these organizations. Despite the significant contribution charities make to the Canadian economy, the CRA reports that many operate with little or no paid staff.

Getting a handle on the responsibilities of operating a registered charity may be challenged for time-pressed charity administrators. Fortunately, there are many sources of help available online.

Resources for Charities

Canada Revenue Agency: Charities http://www.cra-arc.gc.ca/chrts-gvng/chrts/menu-eng.html

Charities in Canada must be registered through Canada Revenue Agency's Charities Directorate. The Directorate provides advice on the operations of charitable organizations and maintains information and regulations on audits and compliance. Key elements of the website are the searchable list of registered Canadian charities and the comprehensive collection of educational resources. The 'checklists for charities' are easy-to-use tools that guide registered charities through

various responsibilities which apply to the non-profit sector, from basic guidelines on maintaining charitable status to questions about proper receipting practices. Charities can keep up-to-date by subscribing to the Canada Revenue Agency's *Charities and Giving – What's New* electronic mailing list, by adding the RSS feed to their feed reader or by following the CRA on Twitter at @CanRevAgency.

Under their Charities Outreach and Partnerships Program, the Canada Revenue Agency has provided funding for educational programs to a number of organizations, including those listed here.

Charity Central http://www.charitycentral.ca

Charity Central provides guidance to Canadian charities on their legislated responsibilities under the *Income Tax Act*. Targeting charities of all sizes, the Charity Central website offers assistance in the areas of receipting, fundraising, record-keeping, and accountability and transparency practices. Information is presented in a variety of formats, from interactive information maps to learning modules. There is a wide range of resources to be found here, including checklists and tipsheets, fast facts and lists of FAQs . Details of upcoming training sessions and workshops can be accessed under Events as well as through a full range of social media tools accessible on the site.

Charity Law Information Program (CLIP) http://www.capacitybuilders.ca/clip/clip.php

CLIP is another program which aims to raise awareness of charities' legal requirements under the law. Webinars, podcasts and learning guides assist organizations in learning all that is involved in running a registered charity. One of the highlights of the site is the Resource section which features video recordings of the 2010 conference *Being Good at Doing Good: Safeguarding Yourself and Your Charity in a Complex World* on topics such as Governance, Accountability and Canadian Charities, and Costs and Benefits of External Audits. Visitors to the site can keep in touch with new developments in charity law via the CLIP Communiqué or by joining in regularly scheduled Charity Chat interactive online sessions.

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The Charities File http://www.thecharitiesfile.ca/

The Charities File, a joint project of the Centre for Voluntary Sector Research and Development funded by the Canada Revenue Agency works with small and rural charitable organizations across Canada to help them manage their charitable status and meet their obligations under the *Income Tax Act*. Charities can learn more about fundraising and other relevant concerns through a collection of YouTube videos available on the site. For those in the position of treasurer for a Canadian charitable organization, the Treasurer's Chest offers a useful collection of templates, tools and resources.

Éducaloi http://www.educaloi.qc.ca/

The Charities section of the bilingual Éducaloi website contains a wide range of helpful resources for Québec's charity and non-profit sector. Infosheets, quizzes and checklists, all written in plain language, guide organizations through the ins and outs of charity law. Through Éducaloi.tv, visitors can view video segments on topics of interest to registered charities. An interactive accountability test provides a visual reminder of the types of information that charities should be sharing with the public in order to boost the level of public trust in their organizations.

Fundraising is a key component of many charities' operations. Donors and the CRA have an expectation of transparency and adherence to established guidelines.

Atlantic Charities Learning Exchange http://www.atlanticcharities.ca/

Fundraising is a key component of many charities' operations. Donors and the CRA have an expectation of transparency and adherence to established guidelines. Atlantic Charities Learning Exchange has developed a number of resources to increase awareness of Canada Revenue Agency guidelines in this area, including the Online Assessment Tool which assists charities in calculating their fundraising ratio.

Imagine Canada http://www.imaginecanada.ca

ImagineCanada is a national registered charity which provides support to Canadian charities and non-profit organizations through research, advocacy and education. Their comprehensive online library includes materials on topics relevant to the charitable and non-profit sector including Governance, Human Resources, Fundraising and Financial Management. The Charity Tax Tools section of the site contains information on legal requirements for charities on topics such as gifts and receipting and record-keeping.

Margo Till-Rogers is a librarian with the Legal Resource Centre in Edmonton, Alberta.

Minimum Wages in Canada

Peter Bowal and
Chris Franssen

Provincial minimum wage legislation sets out the compensation floor in Canada, essentially a "living wage." Historically, it only applied to children and women as they comprised the majority of working class people who were not organized in a union. Now, these laws apply to all non-unionized workers, although very few people work at these minimum compensation levels.

In 2008, only 5.2% of Canadian workers were employed at the minimum wage. Of these, 29% were between the ages of 25 and 54 and 60% of the minimum wage earners were women. Around 2009, all provinces except British Columbia increased their minimum wage rates, which in turn, increased the number of Canadian workers working at minimum wage to 5.8%, or some 817,000 people. Alberta has one of the lowest proportions of minimum wage workers, at fewer than 20,000 workers, or about 1.3% of its population.

The existence of minimum wage legislation suggests that it serves a positive purpose for the most wage-vulnerable workers, yet at the same time imposes little adverse impact on employers. With a living wage, employees not only support themselves and retain their dignity, but they also spend locally and contribute to the consumer economy.

British Columbia was the first province to adopt a minimum wage for men in its *Men's Minimum Wage Act* of 1925. This was followed by other provinces. Alberta's legislation came in 1936. Prince Edward Island, in the early 1960s, was the last province to join the consensus to stipulate all employees a minimal remuneration.

On September 1, 2011, Alberta's minimum wage rate rose to $9.40/hour, an increase of 60 cents from the last increase in April 2009. The process for setting future minimum wage rates will presumably take into account the Alberta annual average weekly earnings level and changes to the Consumer Price Index in Alberta. This formula and any updates will occur on September 1 of each year. The government seeks predictability and consistency, and includes in its analysis any inflation factor.

Province	Minimum Wages	Effective Date	Liquor Serving Minimum Wage	Maximum Deduction for Board and Lodging	Maximum Deduction for Food
Alberta	$9.40	Oct 01, 2011	$9.05	$4.08/hour	$3.09/hour
British Columbia	$9.50	Nov 01, 2011	$8.75	$325/month	
Saskatchewan	$9.50	Sept 01, 2011	$-		
Manitoba	$10.00	Oct 01, 2011	$-		
Ontario	$10.25	Mar 31, 2010	$8.90		
Quebec	$9.65	May 01, 2011	$8.35	$20.00/week	$1.50/meal to max $20/week
Nova Scotia	$10.00	Oct 01, 2011	$-	$65.00/week	$3.45/meal
NL	$10.00	July 01, 2010	$-		
New Brunswick	$9.50	Apr 01, 2011	$-		
PEI	$9.60	Oct 01, 2011	$-	$56.00/week	$3.75/meal
Yukon	$9.00	Apr 01, 2011	$-		
NWT	$10.00	Apr 01, 2011	$-	$0.80/day	$0.65/meal
Nunavut	$11.00	Jan 01, 2011	$-	$0.80/day	$0.65/meal
*Minimum weekly wages only in Alberta ($275) and New Brunswick ($440)					
*New Brunswick minimum wage expected to increase in April 2012					

As this table shows, minimum wages in some provinces are reduced for alcohol servers, apparently due to the prevalence of tips that accrue to workers in that sector. Industry lobbying led to this two-tiered system. Some people oppose creating two classes of minimum wage earners, as receipt of tips is not guaranteed, but the difference in the minimum hourly rate is only $0.35 or less than 4%. Most agree that servers in restaurants and bars should earn at least $0.35 per hour in tips.

With the cost of living in Canada as it is currently, even these minimum wages do not comprise a sturdy living wage for the long term. Workers with potential to rise through the ranks of employment should reasonably quickly earn more than minimum income, especially since they are typically young and less skilled and experienced. Calibrating the minimum wage too high in the market can cause a reduction of jobs, even those for which only minimum wages are paid, so the government must remain prudent in maintaining the balance between living wages and job opportunities.

References to Canadian Minimum Wage Legislation

British Columbia *Employment Standards Act*, Employment Standards Regulation, Part 4, Sections 14 – 18.1, last updated May 1, 2011

Alberta *Employment Standards Code*. Employment Standards Regulation 14/97 Part 2, Sections 7 – 13.1, last updated Sept 2, 2011

Saskatchewan *Labour Standards Act*, Minimum Wage Regulation, Sections 2 – 9.5, last updated Sept 2, 2011

Manitoba *Employment Standards Code*, Minimum Wage and Employment Conditions Regulation, Part 2, last updated April 10, 2007

Ontario *Employment Standards Act, 2000*. Exemptions, Special Rules and Establishment of Minimum Wage, Sections 5 – 10, last updated Jan 2, 2009

Act Respecting Labour Standards, R.S.Q., c. N-1.1, ss. 88, 89 and 91. Quebec. Regulation Respecting Labour Standards, Sections 2 -5, last updated Sept 2, 2011

New Brunswick *Employment Standards Act*, Minimum Wage Regulation, Sections 2 – 10, last amended Sept 2, 2011

Nova Scotia *Labour Standards Code*, Sections 50 and 52, Minimum Wage Order, Sections 6 –11, last updated Sept 2, 2011

Prince Edward Island *Employment Standards Act*, Minimum Wage Order, Sections 1 – 3, last updated Sept 2, 2011

Newfoundland and Labrador *Labour Standards Act*, Labour Standards Regulation, Sections 8 – 11, last updated Sept 3, 2011

Yukon *Employment Standards Act*, Minimum Wage Regulation, Sections 1 – 6, last updated Sept 2, 2011

Northwest Territories *Labour Standards Act*, Employment Standards Regulation and Wage Regulation, Sections 2 -3, last updated April 15, 2008

Nunavut *Labour Standards Act*, Wage Regulations, Sections 1-5, last updated Sept 4, 2007.

Peter Bowal is a Professor of Law and Chris Franssen is a student at the Haskayne School of Business in Calgary, Alberta.

Closed Curtains? – The Political Theatre of Jason Sherman

Robert Normey

I consider that there are few experiences as thrilling and immediate as participating as an audience member in a politically charged drama unfolding before one's eyes. Theatre is particularly well-suited to provocative and passionate writing that displays political engagement. It thrives on conflict. So why do we see so few political plays, particularly those dealing with Canadian subjects, on Canadian stages? For instance, it has been some time since I have seen one of Jason Sherman's plays. I recall seeing his ominous political thriller, *Three in the Back, Two in the Head*, winner of the Governor General's Literary Award, and thinking, why don't we see more such work?

The play begins with the assassination of a Canadian weapons scientist and moves back and forth in time to gradually disentangle facts from rumour regarding the motivation and execution of the hit.

Other plays of note exemplifying Sherman's pre-eminence as a political playwright are *Reading Hebron* and *The League of Nathans*, two plays about the relationship between Diaspora Jews and Israel. Many political plays can and should lend themselves to a consideration of the intersection of law and politics and raise fundamental rights issues, as these do.

Not having any inside knowledge of the considerations, political and financial, for why mounting plays by award-winning Canadian playwrights capable of rocking the boat should be so difficult, I thought I should ask Mr. Sherman himself. Sherman tells me that a few years into his career as a dramatist it became a matter of some urgency to confront audiences with uncomfortable questions and disquieting scenarios about what he perceived to be sometimes "smug, or at least quietly held beliefs, assumptions, hypocrisies." This led him to develop plays drawn from his own experiences, thoughts and hair-tuggings on subjects close to his upbringing and for which he truly thought he had something to say within the context of the political and social forum that is theatre.

Unfortunately, over time Sherman learned, to his chagrin, that theatre in Canada is, in his words, "a fringe activity with a low threshold for political engagement, or at least political engagement that doesn't ultimately support the status quo." He was dismayed to see that productions of his work, despite very high critical reaction, dried up over time under the decision-making of directors and producers who considered that any play that smacked of local politics was anathema to box office glory. Of course, one notes that such timidity does not extend to prestigious British or American plays staged here, which do grapple with contemporary political issues, but possess a "brand" that mere Canadians lack. (In this regard, think of Caryl Churchill's *Top Girls* or Tony Kushner's *Angels in America*).

Not having any inside knowledge of the considerations, political and financial, for why mounting plays by award-winning Canadian playwrights capable of rocking the boat should be so difficult, I thought I should ask Mr. Sherman himself.

Sherman considers that there is a long tradition of neglect of political dramatists in this country, save for a brief period in the late 60s when George Luscombe and his creative team staged daring political works in Toronto. Luscombe may have succeeded in sending bricks through our windows of complacency, but our thoroughly disillusioned playwright is decidedly of the view that in the current climate, "the windows were replaced with plexiglass, the curtains drawn, the televisions turned up." Lacking the passionate critical and audience engagement to sustain political theatre in the land of the midnight sun, Sherman himself has found it necessary to exit stage right and emerge as a television and radio script writer. Ironically enough, he now writes the material that was being viewed behind those curtains. It is a tragic loss and symptomatic of a deep malaise in Canadian theatre and, more generally, in Canadian culture.

To gain some sense of what we have lost we might turn briefly to two of Sherman's plays which exemplify the politics of engagement. The first is his adaptation of Maxim Gorky's 1906 play, *Enemies. Enemies* was a powerful attack on class and on the uneven playing field between employer and workers and sufficiently controversial to be suppressed in Russia for years. It follows the better-known *The Lower Depths*, which one can see on DVD through the marvelous adaptation by Akira Kurosawa.

Sherman selected the Gorky play as a vehicle for one of Ryerson University's graduating acting classes. He admired *Enemies* for its take on a wide range of subjects, from family dynamics to class and gender relations. The play's locale is nestled within the world of Chekhov's indolent, wistful

landowners of *The Cherry Orchard* with a twist – here the family has done what Madame Ranayevskaya failed to do. They have established a flourishing textile factory on their estate, next to their garden. The play explodes soon enough with a strike over the refusal of the owners to discharge a brutal foreman who regularly inflicts violence on his charges. Questions pertaining to the rights of workers to engage in collective action, including a strike, abound. Perhaps it is no surprise to learn that Mikhail, the tough-minded partner and managing director, uses a lawyer to obfuscate and delay the taking of action via an "investigation" when it is obvious to his more liberal-minded partner, Zakhar, that the factory foreman is a liability to the operation (To the observation that he is a moron, Mikhail's witty, if callous, response is "yes, but he's our moron.").

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Mikhail naturally enough moves to adopt strong-arm tactics, including a lockout of the workers. Feelings run high and toward the end of Act I we learn that Mikhail himself has been shot in a melee.

In Act II we are introduced to the Assistant District Attorney as an investigation unfolds to determine the true murderer. It becomes painfully clear that due process and basic rights are not something that the mutinous workers will be afforded.

Contemporary resonances for Canada are there to ponder. A turn to the right at the federal level and a hardening attitude towards workers' rights can be seen in this year's high-profile strikes. Federal action could be taken to suggest that workers have the right to strike until such time as they choose to exercise it, in which case legislation will be grabbed from the closet and enacted, with a peremptory order to return to work. A truly interesting development is the case of *Association of Justice Counsel v. Canada (Attorney General)* 2011 ONSC 6435 (CanLII). The court there found that salary caps imposed on lawyers in the federal public service were contrary to s. 2 (d) of the *Charter of Rights*, which protects the fundamental freedom of association. The caps were established in the manner described in the decision and those which clawed back wages for the year 2006-07 could not be justified under the reasonable limits analysis pursuant to s. 1 of the *Charter of Rights*. This particular provision was "arbitrary and motivated by considerations beyond the economic reality of the day" (paragraph 141).

None is Too Many is an adaptation of the groundbreaking history, subtitled *Canada and the Jews of Europe*, 1933-1948, by Irving Abella and Harold Troper. Sherman's play dramatizes the rather shameful response of the federal government in those years to the crisis that developed when large numbers of Jewish refugees sought sanctuary in Canada from Nazi oppression, which became internment and then liquidation.

Not only should it have been apparent to the Canadian government that the lives of vast numbers of Jews were in peril but they received regular briefings and appeals from a gifted, driven Montreal lawyer, Saul Hayes, as the tragedy unfolded. In reading Sherman's sombre, disquieting play I was uncertain as to whether my dismay and outrage was greater in relation to the racist official Blair, or in relation to the political calculations of Prime Minister Mackenzie King and his Québec

lieutenant, Ernest Lapointe. The sad truth, of course, is that those political calculations may have had weight, if considered solely in light of considerations of electoral advantage. It indeed would appear to be the case that large segments of the population in Québec and elsewhere at that time were anti-Semitic or, at the very least, totally indifferent to the fate of the helpless Jews of Europe. Sherman commences his drama with a rather telling dialogue in 1949 between the Chairman of the Senate Standing Committee on Immigration and Saul Hayes, representing the Canadian Jewish Congress. Hayes is warned that if he is sufficiently impolitic as to make submissions which assert that Canada deliberately kept out Jewish refugees, this will somehow indicate a lack of gratitude to his country. Hayes refers to the "ashes and bones" which today lie in Buchenwald and of the soap that has been made of their bodies. The hypocritical Chairman comments on how disturbing this imagery is, but is clearly of the view that linking those graphic images to failures of Canadian immigration policy during WWII will only antagonize the Canadian people. We learn that Canada took in a mere 4,381 Jewish refugees during the period 1933-45 and that this was a much lower total than that of any other refugee-receiving state.

None is Too Many is an adaptation of the groundbreaking history, subtitled *Canada and the Jews of Europe, 1933-1948*, by Irving Abella and Harold Troper.

In their preface to their text Abella and Troper do identify the strides Canada has made in the postwar era to combat anti-Semitism and other forms of racism. They point to signposts such as the *Saskatchewan Bill of Rights* of 1947, established by the government of Tommy Douglas. They point with pride to the success of public pressure, including their own representations, to the then Minister of Immigration, Ron Atkey, in 1979 which is said to have swayed him to adopt a generous refugee program for the Vietnamese "boat people."

Issues respecting Canada's refugee policies continue to confront us in 2011. Various groups are in considerable peril and may have a well-founded fear of persecution on grounds generally accepted under international and domestic law. I would think that in light of the unbalanced Middle East policy Canada currently follows, a truly generous approach would be adopted for Palestinian refugees, acknowledging that this would not in itself make amends for the foreign policy in question.

Both *None is Too Many* and *Enemies* introduce us to passionate characters raising various issues of fundamental rights and of law and policy in the immigration and labour fields, respectively. They are part of a politically engaged theatre that has, regrettably, been pushed to the margins of the Canadian theatre experience. Let's put out a call to theatre directors and producers to stage one of Jason Sherman's plays soon, or maybe commission a new one.

Note: *Enemies* can be found in the collection *Adopt or Die: Plays New and Used* and *None is Too Many* can be found in *Canada and the Theatre of War, Vol. I*, edited by Donna Coates with an introduction by Sherrill Grace.

Robert Normey is a lawyer with the Constitutional and Aboriginal Law Branch of Alberta Justice in Edmonton, Alberta.

First Nations Education System Failing

Gerry St. Germain and Lillian Dyck

Canadians are rightly concerned and shocked by the deplorable conditions facing the small remote First Nation community of Attawapiskat in northern Ontario.

We should be equally concerned by the stories of students attending schools in First Nations communities where the classrooms are infested with black mould and the lands on which they play at recess are contaminated by chemicals. Many will never gain access to science or computer labs, play sports in a school gymnasium, or learn from textbooks that reflect who they are or speak to who they can become.

In some First Nations communities, a staggering seven out of 10 students will not graduate from high school this year. If we believe that education is a basic human right, then we are most certainly failing our First Nations children.

Access to a high-quality education is vital to ensuring that First Nations citizens are able to contribute to the political and economic life of their communities and are provided the necessary skills to manage their resources well and to govern effectively. Supporting the education of First Nations youth is necessary to create long-lasting solutions for this disadvantaged segment of the population.

On-reserve schools operate in relative isolation from one another and without meaningful access to critical educational supports provided by school boards or ministries of education. In real terms, this means the learning abilities of children are not adequately assessed, schools are not equipped with modern learning facilities, qualified teachers are paid less and cannot be retained, and First Nations students continue to fall further behind.

Since April 2010, as members of the Senate Committee on Aboriginal Peoples, we have looked at ways to reform First Nations education. The findings are set in our report *Reforming First Nations*

Education: From Crisis to Hope. After several months of inquiry, we determined that a complete restructuring of First Nations education is required. The current patchwork of individually operated and funded First Nations schools on reserves is failing students.

Our report recommends a process to overhaul this antiquated and ineffective model. It is time to bring forward a *First Nations Education Act* to enable the establishment of a modern system of education that is accountable to parents, teachers and students and capable of supporting schools. Federal and provincial roles must also be better defined as well as their responsibilities for ensuring First Nations children are not left behind.

As noted by the Auditor General of Canada, the way in which First Nations education is financed must also be transformed. The current system of annual contribution payments makes no reference to the educational outcomes we expect must be met and who is responsible for meeting them. A statutory base for education funding, together with structural reform, will provide stable, transparent and targeted education funding.

This process of reform, while undoubtedly challenging, is urgent. In a little over a decade, almost 600,000 aboriginal youth will come of age to enter the labour market. Education will be critical in ensuring that these youths can contribute to Canada's economy, its productivity and long-term demand for workers. The return on investment in closing the unacceptable gap in educational outcomes between aboriginal and non-aboriginal Canadians is considerable. It is estimated that closing the gap could increase total tax revenue for provincial and federal governments by as much as $3.5 billion and could result in savings of $115 billion in avoided government expenditures for social assistance.

In a country as wealthy as ours, no child should ever have to beg for a decent education. Nor should any child ever have to fight for a school or travel hundreds of kilometres away from home to attend one. This is very much the reality for First Nations people across the country. Addressing the unacceptable state of First Nations education in this country demands our best efforts. The cost of not meeting this challenge in lost opportunities is too high, both for First Nations and for Canada. The way forward must be grounded in co-operation. We encourage all parties to work together to secure the basic right of every child to an education that enables them to realize their full potential. This is an urgent moment and we must act boldly to bring about a fundamental transformation of First Nations education.

Senator Gerry St. Germain is chair of the Senate Aboriginal Peoples Committee and Senator Lillian Dyck is deputy chair. *Reforming First Nations Education: From Crisis to Hope* is available on the Senate committee website at http://senate-senat.ca/appa-e.asp

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