

Episode 16: Debunking Myths in Canadian Law (Part I, English)

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TRANSCRIPT

Esther Kim: Hi, and welcome to our newest episode of the *Ottawa Law Review* podcast. My name is Esther Kim.

Vincent Zeng: And I'm Vincent Zeng.

Esther Kim: And we are two associate editors with the *Ottawa Law Review*. I'm sure we have all watched a movie or a TV show about lawyers and have noted the inconsistencies or inaccurate portrayals of lawyers or how the law works in Canada. Or perhaps we've heard some incorrect statements about certain laws or a comment about lawyers that isn't exactly an accurate representation of what lawyers do.

Vincent Zeng: In this episode, we will be debunking some of those common myths about lawyers and laws in Canada. We are going to break down a few popular misconceptions about lawyers and the law, and we hope this will help separate fact from fiction.

Esther Kim: The first common myth is that people with mental health issues never face liability for crimes or that mental health defense is a "get-out-of-jail-free card".

In Canada, the defense of mental disorder is covered in section 16 of the *Criminal Code*. Section 16(1) says:

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Sections 16(2) and (3) describe that the burden of proving mental disorder under this defense is on the party that raises the issue and that it must be proven on a balance of probabilities.

This defense of mental disorder reflects a core idea in Canadian criminal law: that people should only be found guilty if they act out of their own free will. This is what lawyers call *mens rea*, or a "guilty mind" in committing a crime.

If we break down this defense, we see that there are two branches where the defense of mental disorder will be applicable. The first branch is when a person, due to their mental disorder, was incapable of appreciating the nature and quality of their act. For example, a person believed that they were killing Satan, when in fact they were killing a loved one. The second branch is when a person,

due to their mental disorder, did not know what they were doing was wrong. For example, they believed that they had been ordered by God to carry out a sacrifice in order to save mankind.

This defense of mental disorder was discussed a couple years ago in *R v Minassian*. In April of 2018, Minassian drove a van through the streets of Toronto, killing 11 people and injuring 15. Minassian was charged with 10 counts of first-degree murder and 16 counts of attempted murder. For all his charges, Minassian pled the defense of mental disorder under section 16 of the *Criminal Code*. The court rejected his argument, finding that although Minassian did have autism, his mental disorder did not amount to a “disease of the mind” under the law that rendered him incapable of distinguishing between right and wrong. In other words, Minassian, despite having a mental disorder, was still capable of understanding what he was doing and that it was wrong. As a result, Minassian was found guilty on all counts and was later on sentenced to life in prison.

There are several key things to note about this defense. Firstly, in order for the defense to be successful, there must be proof that the mental disorder itself caused the inability to correctly perceive the nature of the act or whether that act was right or wrong. Hence, this defense will not succeed if someone has a mental disorder, but it had no effect on that perception of reality or judgment of morality. Secondly, what is considered to be a “mental disorder” in medicine can be different from what is considered to be a “mental disorder” in law. In law, mental disorder does not encompass transitory states. The mental disorder needs to have an organic or internal cause in the brain, often has to be permanent or reoccurring that cannot be detached from the individual, and usually has to be non-curable in which medication or treatment is unable to completely remove the effect of the disorder on the thought processing or perception of an individual. Thirdly, knowing that the act is legally wrong is not the same thing as knowing that the act is morally wrong. For example, someone may know that murder is legally wrong, but they personally might not believe murder to be morally wrong. However, in law, what is considered to be morally wrong is determined by the normal standards of society. In other words, it does not matter what the personal standards of morality the accused has, because what matters is whether an ordinary person in society would think that action is morally wrong. Lastly, unlike other criminal trials where the prosecution bears the burden of proof, the onus is usually on the accused person to prove this defense.

Overall, when you take all these factors into mind, you can see that the defense of mental disorder is actually quite a difficult defense to prove successfully. Furthermore, it is important to note that some individuals may not actually raise this defense on purpose, because if the mental defense is successful, the individual will be placed in a medical institution for an indeterminate period of time. Some people may prefer a finite sentence in prison, rather than an indefinite custody under medical supervision.

All in all, not only is the defense of mental disorder quite difficult to prove, even a successful claim of mental disorder does not mean the individual will walk free. As a result, mental disorder is definitely not a “get-out-of-jail-free card”.

Vincent Zeng: Our second myth is freedom of contract means you can put anything you want in the contract. So, this is actually false because it's a very broad saying. While people may have lots of

discretion on their contracts, that does not mean courts will uphold anything that parties have agreed on.

For example, a contract to sell illegal drugs or to avoid paying taxes is automatically void. In plain English, in the eyes of the law, these contracts are treated like they never existed. Another restriction on the freedom of contract is that courts will not support terms that are against public policies, such as giving up your fundamental rights.

But the water may get muddy because sometimes the law does allow a party to waive certain rights. You must be familiar with the situation that you need to first click “I agree with the terms and conditions” before using a certain service. Chances are that there might be waivers or other clauses you might actually not like in those terms and conditions.

Are these sneaky waivers or clauses valid? Generally, if a person knows a restriction on their rights before signing the contract, and because the company uses conspicuous manners to bring that restriction to that person’s attention and make sure that person understands it, then the company might succeed in arguing that that person agreed on such restriction to its disadvantages.

Things will get even more complicated if those restrictions are bolded, capitalized, or underlined. But a person that signed the contract did not realize or understand the implications or consequences of such restrictions.

The following sad story shows exactly how the theory I just told you comes into play in real life. A New York doctor died shortly after eating at a Disney restaurant in Florida in 2023. The doctor's husband sued Disney Parks and Resorts for negligence. Disney tried to get the case dismissed by arguing that the husband could not sue the company because he agreed to settle any lawsuits against Disney out of court when he signed up for the free trial of Disney+ in 2019. Since this is a US legal matter, we are not sure whether Disney would have been successful on this argument in Canada, but following public backlash, Disney dropped its motion to dismiss the lawsuit and allowed the case to be heard in court.

So, what about the law in Canada? Well, the Supreme Court of Canada ruled on a similar issue in its *Uber Technologies v Heller*. Heller is an Uber Eats driver, and when he signed his employment contract, he agreed to an arbitration clause, which basically says Heller must solve any dispute with Uber through the International Chamber of Commerce in the Netherlands. But Heller had no idea how much an arbitration would cost when he signed the contract.

The Supreme Court found there’s an imbalance of bargaining power between Heller and Uber, and that Uber took advantage of its strong bargaining power over Heller. The court eventually held that the arbitration clause is unconscionable and that clause is therefore invalid.

So, we can see the contract law does not hold weaker parties to all the bargains they made. It is false to say that freedom of contract means you can put anything you want in the contract.

Esther Kim: The next myth about the law is that freedom of expression means we can say whatever we want.

In Canada, freedom of expression is protected by section 2(b) of the *Charter*. Section 2(b) states that everyone has the following fundamental freedoms: freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication. In the case of *Irwin Toy*, the court stated that the purpose of the freedom of expression is to promote the search for and attainment of truth, participation in social and political decision-making, and the opportunity for individual self-fulfillment through expression.

There are a couple things about our freedom of expression that we would like to point out. Firstly, the freedom of expression covers more than just speech. It covers any kind of activity or communication that conveys or attempts to convey meaning such as music, art, dance, advertisements, signs, and leaflets. Secondly, and this is something most people may forget about, but freedom of expression also covers the freedom to be silent. Silence is also an expression and conveyance of meaning. Hence, the freedom of expression, you also have the right to not express anything. Similarly, freedom of expression not only covers the speaker, but also the listener, who is the receiver of the meaning expressed.

However, it is important to remember that freedom of expression actually does not protect all expression. Freedom of expression, just like other charter rights, protect individuals from undue governmental action. In other words, freedom of expression protects people from the state and is not a right invoked in personal or private conversations between individuals. In simple terms, the government cannot irrationally restrict your expression, but this right does not really protect you in a private conversation you had with a friend or family member in your living room.

If we break down this *Charter* right even more, we see that the courts outlined a test that must be met in order for the expression and question to be protected by section 2(b). In the case *Canadian Broadcasting Corp v Canada (AG)*, the court explained that: one, the activity and question must have expressive content; two, the method or location of the expression must not remove the protection of section 2(b); and three, the government action must infringe the protection of section 2(b) either in purpose or in its effect. This means that if these three criteria are not met, your expression may not be protected even from a governmental action.

Furthermore, the court also clarified that some things are explicitly not protected by the freedom of expression. For example, in *Irwin Toy*, the court stated that the expressions that take the form of violence are not protected by the freedom of expression. Likewise, in the case *Greater Vancouver Transportation Authority*, the court stated that expressions that are threats of violence are also not protected.

Additionally, freedom of expression does not extend to all locations. Generally, private property falls outside the scope of protection offered by the freedom of expression. Even on public property, the location must be a type of public property in which one would expect constitutional protection of free expression. In other words, these are locations where one would expect that free expression is allowed

in order to have democratic discourse, truth-finding, or self-fulfillment. For example, although courtrooms or military bases may be public property, they are not areas that one would expect free expression to be allowed. Hence, the freedom of expression may not be protected in these locations.

And lastly, it is important to note that sometimes freedom of expression can be limited if the limitation is justifiable under section 1 of the *Charter*. For example, although hate speech, obscene pornography, or marketing of harmful products may initially be protected by section 2(b), it may be ruled that governmental infringement on these expressions is justifiably limited under section 1, and thus these expressions are not allowed.

All this is to say, yes, even though Canadians have their freedom of expression protected by the *Charter*, it is definitely a myth that this right allows us to say whatever we want, wherever we want.

Vincent Zeng: This myth is a very common one. A lot of people think that indigenous peoples never pay taxes. But this is false.

This myth may come from the misunderstanding of tax exemptions. Before we get into the law, I want to note that I will be using the term “Indian” within its legal meaning in the *Indian Act* only.

Okay, let's get into the law. Simply speaking, a tax exemption means a person does not have to pay tax on certain income or purchases. But a tax exemption does not mean the person never pay any taxes.

For example, scholarships are the kind of income but are exempt from income tax if they are received by full-time students for enrollment in a qualifying education program. Would you therefore think students never pay taxes? Probably not. Then you can see the logical error with the myth about Indigenous peoples.

So, what is the real situation?

According to section 87 of the *Indian Act*, if a person meets the legal definition of Indian as set out in this act, it has personal property such as income on a reserve, then the property is exempt from tax. For reference, a reserve is a piece of land set aside by the federal government for the Indigenous community. However, if an Indigenous person doesn't meet the exemption, then they will be taxed under same tax rules as other Canadians.

Besides this *Act*, I also want to share a 2024 case from the Tax Court of Canada about whether the employment income of a First Nations woman, Ms. Hill, was earned on the reserve. In other words, whether her income would be exempt from tax. Generally, courts will look at different factors such as the employer's residence, the employee's residence, and the place of payments to decide whether the income is on the reserve. In the *Hill* case, after weighing different factors, the judge found while the hospital that Ms. Hill worked in was a disputed land, the income was not closely related to the reserve and therefore Ms. Hill's income was taxable. So here we can see an example of an Indigenous person who was taxed under the general rules.

Therefore, the idea that Indigenous peoples never pay taxes is wrong.

Esther Kim: Our next myth is one held about lawyers. It says criminal defense lawyers represent and are on the side of even the worst criminals.

In order to debunk this myth, we have to start all the way back at the basics of Canadian criminal law. In Canada, our criminal law system works on a due process model. Due process means that we focus on fact-finding and we do this through an adversarial process. Intrinsic to a good adversarial process is that both sides have a fair opportunity to present their case and argue their side. Criminal defence lawyers are imperative for a proper adversarial system to take place. Even the worst of criminals deserve to have a defence lawyer and have fair representation. Criminal defense lawyers are imperative figures in our system because they make sure that individuals are only charged for a crime if there is sufficient legal evidence to support that conviction.

Furthermore, it is important to remember that Canadian criminal law is grounded on the presumption of innocence. The presumption of innocence is expressly protected by section 11(d) of the *Charter*. Section 11(d) states that any person charged with an offense has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. The presumption of innocence is important because it ensures that we only charge and criminalize those who are truly deserving of punishment. In order to find out whether the individual is truly deserving of punishment, we need to find the facts through the participation of defense lawyers in the adversarial process. Without defense lawyers to preserve the adversarial process, our criminal law system can easily become one of unchecked governmental power, in which the government may imprison anyone they wish and without fair trial.

Hence, criminal defense lawyers play a crucial role and are often the only protectors against overwhelming governmental power against an often powerless and marginalized accused individual. If we start to disallow defense lawyers for even the “worst criminals”, where do we draw the line? How can we define who are the “worst” of criminals and who are “undeserving” of proper legal representation? As you can see, this quickly becomes a slippery slope.

It is also important to keep in mind that criminal defense lawyers defend accused individuals regardless of if they are actually guilty or innocent, because that is a criminal defense lawyer’s job. A defense lawyer does not represent the accused because they personally believe in or is on the side of the accused. In other words, even if a criminal defense lawyer represents someone proven guilty, this is not a reflection of the lawyer’s own morals or opinions. It is not immoral for a defense lawyer to defend a convicted person, because the defense lawyer is just fulfilling their duty and their role in the justice system. A lawyer’s job is to test the evidence and witnesses presented by the prosecution and object if the evidence as a whole is insufficient to prove that the accused is guilty beyond a reasonable doubt for the offense in question.

As you can see, defense lawyers do not represent convicted people because they believe in or agree with the client’s crimes. Defense lawyers are fulfilling a very important role in the Canadian legal

system to ensure that our nation remains fair, equal, and ruled by law. So, the next time you hear about a lawyer defending an individual who is unpopular or controversial, we think it is important to keep in mind that they are not standing up for the crime. They are standing up to preserve a fair and just process that protects us all.

Vincent Zeng: Alright, those are five popular myths about lawyers and the law that we have covered in this episode. We hope our discussions of the myths have helped clear up some common misconceptions about how the law works in Canada and what lawyers do in our legal system.

Esther Kim: It's understandable if you've ever found the law complex and confusing. Canadian law often develops and grows through complicated cases and amendments of legislation. And these changes and growths can take place over a long period of time. As a result, it is not surprising that myths and misconceptions tend to fill in the gaps of our understanding. This is compounded by the portrayals of lawyers and the law in media, such as in TV shows, movies, or social media posts.

Vincent Zeng: But as we've explored today, Canadian law is not black and white. If there's one takeaway from today's podcast episode, it is that the Canadian legal system is complex and nuanced. We hope our discussion today helps to clear up some confusion and misconceptions about our legal system and have explained that every law, right and lawyer plays an important role in maintaining the delicate balance between protecting society and protecting individuals.

Esther Kim: This concludes this episode of the *Ottawa Law Review* podcast. We would like to thank the *Ottawa Law Review* podcast committee for researching the myths for this episode, as well as recording and editing this podcast episode. Lastly, thank you all for listening!