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ROY GROGAN FOR THE LAWYERS WEEKLY

Blais: He backs Moldaver's SCC dissent

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public narrative that the federal courts are unduly deferential — i.e. biased in favour of Ottawa — as evidenced by their dismissal of more judicial reviews than they allow.

"[Commentators] were saying 'Well, when we look at the judgments by federal courts, they look to be like the Peace Tower, in favour of government and... now we understand why the government is making the decision to send" federal court judges to the Supreme Court, he said.

However, as lawyers know, courts on judicial review are required to show deference to the presumptively valid decisions of specialized decision-makers — meaning that most challenges fail. Aspersions of bias have the potential to undermine public confidence in the court, the chief justice said.

Speaking personally, Chief Justice Blais, whose family arrived in Quebec from France 350 years ago, admitted he was wounded by the suggestion of the Quebec government — endorsed by some of the province's media and commentators — that Quebec jurists appointed to the five seats reserved for the province on the 13-judge Federal Court of Appeal do not sufficiently embody Quebec's social values to represent the province at the top court.

(Indeed, the Supreme Court's majority itself said that interpreting s. 6 of the *Supreme Court Act* as making judges of the federal courts ineligible for Quebec's three seats advances that section's "dual purpose of ensuring that the court has civil law expertise and that Quebec's legal traditions and social values are represented on the court and that Quebec's confidence in the court can be maintained.")

"Who am I?!" the chief justice asked incredulously, as he prepared to return to his birthplace and home in Berthier-sur-mer, Que., where the Blais family has farmed since 1700.

> "What bothers me is that there were more people looking at how [overturning Justice Nadon's appointment] could embarrass the government, and not looking really at what was the situation about our court.
>
> **Chief Justice Pierre Blais**
> Federal Court of Appeal

"Oh yes, it hurts me," he acknowledged, after representing Quebeckers as an MP and as a jurist on the Ottawa-based federal courts for 25 years. "It's difficult for me that I could be seen by the community, by lawyers or by the journalists [in Quebec], not to be representing Quebec, or not having what they call 'social values.' If you are not supported by your own people — your own environment you come from — it's always tough."

After spending decades telling Quebeckers of the importance of participating in national institutions, to see that some in the province were content to see their own representatives on the federal courts treated as "second class" is "something that I found a little difficult to swallow because you cannot expect that from your own people," he added. "With friends like that you don't need enemies."

He noted that federal judges are sympathetic to their Quebec colleagues' "second-class situation" barring them from service on the Supreme Court.

As to the top court's ruling last March that only current members of the Quebec bar and the province's superior courts are eligible for the Supreme Court's Quebec seats, "even the pope — now — we don't recognize that he is infallible," the chief justice said with a laugh. "I was strongly supportive of the [dissenting] position expressed squarely, in a very good way, by Justice [Michael] Moldaver. When you read that, it's crystal clear."

Going forward, "It's business as usual," he said of the Federal Court of Appeal. "A black eye sometimes disappears after a while. A majority of our judges are young, dedicated, strong, and very well equipped to face the challenge of our court."

Manitoba is opening up the adoption information process

MICHAEL BENEDICT

The award-winning movie *Philomena* tells the heartbreaking and true story of a woman searching for the son she gave up for adoption 50 years earlier. Her quest is stymied by the nuns who arranged the adoption. As it turns out, the sisters also rebuff the son's attempts to learn about his birth mother. By the time the truth emerges, the son is dead, having succumbed to AIDS.

In an effort to provide for potentially happier endings to usually tragic beginnings, Manitoba has joined several other provinces in opening up its adoption process. Under new legislation that is to be proclaimed next year, it will be possible for either adopted children or their birth parents to reach out to the other. Adult adoptees will have the opportunity to learn about their birth families and birth parents can learn about the adult children they gave up for adoption.

However, the legislation will protect both adoptees and their parents who have said they do not wish any contact with the other. "Manitoba has done a good job in striking a balance between the right to privacy and the desire to connect with one's natural family," says Kingston, Ont., family lawyer Mary-Jo Maur, who is also a part-time adjunct faculty member at Queen's University Faculty of Law. "It's challenging in these situations to mend heartache without creating more heartache."

Adds Maur: "Manitoba's new legislation is quite thoughtful in permitting contact in a structured way or disallowing it if such contact is not wanted. It's a sensible approach and mindful of both sides."

Janet Sigurdson, Crown counsel with the Manitoba government's family law branch, describes her province's approach as "unique." Says Sigurdson: "We studied how other jurisdictions across North America handle these issues and took bits and pieces from here and there. But our package is special."

Drafting was done in consultation with the province's ombudsman who is also responsible for privacy issues. "The legislation strikes a proper balance between the right to know your history and the right to privacy," says Nancy Love, sen-

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Onus: Ontario appeal court rules respondent liable

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"The Carter family members were careless in signing the document that consisted of one page," said Court of Appeal Justices Russell Juriansz, Gloria Epstein and Sarah Pepall in their endorsement. "[They] did not read it…did not ask any questions about it [and] did not ask for an opportunity to obtain independent legal advice."

Therefore, the defence of *non est factum* was unavailable to them, said the court, which also noted that for the test to apply, "the guarantee must have been signed as a result of misrepresentation as to its nature," which neither the defendants were able to demonstrate nor Justice Morissette considered in her ruling.

The defence of *non est factum* — the test for which was set out by the Supreme Court of Canada in *Marvco Colour Research Ltd. v. Harris* [1982] 2 S.C.R. 774 — is available, as the Ontario Appeal Court noted, "to someone who, as a result of misrepresentation, has signed a document mistaken as to its nature and character and who has not been careless in doing so."

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James Morton
Steinberg Morton Hope & Israel

The court's emphasis on carelessness is consistent with case law, said James Morton, head of the litigation group at Steinberg Morton Hope & Israel in Toronto.

"The defendants in this case also did not plead *non est factum* but argued they didn't understand what they signed, and the Court of Appeal said you don't have to use the words, '*non est factum*,' you just have to raise the concept that you didn't understand what you signed."

He explained that *non est factum* usually fails as a defence because people either don't read or ask questions about documents before signing them.

"It's almost a boilerplate defence in banking litigation where you'll often see an assertion of *non est factum*. How often it succeeds is a different point," said Morton, past president of the Ontario Bar Association.

The defence is to be used as "a shield and not a sword," now-retired Ontario Superior Court Justice Anthony Cusinato wrote in *Piccolo v. Dibenedetto* [2002] O.J. No. 4151, a case involving an elderly Italian man who understood very little English and who successfully sued his longtime lawyer for breach of fiduciary duty.

"This decision shows just how extreme cases have to be before you get a successful defence of *non est factum*," said Morton. "It has to be a situation where, for example, somebody with limited language skills is told they're signing one thing and in fact signing another, and that they reasonably relied on that person who told them that."

For instance in *J.R. Watkins Co. v. Minke* [1928] S.C.J. No. 38, the country's top court held that two illiterate defendants were not bound by a document they signed assuming liability for a third party's indebtedness because the document was "falsely explained to them" and the liability they acquired was "entirely different from that which they were told they were assuming."

But *non est factum* "would not have been available to those defendants if they had signed the document without asking to have the document read to them," explained veteran civil litigator Mike Adams, a partner with Anderson Adams in Innisfil, Ont.

"To be proved, the defence requires three ingredients: the defendant believes he or she is signing a document of an entirely different class from the one actually signed; the mistake was procured by misrepresentation; and the signer was not careless."

He said that if *non est factum* is established, the contract at issue is void as opposed to voidable, the latter of which could be avoided between the original parties but not defeat the interests of an innocent third party referred to in case law as a "bona fide purchaser for value."

According to Adams, "it is serious business to make an innocent third party pay for the mistake of a signer, so the restrictions put on this defence account for its rare success."

Even: Legislation attempts to balance rights

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ior legislative and policy analyst with the ombudsman's office.

Among the law's distinctive features is overcoming cross-jurisdictional obstacles by making birth records more accessible for Manitoba-born children who are adopted outside the province. That provision is particularly significant for aboriginals, many of whom were placed outside the province in the 1960s and the 1970s. "These adoptees may now be able to reconnect with birth families," Sigurdson says. "The legislation allows an adopted aboriginal person's pre-adoption birth information to be shared with a third party to potentially access a benefit."

The legislation is based on a presumption of openness with privacy protections. For adoptions that took place before the new law is proclaimed, disclosure of information is not permitted if either party files or has filed a disclosure veto. "The legislation won't come into effect for a year, to allow time for adoptees and registered birth parents to file those vetoes if they wish to keep their information private," Sigurdson says.

After the law is proclaimed, birth and adoption records will be open, but parents and adoptees can file a "contact preference" whereby they can specify what contact, if any, they want.

"Manitoba's new legislation is quite thoughtful in permitting contact in a structured way or disallowing it if such contact is not wanted. It's a sensible approach and mindful of both sides.

Mary-Jo Maur
Family lawyer

"You need to account for women being able to put up their children for adoption and walking away. When balancing child-parent rights, one right does not trump the other.

David Fraser
McInnes Cooper

Adoptees will be able to seek out their birth information once they turn 18, but they can also file a contact preference when they turn 16. Birth parents will be unable to seek information about their children until the adoptees turn 18. And the privacy of the adoptive parents will be protected at all times.

With openness the goal in some provinces but not in others, adoption laws across the country remain a "hodge-podge," according to Toronto family lawyer Robert Shawyer, a member of the Ontario Bar Association's family law section.

Nevertheless, Shawyer praises one aspect of Manitoba's approach, especially when compared to Ontario. "They are going to centralize their records for one-stop shopping," he says.

British Columbia, Alberta, Ontario, Newfoundland and Labrador and Yukon have all struck similar balances among adoption's competing privacy interests. "Openness means you are entitled to the information, but it does not mean that you are entitled to a relationship," Sigurdson says.

Or as Winnipeg family lawyer Lawrence Pinsky, a partner at Taylor McCaffrey, puts it, "It opens the door, but does not mean you can get in."

David Fraser, one of Canada's leading privacy experts, says it is critical to respect individual autonomy when opening up adoption records. "You need to account for women being able to put up their children for adoption and walking away," says Fraser, a partner at McInnes Cooper in Halifax. "When balancing child-parent rights, one right does not trump the other."

Fraser adds that respect for privacy means that the rules of the game are not subject to change. "Privacy is setting expectations and meeting those expectations," he says.

The Manitoba legislation attempts to meet those standards and demonstrates its privacy concerns with a fine of up to $50,000 for people who seek contact when it is not wanted.