November/December 2012

A Candidate's Journey

Privacy Issues

Miss Julie Meets Lisbeth

LawNow

Relating law to life in Canada

Elections and the Law

Afghan women voting in the 2011 parliamentary election.

Free and fair elections are the cornerstones of democracies. This issue of LawNow examines elections law in Canada and around the world.

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Freedom from bias always your right

First Nations people can now seek equality other Canadians enjoy

David Langtry

Given the toxic stew of brutality and intolerance that envelops so much of the world, Canadians are right to feel a deep sense of privilege. We should be thankful not just for good institutions and laws, but for the force of our collective aspiration to build a society in one small corner of the planet where equality, fairness and freedom from discrimination at least have a chance to flourish.

In passing the *Canadian Human Rights Act* in 1977, Parliament intended to make a difference in people's lives. For the most part, the law has lived up to its promise. Canadians filing discrimination complaints under federal human rights law have brought about changes that help make equality tangible in everyday life. Closed captioning on TV, accessibility of ATM machines, the role of women in the military, and the principle of equal pay for work of equal value are all examples of change born from discrimination complaints.

Yet with just 21 words, the 1977 *Canadian Human Rights Act* excluded the *Indian Act*, leaving hundreds of thousands of aboriginal people, primarily residents of First Nations, in the cold. The law that outlawed discrimination was itself discriminatory.

For over 30 years, First Nations residents did not enjoy the same protections as other Canadians and could not hold their leadership or the federal government accountable for many of the actions and decisions that affect their lives.

This government brought in a bill to correct this anomaly in 2008. Parliament decided then to make the change applicable to the federal government immediately, but gave First Nations governments until 2011 to prepare for their new responsibilities and accountability.

Since they obtained these rights, aboriginal people and First Nations organizations have filed over 300 discrimination complaints. Some are complaints against the federal government concerning alleged disparities in federal funding for on-reserve services. But the bulk of them are against First Nations governments.

The sheer volume of complaints validates Parliament's conviction that the *Canadian Human Rights Act* would be useful for improving accountability and governance. It has only been a year since complaints of discrimination for matters under the *Indian Act* could be made against First Nations governments, and the Canadian Human Rights Commission has already received close to 200 of them. Aboriginal complaints have rapidly become a large part of our work – just over 12 per cent of our caseload.

Filing a human rights complaint often takes courage, especially in small communities or tightly knit organizations. People often fear ostracism or other forms of retaliation for challenging the status quo.

Filing a human rights complaint often takes courage, especially in small communities or tightly knit organizations. People often fear ostracism or other forms of retaliation for challenging the status quo.

In spite of this, First Nations people have come forward. Their complaints involve allegations they were barred from educational support, health care, housing or other services because of their race, sex or family status. Others have complained they have been denied jobs because of their race or sex. Still others claim they were prevented from voting or running in an election because of the race or family relationships of their spouse.

These complaints do not reflect life in all First Nations communities. Nor are aboriginal people the only ones to be dealing with the impacts of discrimination in Canada today. Sadly, despite Canada's enviable reputation for respecting human rights, headlines about allegations of sexual harassment, racial discrimination or other forms of abuse continue to be almost a daily occurrence.

Human rights law does not guarantee freedom from discrimination for anyone. What it does guarantee is your right to hold people in power accountable for their actions.

We are just beginning the process of remediating the unjust exclusion of people living under the *Indian Act* from federal human rights law. Aboriginal complaints are more resource intensive, as many touch on a new area of law. New issues, such as the need to take aboriginal customs and laws into account provided they are consistent with the principle of gender equality, are part of the challenge.

I believe, however, that most First Nations governments support this change. In my meetings with First Nations leaders, I have only seen a willingness to improve accountability and governance. So I am optimistic that the *Canadian Human Rights Act* will deliver to communities previously excluded from it the same benefits it has brought to mainstream Canadian society, in which freedom from discrimination might not always be a reality, but is always your right.

David Langtry is acting chief commissioner of the Canadian Human Rights Commission. This article was first published in the *Edmonton Journal* on October 3, 2012, and is reproduced with the permission of the Commission.

1. Children and Cyber-bullying

A 15-year-old Nova Scotia girl discovered that someone had posted a fake profile about her on Facebook, using her photo, slightly changing her name and posting unflattering comments and sexually explicit references. She was successful in obtaining a court order that the Internet provider disclose information about the publisher of the profile, but her requests for anonymity and a publication ban on the content of the profile were turned down, on the grounds that there was insufficient evidence of specific harm to her. The Nova Scotia Court of Appeal agreed that there was not enough evidence of harm to the girl to justify restricting media coverage through a publication ban. However, the Supreme Court of Canada granted the teen an order giving her anonymity as she pursues the profilers. The Court reasoned that while freedom of the press and open courts are important, such access can be restricted by important interests such as privacy and protecting children from cyber-bullying. It found that while evidence of direct, harmful consequence to an individual applicant is relevant, courts can also find objective harm in the vulnerability of children to cyber-bullying. The Court wrote "Since common sense and the evidence show that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and since the right to protection will disappear for most children without the further protection of anonymity, the girl's anonymous legal pursuit of the identity of her cyberbully should be allowed." But, the Court also ruled that the non-identifying parts of her profile should not be protected by a publication ban.

A.B. v. Bragg Communications Inc., 2012 SCC 46

2. What do We Mean by Public Standing?

In British Columbia, an individual and a Society in Vancouver who have worked with prostitutes for over 30 years asked for standing to challenge Canada's prostitution laws under the *Charter.* The Supreme Court of Canada said that in determining whether to grant public standing to applicants, courts should consider three factors:

- whether the case raises a serious justiciable issue;
- whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and
- whether the proposed suit is a reasonable and effective means to bring the case to court.

The Supreme Court said that it was clear that the applicants met the first two factors; the matter is serious and the applicants have a real stake in the proceedings. The Court ruled that the applicants also met the requirements of the third factor, substituting the words "a reasonable and effective means" from the previous formulation, which stipulated that "no other" reasonable and effective means exist. Justice Thomas Cromwell wrote that judges should take a "liberal, generous and purposive approach to granting public interest standing." The Court referenced the Ontario case of *Bedford v. Attorney General (Canada)*, but noted that a case that raises many of the same issues in Ontario may not be binding in

another province, and that the applicants in these two cases are quite different. It wrote "This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it."

Canada (Attorney General) v. Downtown Eastside Sex Workers United against Violence Society, 2012 SCC 45.

3. A Task for Solomon?

An Alberta judge had the daunting task of deciding whether or not to remove a toddler from life support. One of her doctors testified that the child existed in a state between brain death and a persistent coma, and was completely dependent on technology to survive. Her medical team recommended that life-sustaining treatment be withdrawn. Her parents were charged with aggravated assault, criminal negligence and failing to provide the necessities of life. If the child died, they could be charged with murder. They opposed an application by the Director of Child Welfare for an order determining the medical treatment for the child, stating their religious beliefs. Justice June Ross decided that she could use the court's *parens patriae* (the power of a court to deal with persons under a disability, particularly children) and that this power must be exercised in the best interests of the protected person. She wrote that case law reflects a general understanding in society that "life without awareness and totally supported by machines is not in accord with the best interests of any patient, including a child." She stated that the parents' religious beliefs should not be a determining factor of the child's best interests, noting that she is too young to have ever made her own religious commitment. Justice Ross directed that the child's doctors follow their recommendation that the child be removed from life-sustaining treatment and provided with palliative care. Shortly after the order was followed, the child died.

Alberta (Child, Youth, and Family Enhancement Act, Director) v D.L., 2012 ABQB 562

4. Reid This: Police Tactic Oppressive

The "Reid Technique" was invented in the 1950s by an American company and is used extensively by police forces in North America for interrogating suspects. A Calgary daycare worker was questioned for over eight hours using the technique, after a child at the daycare suffered serious injuries. She stated 24 times that she wished to remain silent, but was subjected to lengthy monologues, interruptions and questioning. Eventually, she made a statement. Judge Mike Dinkel of the Provincial Court of Alberta (Criminal Division) threw out her confession. He wrote, "I denounce the use of this technique in the strongest terms possible and find that its use can lead to overwhelmingly oppressive situations that can render false confessions and cause innocent people to be wrongfully imprisoned." He deemed the accused's confession inadmissible and dismissed the charges against her.

R. v. Chapple, 2012 ABPC 229

American and Canadian Election Laws

Peter Bowal and Lauren Stan

Introduction

There are distinct differences in Canadian and American federal election law and practices. For example, while the processes differ, American primaries are essentially party nominations in Canada. The American process for drawing constituency boundaries (often referred to as "gerrymandering") is much more politicized than in Canada. On the other hand, party discipline is palpably stronger in Canada than in the U.S. Here are the Top Ten differences.

1. Regulation

The Constitution determines the fundamentals of the federal elections of both countries – but far more in the U.S. than in Canada. Federal elections in the U.S. are regulated by both federal and state law. For example, the ballots and conduct of the election varies in each state. This inconsistency

in state practices was highlighted in the Bush versus Gore election in 2000 where Florida's confusing chads on the "butterfly" ballot and state control of that vote determined the outcome.

Canadian federal elections are governed entirely by federal law, the *Canada Elections Act*, (SC 2000, c 9) which establishes and mandates the office of the non-partisan Chief Electoral Officer.

2. Federal Electoral Form

The federal branch of the United States is comprised of the Congress (Senate and House of Representatives) and the President and Vice President. Every American casts a vote directly for a Representative, Senator and a President/Vice President ticket.

Canada follows the British Parliamentary system of government. We vote directly for a Member of Parliament. The political party that wins or can control the most seats in the House of Commons gets to form the government and the party leader becomes the Prime Minister. Only the Prime Minister's electors vote for him.

It remains a matter of debate which system of government (republican or parliamentary) is preferable. Minority governments, while rare, can be ineffective and less bold. Most observers would agree that the sharp partisanship between the current Congress and executive administration (Presidency) in the U.S. has resulted in years of gridlock.

The three branches of government – executive, legislative and judicial – are clearly delineated and elected separately in the U.S. The executive and legislative branches are interwoven in Canada.

It remains a matter of debate which system of government (republican or parliamentary) is preferable. Minority governments, while rare, can be ineffective and less bold. Most observers would agree that the sharp partisanship between the current Congress and executive administration (Presidency) in the U.S. has resulted in years of gridlock.

3. The House of Representatives and House of Commons

U.S. representatives are directly elected to serve two-year terms. Candidates for the House of Representatives must be at least twenty-five years old, have been a citizen for at least seven years, and must be a resident of the state in which they run. (U.S. Constitution, art. I, § 2).

The Canadian *Charter of Rights*, section 3, states that "every citizen" is qualified to serve as a Member of Parliament but section 65 of the *Elections Act* disqualifies some individuals. Citizens who cannot run in federal elections include those who cannot vote, who have been convicted of electoral fraud, members of legislatures, sheriffs, prison inmates, and all election officers.

4. The Senate

The 100 U.S. senators are directly elected to serve for six-year staggered terms. There are elections for the Senate every two years, so one-third of the Senate is up for election every two years. Candidates for the Senate must be at least 30 years old, have been a citizen for at least nine years, and, like the representatives, must reside in the respective state in which they run. (U.S. Constitution, article I, § 3).

The 105 Canadian senators are appointed on a regional basis to serve until age 75 by the Prime Minister. From the *Constitution Act, 1867*, Canadian senators must be citizens, at least 30 years old and reside in the province or territory for which they are appointed. They must have a net wealth of $4000 – a sum set in 1867! Currently, Alberta, in effect, votes for its senators during provincial elections as the Prime Minister has agreed to appoint senators who received the highest number of votes in this way.

The choice of President is technically in the hands of the historical, but controversial, Electoral College.

5. The U.S. Presidency

A candidate for President or Vice President of the United States must be born in, and have resided at least 14 years in the United States, and be at least 35 years old. Both the President and the Vice President serve four-year terms together (article II, § 2, and Twelfth Amendment).

There are no special age, residency or birthplace requirements for the Prime Minister of Canada, and no elected Deputy (or Vice) Prime Minister of Canada on the ballot.

6. Fixed Election Dates

U.S. federal legislation fixes the timing of elections which are held on the Tuesday following the first Monday in November on even numbered years. The new term starts January 3rd for Congress and January 20 for the President and Vice President.

Since the individual states control the actual voting process, about 40 of them have gone to early voting. In the current election, therefore, many Americans will have a chance to vote up to 50 days before the actual election date, while the campaign is well underway.

The Canadian *Constitution* limits Parliaments to five years, although "in time of real or apprehended war, invasion or insurrection" a vote of at least two-thirds of MPs can postpone an election (s. 4). The Prime Minister can ask the Governor General for an election at any time, but a weak attempt to fix the federal election dates for the third Monday of October every four years was made in 2007. Neither of the two elections since that time held to that fixed election date schedule, but several provinces, including Ontario and British Columbia, and most municipalities, follow fixed election dates.

Advance polling is permitted for federal elections in Canada during the hours of noon to eight p.m. on Friday, Saturday and Monday, the 10th, 9th and 7th days before election day (Canada *Elections Act*, s. 171(2)).

7. The Electoral College

Americans do vote directly for their President but there is a qualification. The choice of President is technically in the hands of the historical, but controversial, Electoral College. Voters in each state vote for their choice of President/Vice President by name but are really choosing "electors"

who correspond to their candidate. These "pledged" electors promise to vote for the candidates of their party. State law regulates how states cast their Electoral College votes, but in all but two small states, it is a "winner takes all" system. If an elector does not vote according to the pledge, some states provide for punishment but only ten electors have violated their pledges from 1789 to 2000.[1] There are 538 electors in the current federal election.

To win, the President must receive at least 270 Electoral College votes. Therefore, it is critical to win in the states with the most Electoral College votes. This leads to clearly strategic campaigning. Most states poll clearly in favour of one presidential ticket or the other. The essence of the modern federal election campaign is focus on those relatively few "swing" or "battleground" states where saturation campaigning and advertising seek to capture the favour of undecided voters and win all those states' Electoral College votes.

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The Electoral College system makes it possible for a President to be elected with fewer overall popular votes than the opponent. This was the case in 17 of the 56 U.S. federal elections, the most recent being when George W. Bush won as President in 2000. The Electoral College system has been criticized as being undemocratic compared to direct election and creating the "swing state" campaign which ignores most voters. The small states also have proportionately more influence (Electoral College votes per voter) on the outcome than the big states.

There is no Electoral College system in Canada, but with 308 constituencies, it is possible for a party to form a government with fewer votes than another party. This has happened in some provincial elections (Quebec and British Columbia are recent examples) where a party won more seats with fewer overall votes than another party. At the federal level in Canada, however, the fact that three or four parties are in play for seats means that a governing party will rarely obtain an absolute majority of votes. A plurality (more than any other party) is all that is required for at least a minority government and sometimes even a majority government. For example, the current Conservative government in 2011 won 54% of the seats in the House of Commons with less than 40% of the popular vote.

8. Voter Rights and Registration

Americans must make the effort to register to vote. Many do not. One can register to vote when applying for or renewing a driver's licence, by mail-in registration and at public assistance offices. A major legal issue working its way through some U.S. courts is the new legislative requirement in some states to produce

A major legal issue working its way through some U.S. courts is the new legislative requirement in some states to produce voter photo ID. As it stands now, courts have suspended the requirement because unemployed, low-income and homeless citizens do not have the time or ability to acquire the necessary photo identification by November 6, 2012.

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Canada follows a "pull" resident registration system. Enumerators from Elections Canada go door-to-door to identify eligible voters and publish a voters list. That is an expensive approach and more recently the opt-in model has been used. Each year on their income tax returns, Canadians can check off their consent to be on the national voters list. Regular updates are achieved by cross-referencing motor vehicle registries, vital statistics offices, other electoral lists and passport offices.

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Voter turnout in the U.S. is much higher every four years during the presidential election, than it is in mid-term elections. In 2008, it was 56.8%. In Canada, every election is an election of a Prime Minister and government. The 2011 election saw a voting rate of 61.1%

9. Campaign Financing

Running for U.S. federal political office is very expensive. As of this writing, the presidential candidates have raised a total of $1.325 billion. Add to that all the costs of the other congressional campaigns. Financing is a critical factor to running a successful campaign.

Corporations, labour unions, federal government contractors and foreign nationals are not allowed to contribute directly to federal elections. The *Federal Election Campaign Act* (*FECA*), enacted in 1971, created political action committees (PACs). Corporations and unions donate to PACs of their choice, which in turn help fund federal campaigns.

In 1974, *FECA* was amended to set limits on campaign contributions, but these restrictions were challenged on grounds of freedom of speech, and the U.S. Supreme Court removed most of them.

The issue came up again with the 2002 *Bipartisan Campaign Reform Act* (*BCRA*) In a widely publicized 2010 U.S. Supreme Court case, *Citizens United v. Federal Election Commission* (No. 08-205) (2010), the constitutionality of limits on political donations and expenditures was challenged.

Citizens United produces documentaries and advertisements about political issues.[2] In 2008, it created a movie critical of Hillary Clinton. The *BCRA* prohibited corporations or unions from using their funds to advocate for or against a candidate for federal office. Advocacy of this type was only allowed through PACs. Citizens United claimed these restrictions violated the right to free speech. The Supreme Court agreed and struck out the legislation. This has resulted in "Super PACs" which are technically independent of the parties and candidates, and therefore have no contribution or expenditure limits.

10. Term Limits

The President is limited to terms but the Vice President is not. Likewise, members of Congress are not term limited and many serve very long political careers. Incumbency (continued re-election) is generally stronger in the U.S. than in Canada. One of the biggest recent exceptions to that was the 2010 mid-term election, when an unusually large number of new Tea Party candidates defeated political veterans in the primaries and in the election.

The only limits on the tenure of Canadian politicians are their willingness to run and the voters' decision to elect them.

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Notes

1 Berns, W., Amar, A., Amar, V., Diamond, M., Fortier, J. C., & Ornstein, N. J. (2004). *After the People Vote: A Guide to the Electoral College*. Jackson, TN: American Enterprise Institute Press.

2 "Fulfilling our Mission". (2011). *Citizens United*. Retrieved August 23, 2012.

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Democracy After Post-Conflict Elections

Are we there yet?

Michael Clegg

"The election went reasonably well, millions voted, not too many died and the fraud was mostly detected and removed. But the elected members sit in a chaotic and dysfunctional assembly, concerned mainly to gain personal power and caring little for those whom they represent. As a result the president governs as he wishes."

This imaginary comment could describe several recent elections. Perhaps it overstates the situation in many cases but the outcome of many recent post-conflict elections, supported at great expense by international donors, is far from satisfactory. Unfortunately, it is not uncommon for an election to weave a thin veil of validity and integrity over an undeserving victor. What is wrong? Is it caused by the law, the wider election process, or is it a factor outside the election?

What approach to post-election review should be taken, and should it relate to the process or to reviewing the effectiveness of laws generally? This is sometimes simply represented as "law reform". But what is meant by law reform? If a review process only examines the text of the law itself, it may conclude that the law clearly describes an appropriate system, maybe with some small adjustments, but the real solution to the poor outcome may be elsewhere.

In the case of elections, culture and recent history affect voters' attitudes to authority and to their own place in the world.

In the case of elections, culture and recent history affect voters' attitudes to authority and to their own place in the world. Poor infrastructure results in low levels of literacy, which impedes education about governance and elections. These factors significantly affect voting choices. Clearly, a wider view is necessary.

This can be extrapolated to other areas of law. Legislatures and governments regularly seek the views of the legal profession on the adjustment of existing laws. The creation of new laws and the views of the profession are particularly valuable when they are truly non-partisan. In this, it is important to attach the wide angle lens. A lawyer may well sometimes wonder whether a law is really serving the purpose for which it was designed, and may have the opportunity to be part of a process of review.

Officials working at the 2010 Afghan parliamentary election

This process should not be structured on the assumption that the wording of the law is the problem. It must be approached as a form of problem-solving, where the classical start point is a careful analysis of what the problem really is. It may be that a change in the law is not the solution, and the apparent failure of a law to achieve its purpose may really lie in external factors. The law may not be the main cause of the failure.

In reviewing elections, the use of a wide angle perspective is essential to find out why democracy in post-conflict states is not evolving as we had hoped. A review is usually carried out soon after an election, while experience is fresh, and will generally cover the technical efficiency and accuracy of the process. This should be supplemented by a wider consideration at a later stage, which can address the broader question of whether the outcome served the citizens, followed the principles of the constitution and moved the state closer to justice, peace and prosperity. If not, why not? The social and political environment, for example may be the cause of problems.

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Elections are dramatic events, the one day every four or five years when the people can decide on their government for the next few years. They are presented by the media as dramatic and newsworthy events. Of course, this is true. Elections present elements of triumph and tragedy, integrity and corruption, public service and public exploitation. However, in most cases, the United States election being a notable exception, the media pay attention for only one day – or maybe a few days if the outcome is in doubt or if the process is marred by violence or fraud.

An election is only one small step in the progress from conflict to peace, justice and prosperity. An election that is well run, free and fair can nevertheless produce a dysfunctional parliament and a non-accountable government.

An election is only one small step in the progress from conflict to peace, justice and prosperity. An election that is well run, free and fair can nevertheless produce a dysfunctional parliament and a non-accountable government.

A frequent question is whether we offer post-conflict states some form of democracy too soon after the end of conflict, even if it is applied by a process of their choosing. Would a few years of benign administration be better? There are two problems with this.

Afghan men voting in the 2010 parliamentary election.

Firstly, the body most likely to undertake this, the United Nations, has a cumbersome administration and, partly because of its veto system, has limits on its own internal democracy and its ability to decide and act.

Secondly, the citizens of the newly freed state are usually impatient for the chance to vote. It is dramatic and symbolic. Even when the institution structures of government are new and frail and the conditions for a good outcome are far away, citizens demand an early right to vote. Sadly, this enthusiasm is often based on an assumption that "we will win!" However, the reality is that quite a large percentage will not win. They must consider this before the election, consider that they may lose and that, in the public interest, they must accept the result.

This is particularly hard in countries where voters believe they are choosing a protector, not a representative. As well as anticipating the benefits of being supporters of the winner, they fear the consequences of being seen as supporters of a loser. In a developed country, the proportion of the voters who are very significantly impacted by the result of an election is very small. In post-conflict states, the consequences of supporting the wrong side may be serious and may apply to nearly half the population.

It will probably take decades, not years, to reach the stage where elections are about choosing the best socio-economic policy for the general health of the state and not a knife-edge decision for the voter between benefit and poverty, security and terror.

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It will probably take decades, not years, to reach the stage where elections are about choosing the best socio-economic policy for the general health of the state and not a knife-edge decision for the voter between benefit and poverty, security and terror. Can this process be accelerated? Nations differ widely. Iraq, with a high level of education and good infrastructure, has made some progress since its first elections despite insurgency and instability in the region. There has been an election with some changes in government – always a good sign. Afghanistan, with about the lowest literacy rate in the world and extremely weak infrastructure, has not.

An early and continuing civic education program is of enormous value in increasing awareness of the purpose of the election and its various stages and can prevent the most deadly election disease – apathy.

Post-election problems such as a dysfunctional parliament may be addressed by training for individual members, and can be improved by a strong party system. Of course, the need for party discipline has to be balanced with members' local interests, but this happens everywhere. There is also a tendency for a party to place its interest above the national interest. This is not restricted to developing nations.

Election process factors of universal access, efficient training and logistics are management issues for the election administration. Security is an administrative issue for local and international military and police. Personal intimidation may be reduced by education because it gives the individuals and the community a better understanding of the process, a sense of personal and collective right, and greater confidence in the secrecy of the ballot.

Some issues can be partly addressed by legislation, such as the overwhelming effect of media control. Legislation can require some measure of equality of media access for candidates. Partly tied to this is political campaign finance. Money can destroy equality in an election and some legislative control is necessary to give transparency and limits on contribution and expenditure.

An early and continuing civic education program is of enormous value in increasing awareness of the purpose of the election and its various stages and can prevent the most deadly election disease – apathy.

Both before and after elections, an international advisory team will usually work to support elements of local civil society to promote:

- non-partisan education on how the state is organized and run under the constitution;
- debate on the need for and the means to secure accountability of elected and appointed officials; the concept: "it's your money";
- the need for transparency in public administration to bring efficiency and mitigate corruption; and
- the need to recognize that you may not win, but you must accept the result.

It has been found that well-developed school curriculum materials delivering civic education on the general issues of governance can be very effective. Teachers are generally highly respected in most societies and teenagers can be better learners than their parents.

Clearly, this cannot be left to political parties alone. They often help significantly, but are generally and understandably partisan to the core.

Civic education programs can be run even in near-war situations. Before the 2010 Afghan parliamentary elections one NGO partnership managed to arrange 3,500 "town hall" meetings that were mostly free of both physical and political intimidation.

It has been found that well-developed school curriculum materials delivering civic education on the general issues of governance can be very effective. Teachers are generally highly respected in most societies and teenagers can be better learners than their parents. Even in areas like Afghanistan and Iraq, students who were not even of voting age were surprisingly effective in passing ideas to their parents and wider family. This was effective even in areas where town hall meetings were poorly attended or interrupted by party agents or insurgents; another result of the wider view.

Many areas of law are reviewed for their effectiveness in fulfilling their purpose. As with elections, the remedy may lie outside the law itself. Those who think outside the box to identify a way to make things work better may make a great contribution.

Michael Clegg was Parliamentary Counsel to the Alberta Legislature and Legal Advisor to the Alberta Chief Electoral Officer. He has worked for both the Canadian House of Commons and the Senate as a legislative drafter and committee counsel. More recently, he has worked for the UN and the International Foundation for Electoral Systems in post-conflict states including Namibia, Bolivia, Iraq, Lebanon, East Timor, Afghanistan, Kyrgyzstan, Liberia, Yemen and Cambodia.

Running for Office: A Candidate's Journey

Anita Vandenbeld was a candidate in the 2011 federal election in the riding of Ottawa West-Nepean

Anita Vandenbeld

In April 2010, I was sitting in a hotel in Jakarta, Indonesia with a remarkable group of women from all around the world who were attending a conference of the *World Movement for Democracy*. Each of them had been a candidate for parliament in their home countries, many of them had not succeeded. Most of those countries were emerging democracies where women had few rights. All of them were determined to keep trying. The conversation went something like this:

> "*When I first decided to run for parliament, my husband beat me. When I refused to give in, he divorced me. Then I was threatened by the government, and my best friend disappeared. She is still missing. I keep going because if I quit there is no hope that we will ever find her alive.*"

"*They put me in prison for six months*."

"*They murdered my son*."

"*They beat and raped me so badly that I was in the hospital for six weeks*."

The stories went on – women who had braved the unimaginable in order to assert their democratic rights and change their societies for the better.

Then one of them turned to me. "*What about you, Anita? You've been telling us about your worries about government policies in your own country. You live in a country where they will not beat you or rape you for being in politics. Why are you not running?*"

It was true that while I realized how special Canada is and how fortunate we are, I was worried about the direction that things were going: the growing gap between the rich and poor; the erosion of our own democratic institutions; families struggling to find affordable child care while looking after aging parents and wondering how they would ever be able to pay for their children's tuition fees; wondering if the health care system and public pensions would still be there by the time they retired.

Until that moment, I was quite happy with the way my life was going. I had been active in politics in my youth – both in party politics and in activist groups like Amnesty International. I had worked for a time in the Canadian Parliament, which I enjoyed immensely. I was fortunate to have gotten a job with the United Nations Development Programme in New York, as a manager of a global online network to promote women in politics and connect women around the world using technology to help and encourage one another (www.iKNOWPolitics.org). As part of my job, I got to travel around the world talking to women like this and building connections between people on different continents who spoke different languages, but who shared the common desire to see more inclusive politics in their countries. Why on earth would I give it all up to run for Parliament?

But when I looked these women in the eyes, I realized what a privilege it was that I could even consider it. That as a woman – and an opposition member – I could run for Parliament in my home country without risking my own personal safety or that of people closest to me. And that I lived in a system where, once elected, I could actually make a difference for people. One week later, I submitted my resignation letter to the UN and packed my bags to go back home for what turned out to be the most tumultuous year of my life. I decided to run for Parliament!

Through my international work I always heard about how important it was for candidates to have mentors and role models. I am lucky that, in my constituency, the former MP and another past candidate are women, and they gave me a lot of support. Sometimes all it took was a nod of encouragement from across the room and I knew that I wasn't alone in this! I also got good advice from politicians I had worked with over the years – both male and female – and to this day I can still recite some of the sage words they imparted to me, probably long after they've forgotten what they said.

> As a candidate, a lot of people feel very invested in your success, and sometimes they forget that you are a person rather than a marketable product.

Since I had been around politics on and off since I was 15, I thought that I knew what I was getting into. But I learned quickly that politics is very different when it's your own name on the ballot. What surprised me the most in the whole process was how much emphasis there was on the superficial aspects of politics, rather than on the substance. More people commented on my hair and my outfits than they did on my policy ideas. I will never forget my conversation with a former female MP. When I asked her for advice, her first words were: "Start wearing lipstick"!

When she got up to get more coffee, a woman sitting at the next table turned to me and said "I'd have slugged her by now!" Ah – the life of a female candidate.

This was my first indication that elections are as much about image as they are about ideas and smarts. As a candidate, a lot of people feel very invested in your success, and sometimes they forget that you are a person rather than a marketable product. At first I resented it when someone I had known for only a few weeks offered me a coupon to go get my hair done at her salon. Or when my campaign aide pulled me out of a meeting to tell me to go refresh my make-up. Or when my campaign chair insisted that I get my hair professionally blow-dried before every television appearance. I almost drew the line when they referred me to an image consultant. My image was perfectly fine, thank you! And wasn't this supposed to be about what I could contribute and how well I could represent people's concerns?

Regardless of my protestations, I soon found myself in a coffee-shop, with a consultant critiquing everything from my forehead (bangs are too short) to my bra (must go see a consultant at Sears) to my shoes (nothing open-toed without a pedicure). When she got up to get more coffee, a woman sitting at the next table turned to me and said "I'd have slugged her by now!" Ah – the life of a female candidate. Somehow, I can't imagine that my male opponent was ever told that in order to qualify for public office he had to get a pedicure!

During the year that I ran for Parliament, I realized that politics is very much about highs and lows. I had heard MPs complaining that the nomination was the hardest part, but I didn't understand it until I went through it myself. I think that women in particular are socialized to be co-operative and to work in teams. This is not to say that all women are like that – or that men aren't – but whereas little boys are encouraged to win and be competitive, little girls are admonished to "be nice". This leaves women who are accustomed to working collaboratively at a distinct disadvantage in the nomination process. Whereas I had no trouble being competitive against my opponents from the other parties, I had a very hard time when the attacks came from my fellow Liberals. My nomination race was the most competitive one that the party had seen in that riding since 1988 and lasted for seven months. Throughout the entire year that I spent campaigning, the most difficult moment came when a prominent former female cabinet minister who always spoke publicly about supporting women candidates endorsed my male opponent for the nomination. When you're fighting the election it is easy to accept

Since everything was being done in my name, I had to find the fine line between ensuring that the campaign reflected my values and ethics – and letting go of the things that were best handled by others.

it when people say "I like you but I'm not voting for you because I prefer the other party". But in the nomination process, everything is personal. I learned what people mean about needing a thick skin!

On the other hand, my favourite part was going door to door. Each time that a door opened it was like stepping into a vignette of someone's life. People are amazingly forthcoming with their worries and ideas when talking to a political candidate. I'll never forget the single mother who started to cry because she was just at the end of her rope with three small children and no childcare. Or the elderly woman who had just returned from the hospital after her brother passed away and all I could think of was to give her a hug, completely forgetting that we were total strangers. Or the three nursing students who'd just been evicted because they couldn't pay both rent and tuition. People also shared their joys with me – I had young children give me pictures they'd drawn, seniors who went out to their gardens to pick fresh tomatoes for me, and people even inviting me to sit down to dinner with them! While not every encounter had a major public policy implication, I got a chance to connect with people on so many levels. I am a richer person for it.

But I don't think anyone who has not run for office can appreciate the overwhelming emotion that you feel for those people who put aside their own lives for 36 days or longer, go out in the snow for 11 hours at a time, eat crappy food and fold brochures until three a.m. – until you are the one they are doing it for.

One of my biggest challenges was recognizing that as a candidate, I had to let go of so many aspects of my own campaign and let other people do the work. Since everything was being done in my name, I had to find the fine line between ensuring that the campaign reflected my values and ethics and letting go of the things that were best handled by others. My job was to meet with and convince 60,000 people to vote for me. Any minute that I was not talking to a voter was a minute wasted. While I wanted to write the answer to every policy question that came into our email inbox, I had to satisfy myself that I had very good people who understood my policy positions well enough to reply to the easy ones and who knew when to consult me on the harder ones. But at the same time, I had to put a heavy foot down regarding ethics. Everyone on my team knew that I would never tolerate negative campaigning or breaking the rules. You have to have a lot of strength to be able to say "no" to people who are spending every waking minute of their lives working for you for free.

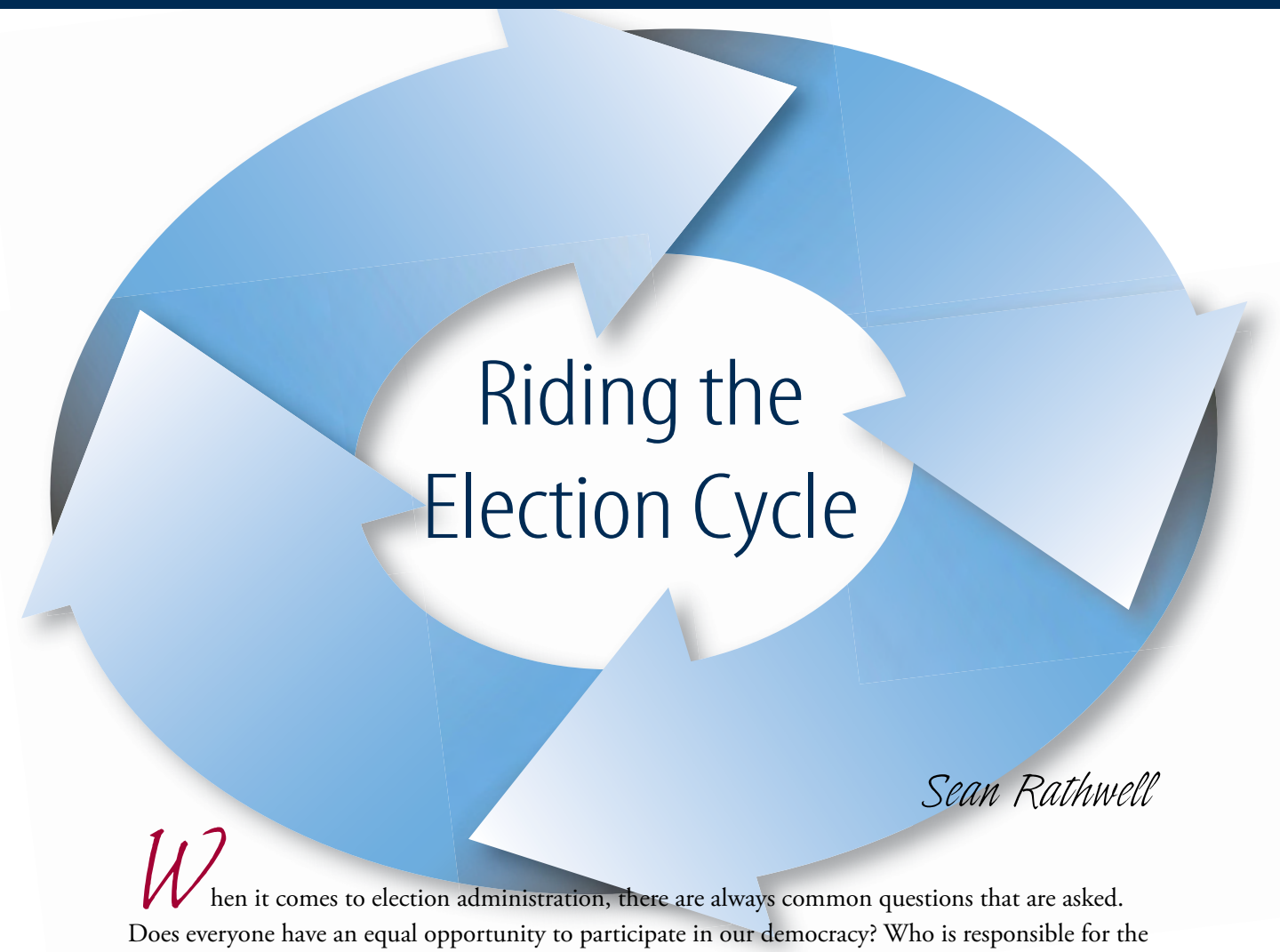
I think the most compelling thing about running for office is the volunteers. I always heard candidates refer to how they didn't do it alone – it was a team effort – and I thought it was a bit trite. But I don't think anyone who has not run for office can appreciate the overwhelming emotion that you feel for those people who put aside their own lives for 36 days or longer, go out in the snow for 11 hours at a time, eat crappy food and fold brochures until three a.m. – until you are the one they are doing it for.

I will never forget election night. I knew I had lost, and I was driving to the hall where my election night party was being held. I saw cars parked on both sides of the street for at least ten blocks. And I realized it was for me. When I walked in and saw hundreds of people chanting my name and red-eyed young people crying while trying to smile at me and the 80-year-old man who had been out door-knocking every day actually looking his age for the first time, it was all I could do to get up to the stage and say something. I felt I had let them all down. I looked at all these people who shared the same vision and passion as I did, and who believed in me, and I felt what can only be called love. I loved those people. So I managed a smile and I managed to get up to the podium, and for the life of me to this day I don't remember what I said, but everyone told me afterwards that it was inspiring. And once again, I felt that sense of huge responsibility. All those people who invested so much time and energy. It wasn't about me, it was about everyone. And I lost the election but they were still chanting my name. I don't think there is anything more humbling than that.

And I lost the election but they were still chanting my name. I don't think there is anything more humbling than that.

After the election, I went back to working internationally on democracy promotion. A few months later, I was in the Democratic Republic of Congo conducting a campaign school for a group of female candidates. As each woman spoke about her frustrations, about the stereotyping and image politics, about the difficulties getting their own party nominations, about the fear of losing and about their own challenges and worries, I was able to give something back. I told them that it was they – women of emerging democracies – who had given me the courage to run for parliament. Now it was my turn to encourage them. Most of them lost that election, which was mired in violence and fraud. But they still email me from time to time and we still lift each other's spirits whenever we get the chance. Because now I understand what it means to put my name on a ballot. What a responsibility it is, and what a privilege. And I am grateful to live in a country where it is possible.

Anita Vandenbeld is a global expert in democratic development and women's political participation, and has worked in Bosnia, Kosovo, DR Congo, and currently Bangladesh with international organizations such as the United Nations Development Program, the Organization for Security and Cooperation and the National Democratic Institute.



Riding the Election Cycle

Sean Rathwell

When it comes to election administration, there are always common questions that are asked. Does everyone have an equal opportunity to participate in our democracy? Who is responsible for the elections? What happens in between and after elections? Are election laws respected?

Democracy isn't something that's practiced once every four years, it occurs every day in our lives when we make choices. From the representatives that we elect, to the food we decide to consume, the world around us is affected by the way we interact with it when we choose. The Office of the Chief Electoral Officer of Alberta (Elections Alberta) provides the opportunity for all Alberta's electors to interact with their communities on a provincial level.

Elections Alberta is a non-partisan, non-government agency that facilitates provincial elections, enumerations and plebiscites. We ensure that the election events are open to all those eligible, that all processes are transparent to maintain integrity and public confidence, that events are as accessible as possible, and that laws are communicated and enforced. Our office of sixteen permanent staff supports the Chief Electoral Officer (CEO), O. Brian Fjeldheim, who was appointed by the Lieutenant Governor in Council on the recommendation of the Legislative Assembly of Alberta. Similar to the other independent officers of the Legislature, Elections Alberta does not report to

O. Brian Fjeldheim, Chief Electoral Officer for the Province of Alberta

a minister, rather to the Legislative Assembly through an all-party Standing Committee. This reporting process lends to the 'Independent' status our office holds. The direction of our office is derived from the interpretation and administration of four pieces of legislation: the *Electoral Boundaries Commission Act*, the *Senatorial Selection Act,* the *Election Finances and Contributions Disclosure Act*, and the *Election Act*.

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The *Electoral Boundaries Commission Act* is carried out by the Electoral Boundaries Commission (EBC). This Commission is headed by a chairperson, appointed by the Lieutenant Governor in Council, and four members who are appointed by the Speaker of the House. Two of the four who are appointed are recommended by the Premier and two are recommended by the Leader of the Official Opposition in consultation with the other opposition leaders. The method by which the EBC is formed acts as a check and balance to ensure that fair boundaries are set. Its purpose is to draw the electoral boundaries mainly on the basis of population, common community interests, geographic area, natural geographic boundaries, political boundaries such as county lines and city limits, as well as other factors. Boundaries are redistributed approximately every ten years to accommodate voter population shifts. There are now 87 electoral divisions after the 2009/2010 Electoral Boundaries Commission, with one Member of the Legislative Assembly elected to each.

The *Senatorial Selection Act* was last used in conjunction with the 2012 provincial election to select Senate nominees. Names of elected nominees were submitted to the Queen's Privy Council for Canada as persons who may be summoned to the Senate of Canada for the purpose of filling vacancies relating to Alberta. Senate Nominee elections may be run in conjunction with a general election under the *Election Act*, in conjunction with municipal elections, or as stand-alone events. The last Senate Nominee Election saw a record of 13 candidates run for three vacancies.

The *Election Finances and Contributions Disclosure Act* provides direction to political entities and third-party advertisers for registration, financial reporting and disclosure. This *Act* also prescribes the means for the Chief Electoral Officer to monitor compliance of political entities including political parties, candidates, constituency associations and, most recently, third-party advertisers. Elections Alberta is assigned the responsibility for ensuring filing, examination and public disclosure of financial documents submitted by political parties, constituency associations and candidates. Another large part of the finance regulation is:

- enforcing the legislation relating to the collection of contributions;
- investigating complaints of breaches of the *Act;* and
- applying administrative penalties or consenting to prosecution, if warranted.

It is important to note that we serve in an advisory role, as well as a regulatory one. Assistance is provided to the staff and volunteers involved in the process to assist them in understanding and complying with the legislation. We maintain a Register of political parties, constituency associations, candidates and third party advertisers, and assist groups in forming new political parties.

Our Office is always involved in some stage of election preparation, and election activities are underway on an ongoing basis. The *Election Act* provides a framework for election activities, as well as a focus for our four-year work cycle between elections. During this cycle, a majority of tasks are dedicated to:

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- increasing the efficiency and effectiveness of election administration;
- adapting to legislative and technological change;
- increasing services and accessibility for stakeholders; and
- increasing Albertans' awareness and knowledge of the electoral process.

These labours ensure that all Albertans are as prepared and aware as possible in order to participate in the next election.

Currently, we are in the first year of our cycle, the post-election year. It involves clean-up; not just the unpacking, sorting and storing returned election material, but reviewing and assessing all election reporting done by Returning Officers. Recommendations for service improvements are gathered for thorough review to enhance any processes and documentation in need of procedural or legislative changes. Formal reporting of election activities and election campaign financing is another major task that's undertaken in this timeframe, adding to the transparency of our democratic system.

The second year focuses on planning and preparing for the next election. Feedback collected from the election is prioritized to begin identifying resources requiring amendments, as well as building resources to ensure that legislation meets the changing needs of stakeholders. For example, recent legislative amendments allow for incarcerated electors to vote. To accommodate this change, Elections Alberta created letters of attestation for incarcerated electors to use as identification to prove their identity and residence. This provided better access to their ballot. A similar process was created for homeless electors for the same reason. An amendment to the *Election Act* in December of 2011 established that general elections would be held between March 1 and May 31. Having a set time frame allowed Returning Officers to establish offices in anticipation of the call of the election. This greatly enhanced the level of service that the Returning Officers were able to deliver to stakeholders as communication lines were installed and supplies were received and distributed earlier.

The third year of preparation is the pre-election year. It is earmarked for building and testing programs and procedures based on the plans developed from the previous year. The building must

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be done early and quickly to allow adequate time for thorough testing prior to the election. This also allows for development of effective training resources so that we can provide our Returning Officers and all election workers with accurate direction. During this time period, the warehouse is stocked with some of the materials required for the election – ballot paper, ballot boxes, polling place signs, voting screens, signs, forms and much more. This allows enough time for securing the best prices for supplies and ensuring that the packing of election supplies is completed in the warehouse with minimal additional staffing costs.

In addition to personal visits, electors who were not available during the enumeration were able to add or update their personal information to the List of Electors by contacting their Returning Officer or by using the online registration system, Voterlink.

Year four is the election year, in which we finish stocking the warehouse, complete election shipments for each of the 87 Returning Officer offices, train the Returning Officers, and manage the election process. It's also the year in which we focus particular attention on updating the Register of Electors. In August of 2011, Returning Officers recruited, trained and supervised over 6,500 enumerators to conduct the door-to-door enumeration of close to 1.5 million residences. This allowed the Register to be updated through direct elector contact province-wide. Over 800 data entry operators updated the Register of Electors for the 2012 Provincial General Election. In addition to personal visits, electors who were not available during the enumeration were able to add or update their personal information to the List of Electors by contacting their Returning Officer or by using the online registration system, Voterlink.

With 3.6 million people in Alberta, of which 2.26 million are eligible electors, we are responsible for a large population of stakeholders. To provide effective services to our stakeholders during the provincial general election and Senate Nominee election, over 17,000 election workers were hired and trained to work at 6,676 polling stations province-wide. There were 429 candidates nominated for the general election. Outreach partners were contacted well in advance of the elections and were notified of key dates and voting methods, which they shared with their members. Partners included groups that serve the military, the disabled communities, First Nations groups, post-secondary institutions, seniors groups, work camps, the homeless, the incarcerated, ethno-cultural communities and new Canadians. Additionally, apartment and condo associations and law enforcement agencies were consulted well in advance to facilitate access to multi-unit dwellings by candidates and campaign workers.

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To ensure that all electors were presented with an equal opportunity to participate in a provincial election, there are a number of voting methods available: Advance Poll, Special Ballot,

and Mobile Poll. This was the first election where there were no restrictions for voting at the advance poll. Electors could vote in advance for convenience, and did not have to provide a reason, as they did in previous elections. The advance poll turnout was high and more polls were added throughout the three-day poll period. The Special (mail-in) Ballot was available to any elector who was physically incapacitated or absent from their electoral division. These voters were able to vote by writing in the candidate of their choice from the voter's Electoral Division or a political party. The final option was provided to those in treatment centres and supportive living facilities. Mobile poll teams visited these facilities on polling day to take the vote of in-patients and residents. To effectively serve all electors, polling was offered both in a designated location and through bed to bed service.

There are many thousands of Albertans who assist in the conduct of elections and related events in Alberta. Their support and assistance is essential for providing the opportunity for all of Alberta's electors to interact with their communities on a provincial level. It is participation, in any capacity, that truly puts democratic principles into action. Whether it be to vote as an elector, work the election, or run as a candidate, the choice to participate remains yours.

Sean Rathwell works in Community Outreach for Elections Alberta, in Edmonton, Alberta.

Electoral Finance Rules at Home and Around the World

Brian Seaman

Non-partisan oversight of how political candidates and parties obtain donations for their campaigns, what they are allowed to spend that money on, and how much they are allowed to spend, is critical for transparent, democratic elections.

Is there a link between the level of political freedom and how the financing and expenditures of political campaigns are regulated? Does the provision of public funding for a portion of a political campaign enhance political freedom or undermine it? These questions and others were examined in an international report about electoral finance laws and regulations from 180 countries that was released earlier this year. Titled *Political Finance Regulations Around the World*, the report was commissioned by the International Institute for Democracy and Electoral Assistance (IDEA), a non-partisan, inter-governmental organization headquartered in Stockholm, Sweden with offices throughout Africa, Asia and South America. There are currently 27 member-states, including Canada.

The organization's mandate is to promote and support democratic initiatives and reform through greater accountability, better governance and more inclusive participation among voters around the world.

The IDEA has maintained an international database of electoral financing regulations since 2003, when the first study was undertaken. However, the scope of the original database was much narrower than this latest project, covering just over 100 countries and excluding those countries classified as *not free* in accordance with the criteria used by Freedom House, which measures, among other things, the level of press freedom, freedom of speech and whether there are multiple political parties in a given country.

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However, further investigation by IDEA researchers revealed that electoral financing rules are sometimes as common in *not free* countries as others, so that lower levels of political freedom are not necessarily related to less regulation of electoral finances. So, the more recent IDEA survey included dozens of additional countries (180 countries in total). A country was defined to include only member-states of the United Nations but excluded any countries that had banned political parties, prohibited parties from registering candidates in elections or where elections had not been held in at least 30 years. This dubious *who's who list* was comprised of Brunei, China, Cuba, Eritrea, Kuwait, Laos, North Korea, Oman, Qatar, Saudi Arabia, Somalia, the United Arab Emirates and Vietnam.

IDEA researchers posed 43 separate questions that fell into five broad categories:

- donations (who can/cannot donate and whether there are caps on donations;
- whether there is public funding available for elections;
- expenditures (what kinds of expenditures are/are not allowed and whether there are caps on expenditures);
- financing reporting requirements; and
- penalties for infringing the rules.

The response rate was fairly good overall. By the end of 2011, when it was time for the researchers to collate the responses and start to put together the database and subsequent report, most of the questions had been answered. Less than five questions remained unanswered spread among a total of 142 countries. In compiling their data, the researchers relied mainly on the electoral finance legislation in each country. If a country did not have such legislation, then the researchers looked to election reports or political analyses from election management officials, academics, or independent observers from the UN or non-governmental organization (NGO) bodies.

The IDEA database is not a static pool of data. Rather, it will be updated and expanded as new information becomes available. Like some kind of *Wikipedia* for election financing regulations and democratic reform, the IDEA database can be updated by its users. They are encouraged to correct information and provide updates as various pieces of electoral legislation are amended and/or improvements are made to the electoral processes in those Tier 2 and Tier 3 countries (as designated by

the *Freedom House* assessment criteria); i.e. *less free* countries that are improving in terms of democratic institutions, accountability and transparency.

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In the Canadian context, a Calgary-based NGO called the Foundation for Democratic Advancement (FDA) has done an audit of the electoral financing laws of Canada's ten provinces and released its report on April 10, 2012. The FDA is a non-partisan agency that promotes democratic reforms through strengthening the democratic process and advocating for better, transparent governance in civil societies around the world. The report, titled *2012 Foundation for Democratic Advancement Global Electoral Finance Audit of Canada's 10 Provinces*, is based on FDA's examination of the various provincial acts that address how elections are financed. The legislation was then audited and analyzed through the lenses of fundamental democratic principles such as neutrality of the legislation, level of political freedom, equity and accountability. Throughout the audit and assessment process, the FDA had at least five experienced auditors to examine the data.

The FDA audit found excellent electoral financing regulations in both Quebec and Manitoba, very good legislation in Nova Scotia, acceptable legislation in New Brunswick, gave a pass to Ontario and Newfoundland, but gave failing grades to Alberta, British Columbia, Saskatchewan and Prince Edward Island. The FDA report described the failed electoral finance legislation as "systemically corrupt by favouring minority or special interests over the interests of the people." The chief points of legislative deficiency were:

- the inclusion of political donations from corporations and trade unions;
- high caps on contributions;
- no limits on campaign expenditures;
- low fines for violations of the rules; and/or
- no regulation of expenditures by third parties.

In its assessment of Alberta's *Election Finances and Contributions Act*, the FDA identified some positive elements in common with the legislation of other provinces; for example, no political party or candidate can accept donations without being registered and contributions from corporations and trade unions located outside the province are prohibited. However, on the whole, the legislation was deemed lacking in other key areas. For one thing, it identified as problematic the fact that there are no expense limits for candidates or political parties. This gives an unfair advantage for candidates and parties which are able to tap into larger corporate donations and outspend their rivals in terms of, for example, advertising. Contrast this situation with the federal electoral financing regime which has candidate expense limits for each federal riding based on location and population size, and limits expenses for political parties based on the number of candidates each party fields.

Then, there is the matter of penalties for violations of the legislation. There is no provision for jail time for violations of the *Election Finances and Contributions Act,* only maximum fines of $10,000 for registered political parties, corporations and trade unions, and maximum fines of $1,000 for registered candidates, constituency associations and individual donors. In the assessment of the FDA,

these maximum fines are too low to have any real deterrent effect and indeed, by default, favour the wealthier segments in society. The FDA goes so far as to describe the provisions of the Act as encouraging "systemic corruption" that "favour minority interests over the interests of the people as a whole."

Chumir Foundation Senior Policy Analyst Heather MacIntosh also saw problems with Alberta's electoral financing legislation, saying "we need limits on contributions as well as spending. Democracy is best served when the playing field is as level as possible. We need to give voters relative parity so that they may fully exercise their democratic options." She saw a trend toward reform of the legislation, with two areas of particular interest being a move away from trade union and corporate donations, and lower limits on both the amounts of individual donations and the amounts of expenditures.

> The majority of voters in Alberta – with the exception of migrants from other parts of Canada and immigrants from other countries – have grown up in a province that has had the same political party in power for over 40 years.

In conclusion, axiomatic though it may be that political campaigns run on money like vehicles run on fuel, rules are necessary to ensure transparency, accountability and to prevent the electoral process from being skewed by powerful special interests. This will ensure true choice for voters and a maximum opportunity for ideas to best circulate among the electorate.

Brian Seaman is a research associate with the Alberta Civil Liberties Research Centre in Calgary, Alberta.

Privacy in Canada

Rob Normey

"I never bow to the laws of the thought police"

– Neil Young, *Living With War* (2006)

Everywhere in the Western world it appears that the right to privacy is under serious assault. It is normal to read about and attend conferences with such threatening monikers as "Big Brother in the 21st Century". Businesses, financial predators and governments all seem to have an ever-increasing appetite for our personal information and may monitor and collect our online information. One hopes that governments will regulate such activity and respect the hard-won right to privacy, enshrined in the *Charter of Rights* when enacting legislation, including legislation pertaining to law enforcement.

George Orwell was one of the most exemplary of 20th century writers and we see him returning time and again to questions of fundamental rights and freedoms in both his novels and his often brilliant nonfiction. It is worthwhile remembering some of the crucial lessons contained in *1984* and *Animal Farm*. These remain every bit as important for our time as when he wrote the novels in the immediate postwar period. There was a reason Orwell chose to set his dystopian masterpiece, *1984*, in Britain although he clearly drew major details from the totalitarian society of Communist Russia. The critical significance of this point is underscored by the fact that one of the last public letters he would pen, from a sanitarium while suffering from the tuberculosis that would soon kill him, was a statement designed to clear up misunderstandings that had arisen upon publication of the novel. He was perturbed that the novel was being characterized in the United States as an attack on the British Labour Party and on all things "socialist,' as somehow tied to the Soviet Union. In his July 1949 statement he reiterated his support for the British Labour Party. He declares:

The scene of the book is laid in Britain in order to emphasize that the English speaking races are not innately better than anyone else and that totalitarianism, if not fought against, could triumph anywhere.

The scene of the book is laid in Britain in order to emphasize that the English speaking races are not innately better than anyone else and that totalitarianism, if not fought against, could triumph anywhere.[1]

In considering the challenges that face North Americans today, we can stop short of the word "totalitarianism" but nonetheless register the reality that the concerns the novel raises remain hanging over us like the Sword of Damocles, with increased surveillance potentially impacting many ordinary citizens. For instance, the very real possibility that the federal government would have enacted Bill C-30, the lawful access legislation, this year caused grave fears on the part of many, starting with all of Canada's privacy commissioners. Ann Cavoukian, Ph.D., Information and Privacy Commissioner, Ontario, warned that the legislation, as drafted, would create a "mandatory surveillance regime." The federal Privacy Commissioner, Jennifer Stoddart, in a similar vein, declared that the Bill raised serious privacy concerns. She issued a statement with the hard-to-ignore warning that; "since this broad power is not limited to reasonable grounds to suspect criminal activity or to a criminal investigation, it could affect any law-abiding citizen."[2]

Ann Cavoukian, Information and Privacy Commissioner for the Province of Ontario

I myself was brought face to face with the drawbacks of living in a thorough-going surveillance society in that fateful year 1984. I took a camping trip, together with my good friend Boris, through the Soviet Bloc countries to do our own private investigations (while having some fun) of life in a part of the world where fundamental rights were not exactly in robust shape. One

day, having toured the Kremlin and listened to a rather humorless guide, lacking all sense of irony, discourse on the centuries of oppression under the Czars, I made my way to Moscow's Gorky Park. I was approached by a young man named Sasha who introduced himself as a hairdresser with an urgent problem. He desperately hoped I might help. He had met the love of his life, a woman from Minnesota who was studying Russian literature at Moscow University. She had to return to the U.S. and thereafter their messages to one another had mostly been intercepted by the state security agency. Sasha had a hefty letter that he asked me to take out of the country. I thought this might be a little reckless so promised instead that I would send her his message, the essence of which he could communicate to me. I have often thought over the years just what it would be like to live in a society where your most intimate messages would be monitored by an ever-vigilant security service. The potential for committing a "thoughtcrime" in the eyes of your arbitrary watchers just might have a chilling effect on you.

In North America, the modern era of awareness of privacy as a right to be enshrined in the law might be traced to the writings of Louis Brandeis and Samuel Warren, particularly their 1890 article "The Right to Privacy."

From the time of the *Code of Hammurabi* in the 17th century BCE, societies that have aspired to some level of freedom and personal autonomy have expressed awareness of the need for privacy. In North America, the modern era of awareness of privacy as a right to be enshrined in the law might be traced to the writings of Louis Brandeis and Samuel Warren, particularly their 1890 article "The Right to Privacy."

Brandeis went on to become a leading member of the U.S. Supreme Court and one of his classic judgments was his dissent in *Olmsted v. United States* (1928).[3] In what would become a landmark ruling, Brandeis extended his thinking on privacy, seeing it as a fundamental right requiring constitutional protection. He expressed concern over the dangers the state posed to individuals, calling it a "potential privacy invader." The case involved the use of wiretapping of private telephone conversations in evidence to convict the accused of bootlegging. While the majority of the Supreme Court held that the use of the wiretaps did not constitute a violation of the Fourth Amendment of the U.S. Constitution, protecting against unreasonable search and seizures, Justice Brandeis' dissent would resonate through the ensuing decades. His contention that there was full constitutional protection for the right to privacy would be finally assented to by a majority of the Court in *Katz v. United States (1967)*.

What remains of keen interest to scholars and privacy advocates is Brandeis' full awareness of the manner in which technological advances enabled government to invade privacy in ways not contemplated when the Fourth Amendment was enacted. He states:

> [Constitutions] are not ephemeral documents, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall 'designed to approach immortality as nearly as human institutions can approach it.' … "time works changes, brings into existence new conditions and purposes."

His flexible approach is one that surely needs to be adopted as we examine privacy issues in the digital world of today. Internet privacy as it pertains to potential surveillance requires careful consideration not only of legitimate security concerns but the full extent of the right to privacy.

This year, many Canadians were transfixed by the prospect of a lawful access bill actually becoming law even in the face of substantial criticisms. Shortly after being introduced in Parliament, the Bill even got a name change. It became the *Protecting Children From Internet Predators Act* (Bill C-30), though one searches in vain for words like children and Internet predators in the body of the text.[4] When questioned by a Member of Parliament on the floor of the House of Commons, Minister Toews stated that: "He (the MP) can either stand with us or with the child pornographers."

The Bill is a point of departure for a discussion of the nature of the privacy interests and rights citizens possess in the digital age and how these might be impacted by lawful access proposals. For example, here is a brief summary of concerns raised by Commissioner Cavoukian, as quoted in a CBC News Report of April 25, 2012. She indicates that by accessing customer information such as the client's name, phone number, IP address and subscriber date, one can find out "what web sites an individual has gone to, someone's surfing habits online, what videos they're viewing, what content they've read. You can infer, by connecting the dots of the surfing habit online, a great deal of very personal information about an individual." All of this very personal information would become available without a warrant. Investigations and other consequences might well flow from knowledge of all of this information.

Perhaps it would be helpful to step back and examine a few of the philosophical and legal considerations respecting privacy and its loss. Supreme Court of Canada Chief Justice Beverly McLachlin provided some illuminating remarks about the importance of both access to information and privacy to the healthy functioning of Canadian democracy in a presentation she gave in 2009.[5] She observed that the enactment of federal Privacy and Access to Information statutes took place on Canada Day in 1983, close to the coming into force of the *Charter of Rights* as part of the *Constitution Act*, 1982. They may therefore be viewed as companions to the *Charter* in important respects and she calls them "quasi-constitutional" in nature.

A powerful *cri de coeur* can be found in Neil Young's 2007 album collection, *Living With War*, which documents the increasing anxiety and angst experienced by ordinary citizens in the Bush years. The narrator of the song cycle angrily denounces orders to spy on citizens and "tap our phones and computers" ("Let's Impeach the President"). The jagged quality of the music helps convey Young's response to the greedheads ransacking his country, while government simultaneously suppresses dissent. His fears recall

This year, many Canadians were transfixed by the prospect of a lawful access bill actually becoming law even in the face of substantial criticisms. Shortly after being introduced in Parliament, the Bill even got a name change. It became the *Protecting Children From Internet Predators Act* (Bill C-30), though one searches in vain for words like children and Internet predators in the body of the text.

those of an earlier era, when individuals like the great civil rights crusader and humanitarian Martin Luther King were spied on and threatened with exposure. Of course, there is a rich legal tradition of protecting privacy rights to be found in Canadian case law. The justices in these cases endeavour to balance *Charter* values and rights with law enforcement objectives which the state alleges can only be achieved by way of some intrusion on privacy. Looking at the sea of case law, academic commentary and articles in response to the federal *Lawful Access Bill* (C-30), a few observations can be made.

Section 8 of the *Charter* protects against unreasonable search and seizure based on the reasonable expectation of privacy that a citizen possesses. The Supreme Court has spoken of the need for vigilance in protecting the integrity of personal information in an age of expanded means for snooping (*R. v. Tessling*). In *R v. Plant*, Justice Sopinka emphasized:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society should wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

New case law has arrived since the debate over the *Lawful Access Bill* ended this spring. Before commenting on it, I would like to make a small detour to clear up one point. The lack of a federal position paper that would canvass the rich body of case law might lead one to wonder about the approach taken to judicial review of legislation. It is most disconcerting to read a full 30 years after the *Charter* became part of the "People's Package" making up our new *Constitution* that somehow it might not be entirely legitimate for courts to scrutinize legislation carefully when a challenger makes a *Charter* claim.[6] Given that all governments in 1982 explicitly endorsed the *Charter of Rights* (with the exception of the Quebec government) and that surveys continually show that Canadians, especially Quebeckers, fully support the *Charter*, which makes up the "supreme law of Canada" (s. 52 *Constitution Act*), surely there can be no question of the courts applying that law, together with a statute, to the case before them. As Alberta's Premier, Alison Redford, made clear earlier this year in a significant endorsement of the *Charter* at a national conference of lawyers: "our *Charter* is fundamental to our past success, and to our children's ability to embrace our future with confidence."[7]

Much of the beauty of the *Charter* as an instrument for guiding public policy is that its influence is not restricted to merely reacting to a Supreme Court decision. The *Charter* provides guidance which enables various actors to frame their debate and make careful decisions which hopefully will avoid the need for further court action. This idea is the notion of a "*Charter* dialogue."

Much of the beauty of the *Charter* as an instrument for guiding public policy is that its influence is not restricted to merely reacting to a Supreme Court decision. The *Charter* provides guidance which enables various actors to frame their debate and make careful decisions which hopefully will avoid the need for further court action.

As Justice Iacobucci states in *Vriend v. Alberta*: "A great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other… This dialogue between and accountability… have the effect of enhancing the democratic process, not denying it."

Recent case law further bolsters the position of privacy advocates that a genuine effort at balancing needs to occur with respect to proposed surveillance going beyond what is already in the *Criminal Code*. I recently had the wonderful opportunity to talk with two of Canada's privacy commissioners, Ann Cavoukian, Ph.D., Information and Privacy Commissioner of Ontario and Jill Clayton, Information and Privacy Commissioner of Alberta, which expanded my thinking on the issues generally and helped me focus on the most recent cases.

In *R v. Tse* the Supreme Court ruled that the failure of authorities to provide after-the-fact notice to targets of wiretaps, done without warrant, violated s. 8 of the *Charter*. Even though the *Criminal Code* provision under challenge included stringent conditions to ensure that relaxing the requirement for a warrant be used solely in difficult conditions, failure by government to include accountability measures was fatal to the section's validity. The Court states that even in the exceptional circumstances where prior judicial authorization for the wiretap will not be essential to a "reasonable search", additional safeguards will generally be required to prevent abuse. In this case, additional safeguards were necessary and no such adequate safeguards were inserted. This decision perhaps will provide an impetus to seeking out adequate safeguards for future federal legislative proposals.

In the unique situation Canadian democracy finds itself in, it is particularly important that new surveillance initiatives in Parliament be preceded by detailed papers outlining the proposals so that they can be studied and then commented upon by all who might be affected – in this case, potentially all Internet users.

Another case whose implications must still be worked through is the 2011 Ontario Court of Appeal decision, Jones v. Tsige, which carefully considered and utilized *Charter* jurisprudence and values to develop a tort of invasion of privacy, or "intrusion upon seclusion". The Court's recognition that substantial harm can be created by invasion of privacy by accessing personal records should reawaken any dormant concerns about just how valuable the privacy of ordinary citizens is.

In the unique situation Canadian democracy finds itself in, it is particularly important that new surveillance initiatives in Parliament be preceded by detailed papers outlining the proposals so that they can be studied and then commented upon by all who might be affected – in this case, potentially all Internet users. This is because a Canadian prime minister is granted powers that are hefty indeed. Numerous books and articles have commented on the democratic deficit and the need to "democratize our constitution" when it comes to what are essentially the law-making powers accruing to a prime minister. For instance, veteran political commentator Jeffrey Simpson, wrote in his book *The Friendly Dictatorship* (2001), "Canadian parliamentary democracy, as it has evolved, places more

power in the hands of the prime minister than does any other democracy, far more than the U.S. President wields, but more, too, than political leaders exercise in other parliamentary regimes. Those seeking a check or balance against this almost unbridled prime-ministerial power remain frustrated…"

A more recent study, involving a thorough analysis by a number of political science experts, concludes that a Canadian prime minister indeed outpaces all other democratic leaders, rating a phenomenal score of 8.24 (out of 9). The prime minister of Malta placed a distant second at 7.16 and the Swedish prime minister was well back of the pack at 6.01.[8] What we might dub the "Northminster Model" means that Her Majesty's Loyal Opposition will need all the help they can get when privacy initiative are brought forward.

Jill Clayton, Information and Privacy Commissioner for the Province of Alberta

Commissioner Jill Clayton was particularly helpful in taking me through the rather torturous process of reviewing various Parliamentary bills on lawful access going all the way back to proposals made by the previous federal government in 2002. Every privacy commissioner in the country has made valiant efforts to draw attention to the dangers created by overly zealous attempts to modernize the regulation of telecommunications for law enforcement purposes. She told me that she came to the world of privacy and access oversight with a degree in history, so I felt I could count on her to properly recount the successive waves of surveillance initiatives. I gulped when I heard her say that she found looking back to be a somewhat disheartening experience. She pointed me to the various open letters sent by the group of Canada's privacy commissioners in the recent past, warning that the proposed legislation in question would "substantially diminish the privacy rights of Canadians."

Ontario Privacy Commissioner Ann Cavoukian made a number of striking observations which refuted the arguments of the advocates of the Lawful Access Bill. She pointed out that Canadian, American and European history shows that intrusive powers will be used not only to target criminals, but also people seen as "troublemakers," including political activists, reporters, academics, and artists, as well as certain minorities. Hence, the importance of ensuring that forthcoming surveillance and intelligence powers come with the safeguards necessary to ensure their proportional, transparent and accountable use.

It is often suggested that people with "nothing to hide" – i.e. supposedly most ordinary citizens – have no reason to fear increased surveillance measures. In fact, there are many ways that the collection of pieces of personal information might be

It is often suggested that people with "nothing to hide" – i.e. supposedly most ordinary citizens – have no reason to fear increased surveillance measures. In fact, there are many ways that the collection of pieces of personal information might be harmful.

harmful. Further, as the Commissioner points out, privacy is about individual dignity and autonomy, concepts which include the right to exercise significant control over your own personal space and personal information. She connects her privacy overview to the recent Ontario Court of Appeal decision, *R v. Ward*, which stated that the right to privacy includes the concept of "public privacy" – the right to seek and find freedom from identification and surveillance with respect to activities engaged in within public spaces (*R v. Ward*).

This article is dedicated to my friend and a champion of rights and freedoms, Boris Kelmer (1954-2008).

Commissioner Cavoukian has played a particularly vital role in engaging with public officials and those with specific interests and viewpoints to understand their concerns and communicate the fundamental privacy and public security issues at stake. She, Commissioner Clayton, and the other privacy commissioners, can be counted on to voice their carefully considered concerns in the future as discussions and debates proceed. Commissioner Cavoukian emphasizes that the key is to adopt an engaged, principled and pragmatic approach and that she is optimistic that this approach will be reflected in the law Parliament ultimately enacts. Buoyed by her optimism, I too look forward to a federal position paper that will address the concerns voiced by privacy commissioners, other privacy advocates and ordinary citizens. But at the same time, I remain on red alert for any legislation that might seriously intrude on our right to privacy. If that were to transpire, some of us would need to exit the information highway and travel the back roads of the old hippie highway with Neil.

Notes

1 *Orwell and Politics*, Penguin Books, at 499-500.

2 CBC News, "Toews Surprised by Content of Online Surveillance Bill," Posted Feb 18, 2012.

3 *Olmsted v United States* 277 US 438 (1928).

4 "Toews Surprised by Content of Online Survellance Bill, supra, see also Bill C-30, *Protecting Children from Internet Predators Act*.

5 Supreme Court of Canada Website / About the Court, "Remarks of the Right Honourable Beverly McLachlin, P.C., Chief Justice of the Supreme Court of Canada, Access to Information and Protection of Privacy in Canadian Democracy, May 5, 2009.

6 Maclean's, "*Harper v. The Judges*," Aug 21, 2012.

7 Lawyers' Weekly, "Celebrate the Charter: Depends Who You Ask," Aug 24, 2012 at p.1.

8 Eoin O'Malley, "The Power of Prime Ministers: Results of an Expert Survey," 28 Intl Political Science Review at 7 – 27; Peter Aucoin, Mark D Jarvis, Lori Turnbull, Democratizing the Constitution, Emond Montgomery, 2011.

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Mary Beth Currie

Intrusion Upon Seclusion

The Tort of Invasion of Privacy

"A person's computer is a highly personal storage instrument. Many cases have concluded that an extremely high level of privacy is expected regarding the contents."

One week after the Ontario Court of Justice made that observation in *Pottruff v. Don Berry Holdings Inc.*, 2012 ONSC 311 (which involved a workplace setting), the Ontario Court of Appeal ruled in *Jones v. Tsige*, 2012 ONCA 32 that in Ontario the tort of invasion of personal privacy now exists. The Court has identified the basis for this new cause of action to be an "*intrusion upon seclusion*".

While this decision applies generally, it is likely to have a significant effect on provincially regulated employers who, to date, have not been subject to any data protection statutes or other requirements with respect to employee personal information as well as those employers who are governed under provincial legislative schemes that do regulate employee personal information.

A breach of privacy claim could arise wherever there is an intrusion upon the employee's seclusion, such as when an employer seeks to monitor an employee's computer usage, conducts video surveillance of employees, requires pre-employment credit checks or undertakes physical searches of employees or their property.

Why is the *Jones v. Tsige* decision noteworthy?

Under the *Personal Information and Protection of Electronic Documents Act* ("PIPEDA"), provincially regulated employers need to protect the personal information they collect in the course of commercial activities, but there is no equivalent statutory obligation to protect employee personal information collected and used in the course of employment. In Alberta and British Columbia provincially regulated employers do have statutory obligations in respect of their collection, use and disclosure of employee personal information under the applicable *Personal Information Protection Act* ("PIPA") of each province.

With the recognition of this new tort, unless employers have appropriate policies with respect to employee privacy, employee data protection and use of workplace technology systems, they may now face claims for damages from employees (and former employees) asserting a breach of their personal privacy at the workplace.

When could such a claim arise?

A breach of privacy claim could arise wherever there is an intrusion upon the employee's seclusion, such as when an employer seeks to monitor an employee's computer usage, conducts video surveillance of employees, requires pre-employment credit checks or undertakes physical searches of employees or their property.

The facts of the case

In *Jones v. Tsige,* Jones and Tsige were both employed at a bank, but did not know or work with each other. Tsige had become involved in a common law relationship with Jones' ex-husband. Jones maintained her primary bank account at the bank. Given her position, Tsige accessed the banking information of Jones 174 times over a four-year period, contrary to the bank's policy. When Jones discovered the unauthorized access of her bank account, she complained to the bank (who suspended Tsige for a week without pay) and commenced an action against Tsige in the Ontario Superior Court of Justice for invasion of privacy, seeking damages of $70,000 plus punitive damages of $20,000.

At the first level, the action was dismissed on the grounds that the tort of invasion of privacy did not exist at common law in Ontario. Jones appealed.

The Court of Appeal overturned the first decision and recognized this new common law action of "intrusion upon seclusion".

It reasoned that the Internet and digital technology have accelerated the pace of technological change exponentially, causing personal data to be particularly vulnerable. The Court found the common law is capable of evolving to develop the common law to protect personal data and an individual's right to privacy.

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Elements of the New Tort

The Court adopted the wording used in the United States to define "intrusion of seclusion" as follows:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

The Court laid out the three elements of this cause of action:

1. the defendant's conduct must be intentional, including recklessness;
2. the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and
3. a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

Importantly, the Court expressly stated that proof of harm to a recognized economic interest is not an element of the cause of action.

Limitations of the Tort

The Court expressly stated that the three elements listed above make it clear that this new tort should not result in massive numbers of claims. A claim for "intrusion upon seclusion" will arise only for deliberate and significant invasions of personal privacy. In an attempt to limit the application of this new tort, the Court identified that only intrusions into sensitive information that, viewed objectively, could be reasonably described as highly offensive, will be protected; examples included intrusions into:

1. financial or health records;
2. sexual practices and orientation;
3. employment; or
4. diaries or private correspondence.

Importantly, the Court expressly stated that proof of harm to a recognized economic interest is not an element of the cause of action.

Damages

The Court suggested that where there was no financial harm suffered by the person making the claim, the damages should be modest, and it set a limit, generally, of $20,000. In this case, it awarded $10,000 to Ms. Jones.

The Court suggested that where there was no financial harm suffered by the person making the claim, the damages should be modest, and it set a limit, generally, of $20,000. In this case, it awarded $10,000 to Ms. Jones.

What does this mean for Employers?

Although in its decision the Court stated that "recognizing this cause of action will not open the floodgates", employers may see an increase in claims for "breach of privacy" until courts have issued decisions defining with greater certainty which actions fall within the parameters of the new tort.

It is suggested employers should have clear policies which articulate the right of the employer to monitor the employee's use of company systems in order to clarify what information would be private at a workplace.

The *Jones* and *Pottruff* decisions further underscore the importance of communicating these expectations in written policies (such as a privacy policy and a "technology use" policy).

Employers who take steps to define the reasonable expectations in the workplace will not only be better equipped to defend against intrusion of seclusion claims but will also be well positioned to argue that they should not be held vicariously liable for employees, acting outside the scope of their employment, who breach policies by accessing or otherwise violating the privacy rights of other employees.

The policies should be clear that employees who engage in personal use on the company's technology systems make a choice that results in potential loss of personal privacy. In other words, it should be clear that if an employee chooses to use company systems for personal communication and information storage, that employee should have no expectation of privacy, and should know that the employer may view all information, including the personal information, on its systems.

Conclusion

The Court in *Jones v. Tsige* recognized that the common law evolves. Employers must be mindful of this evolution. If an employer has not developed privacy policies and technology use policies designed to clarify appropriate privacy expectations at the workplace, they should do so. For employers who have already defined the expectations, it is prudent to revisit the appropriate policies to assess if they need to be updated in light of this decision.

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Privacy Issues in Criminal Law

Charles Davison

From almost the beginning of recorded history in England it had been recognized that "a man's home is his castle" and accordingly, the Sovereign's men could only enter if they had legal authority to do so. Over the centuries that authority evolved into the modern day search warrant. Canada's *Criminal Code* included provisions governing the issuance of search warrants. But, before the enactment of the *Charter of Rights* in Canada, the violation of these laws by state authorities would only give an affected person the right to sue for trespass. Under pre-*Charter* principles, even if a location was entered and searched illegally, the police and Crown could nonetheless rely upon any evidence discovered to help in the prosecution of the accused.

The enactment of the *Canadian Charter of Rights and Freedoms* resulted in one of the most significant developments in Canadian law: the massive growth of laws intended to protect our personal privacy. What had been ordinary statute law, and thus subject to repeal at any time by

Parliament, became enshrined as a mandatory constitutional requirement. In the 1984 case of *Hunter v. Southam Inc.*, the Supreme Court of Canada said that under the *Charter* S. 8 guarantee to "the right to be secure from unreasonable search and seizure", the state may only conduct a search of private property if it has first demonstrated to an independent judicial officer (usually a judge) that it has a valid reason to believe that this will lead to the discovery of evidence of a crime.

Under pre-*Charter* principles, even if a location was entered and searched illegally, the police and Crown could nonetheless rely upon any evidence discovered to help in the prosecution of the accused.

A new era had arrived, giving the privacy of Canadians a priority. While the Court recognized that there might still be emergency situations in which the police or other authorities could not obtain prior authorization before searching, those cases would be rare. Furthermore, when proceeding without a warrant, it would fall to the authorities to later demonstrate to a court that their actions were reasonable. Most importantly, where an individual's right of privacy had been improperly violated by the state, any evidence obtained as a result would potentially be excluded from consideration in later criminal proceedings pursuant to Section 24(2) of the *Charter*.

From that first decision in 1984, the courts have developed principles that apply to a myriad of situations concerning the privacy rights and interests of Canadians. In the 30 years since the *Charter* came into force, these principles have been applied to situations where the state seeks private information about or from an individual. Parliament has now encoded in *Criminal Code* provisions many of the same principles to limit the state's ability to intrude into the private affairs of Canadians, and to establish the appropriate test(s) to be applied when balancing privacy rights with the needs of law enforcement authorities to investigate and prevent crime. But in virtually all of these areas, the basic standard to be met is the same constitutional imperative: the authorities must always be able to show a judge that they have a reasonable basis to believe conducting the search in question will lead to evidence of an offence having been committed.

Some forms of "search and seizure" come more quickly to mind than others. The most common is one frequently depicted on television and in the movies: the police arrive at someone's home or office with a search warrant in hand, and then conduct a methodical inspection of the premises, taking photos of items of interest and then seizing and removing those things for further inspection and analysis. Sometimes, this involves the discovery of direct evidence of criminal activity such as bloody clothing and weapons, or incriminating documents.

. . . the basic standard to be met is the same constitutional imperative: the authorities must always be able to show a judge that they have a reasonable basis to believe conducting the search in question will lead to evidence of an offence having been committed.

Another example is the use of a suspect's DNA as a fairly standard forensic tool by which a particular suspect can be linked

to a specific crime. However, because obtaining the DNA in question involves allowing the state to become aware of the most personal information at the genetic level of the individual, it is classified as a form of search governed by the principles of Section 8.

However, because obtaining the DNA in question involves allowing the state to become aware of the most personal information at the genetic level of the individual, it is classified as a form of search governed by the principles of Section 8.

In 1995 Parliament amended the *Criminal Code* to include a series of special provisions to govern police gathering, analysis and use of DNA information from persons suspected of involvement in criminal activity. These include terms restricting the methods by which the DNA sample(s) may be taken from the suspect, such as plucking hair samples; taking blood by pricking the skin; or swabbing the inside of the mouth for skin cells. The police officers involved also have a duty to explain in detail to the individual the purposes for which the sample(s) are being obtained. Such a warrant can only be granted in relation to certain, serious criminal offences. The *Criminal Code* directs that a judge who is asked to issue a DNA warrant consider whether or not it is in "the best interests of the administration of justice" to do so, take account of the nature of the offence and its surrounding circumstances, and whether or not a properly trained police officer is available to obtain the sample.

Another new development since 1984 is in the area of "impression" warrants. In addition to fingerprinting and photographing as part of the usual processing and record-keeping procedures, the *Criminal Code* also now permits a judge to grant a warrant for the taking of any type of "impression" from someone's body, including, but not limited to, finger, hand or footprints; teeth impressions; or foot impressions. This is considered to be a far less severe intrusion upon individual privacy, so the test is less stringent than in the DNA situation. Nonetheless, the same basic requirement must be observed. To obtain an impression warrant, the police must provide sworn evidence of their reason to believe evidence will be obtained by this means.

The area which is generally acknowledged to be most invasive of our privacy is that of electronic surveillance. From the early days, when police officers would listen to private telephone calls by simply picking up an extension line, "wiretap" technology has now evolved into complex and sophisticated equipment once only imagined by science fiction enthusiasts. The authorities now have the ability to secretly intercept and record all types of phone conversations (land-line and cellular); text messages; emails; and virtually every other form of electronic and wireless communication. Provisions of the *Criminal Code* set out the rules for such forms of surveillance.

In order to conduct electronic surveillance of communications the police must obtain prior authorization from a judge by providing sworn evidence demonstrating the belief that an offence has taken place and that the interception of private communications may lead to the obtaining of information about that crime. Unless one of the parties to the communication has consented to its interception,

The area which is generally acknowledged to be most invasive of our privacy is that of electronic surveillance.

additional requirements also apply to wiretap orders. The police must tell the judge of the locations, as far as they can foresee them; the methods which they propose to use in order to carry out the interceptions; any prior attempts to obtain similar orders, and whether the order(s) in question were granted. Finally, in most situations the authorities must explain why other investigative techniques have failed or, if they are not considered to be viable alternatives to a wiretap order, why this is so. Orders are limited to 60 days, although they can be renewed. Only specially designated Crown lawyers can apply for such orders and only judges of the higher courts can grant them.

Unless one of the parties to the communication has consented to its interception, additional requirements also apply to wiretap orders.

To have state agents secretly listening to private conversations of citizens is considered to be so invasive of our rights to be left alone that such interceptions can only be granted where the investigations involve more serious offences. However, in relation to some of the *most* serious crimes – mainly terrorism and organized crime offences – a number of these restrictions do not apply.

One area of privacy law which is still in its early stages of development relates to the use of computers and other personal electronic devices. The Supreme Court of Canada recently observed that these instruments frequently store as much, or more, personal and deeply private information about individual Canadians as any other form or place where information is collected. However, Parliament has not enacted any special provisions to deal with the issues which arise in searching these devices, apparently satisfied that the ordinary search warrant provisions (which already include within their scope searches to be conducted of any "receptacle or place") apply in such situations. But the area is not free from controversy. A search warrant must describe in careful, precise terms the building, place or receptacle to be examined by the authorities. So, a warrant granted specifically to allow the search of a particular house, for example, would ordinarily not include a detached garage, shed or vehicle found at the same address. However, with a warrant the police *would* be entitled to open locked doors or to examine the contents of locked desk drawers and filing cabinets found inside the home.

When it comes to the searches of computers, it is not yet completely clear how they should be treated by the authorities. The law is still not defined, for example, as to whether a warrant to search a building or place would extend to allow the police, upon finding a computer in that location, to simply turn it on and examine its contents. Just as a warrant to search a building allows the police to open any other locked storage device, so too would no further warrant be required in order to conduct a search of a computer. Other rulings, however, suggest that if the warrant does not specifically permit the search of computers, the police should seek a new authorization, and demonstrate to a judge the need to examine it. The Supreme Court of Canada has not yet settled this debate.

There is a never-ending clash between the privacy rights of Canadians and the needs of society for effective and efficient investigation of criminal activities. If the balance is too strongly in favour of individual privacy rights, law enforcement and police investigations will be thwarted and the safety

and security of all members of society will be jeopardized. On the other hand, if the balance tilts too far in favour of police and similar agencies, Canadians will quickly find themselves living in a virtual police state with no privacy from government intrusion.

Through such means as the constitutional protections of the *Canadian Charter of Rights and Freedoms*, the courts in Canada have been able to strike a relatively fair and effective compromise between those competing interests. The result is that Canadians continue to enjoy a basic expectation of privacy and protection from government snooping, even as police and other state authorities are able to conduct investigations and carry out their other duties in accordance with the law.

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The Complexities of Privacy and Social Networking Sites

Melissa Luhtanen

Two cases, released in April 2012, from the Office of the Privacy Commissioner of Canada ("OPC") demonstrate the privacy challenges facing users of social networking websites.

The first allegation was made by a user who alleged that Facebook was collecting, using and disclosing his personal information without his knowledge or consent (OPC #2011-006). The case addressed the issue of third-party websites hosting Facebook social plug-ins such as the "Like" and "Recommend" buttons. Social plug-ins are defined by Facebook as "buttons and boxes designed to display certain Facebook functionality on third-party websites."

These buttons are shown on the user's screen when they visit a third-party website. So, for instance, a Facebook member who is logged into her account may see an article highlighting a news website that her Facebook friends have recommended. A non-Facebook user, visiting the same site, will see how many members have recommended that certain article.

While users are becoming more savvy about the collection of their personal data, social networking sites are becoming more complex.

In order to assess the privacy implications of social plug-ins used on third-party websites the OPC examined the technical aspect of how this process of exchanging information between the end-user, the third-party and Facebook occurred. The OPC found that Facebook did not share personal information with third-party websites. It may have shared "metric" information that it received through the social plug-in, such as a log of anonymized user data, however, individual information was not identifiable.

The OPC found that Facebook sufficiently disclosed the use of the information on its Privacy FAQs. Facebook therefore had received informed consent from its Facebook users.

The OPC noted that Facebook does receive information any time that a user visits a website that hosts a social plug-in. There are presently over 2 million such websites. The "impression" data that Facebook receives is a log of [para 14-15]:

- the date and time a visitor visited the web page;
- the address of the webpage the visitor is visiting (url);
- the visitor's general geographic location;
- the visitor's browser cookie ID;
- the Internet Protocol (IP) address associated with the visitor's computer;
- the browser and operating system being used by the visitor; and
- for Facebook users, their Facebook user ID.

While Facebook's practice fell within the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*), many users would likely be surprised that such detailed information about them was being logged every time they accessed participating third-party websites while logged into Facebook. Many users, once logged into Facebook, stay logged in all day through a checkbox that says "Keep me logged in" and so would hardly recognize that Facebook is still operating in the background. While users are becoming more savvy about the collection of their personal data, social networking sites are becoming more complex.

As a side-note, while investigating this complaint, the OPC had to examine some of the cookies that are used with social plug-ins. It found that one of the cookies was not working properly and, in fact, Facebook users who had already logged out of Facebook, were still being tracked. Facebook fixed this issue during the investigation stage. However, the OPC noted that its decision did not address the use of cookies for web tracking.

A second decision (OPC #2012-002) was filed by three complainants who had received email invitations to join Facebook with a list of "friend suggestions". None of the complainants were Facebook users and yet the friend suggestions were surprisingly accurate. The complainants surmised

that Facebook had inappropriately accessed their address books to determine what friends might be members of Facebook.

Facebook said that friend suggestions are generated through an algorithm that identifies other users who have [para 6]:

- imported the non-user's email address;
- previously sent the non-user an invitation;
- invited the non-user to an event; or
- tagged the non-user in a photo.

The complainants surmised that Facebook had inappropriately accessed their address books to determine what friends might be members of Facebook.

Therefore, when a Facebook user invites a non-user to join, Facebook examines other Facebook accounts through this algorithm to determine what friends the non-user might have. The non-user's email address may be in the Facebook user's address book, might have been tagged in a photo on Facebook, or found in other event invitations. The matches are then sent to the non-user with the invitation that was initiated by a Facebook user. If the non-user did not reply to the initial invitation then more invitations were sent as follow-up.

The OPC did not find any evidence that Facebook had accessed the non-user's email address books. An individual who invites a non-user is reminded to get the non-user's consent to send an invite from Facebook. However, the OPC said that the concern of this particular complaint was whether the non-user had given permission to process their email address through Facebook's algorithm in order to make friend suggestions. At no time had the non-user been given an opportunity to opt-out of the friend matching process, because the first invitation included the list of generated friends. Facebook agreed to remove the friend suggestion from the initial invitation and to provide the non-user with a more prominent opt-out mechanism.

The case also discussed whether Facebook could rely on a non-user using an "opt-out" procedure rather than an "opt-in" feature. Principle 4.3.6 of *PIPEDA* says that an organization should generally seek express consent when information that is being used is sensitive. The OPC discussed whether Facebook's processing of a non-user's email address could be considered the use of 'sensitive' information. The OPC commented that the social connections gained from that email could be considered sensitive. It is reasonable that non-users would not necessarily expect Facebook to be using their email when they had no previous relationship with Facebook. However, Facebook argued that an opt-in regime would be unworkable in the friend suggestion feature. Also, making a Canadian-only change to the friend suggestion process would be impossible. In addition, the results of the friend suggestions were only viewed by the non-user and no one else. Since *PIPEDA* calls for a reasonable and pragmatic approach, the OPC accepted Facebook's submissions. It accepted the use of an opt-out procedure with certain conditions, including that it is only used for non-sensitive information, and that consent is obtained through a convenient procedure.

. . . the OPC said that the concern of this particular complaint was whether the non-user had given permission to process their email address through Facebook's algorithm in order to make friend suggestions.

Privacy concerns will continue to follow social networking sites. Around the time that these cases were released, another lawsuit was filed regarding the placement of a Facebook user's portrait and name next to third-party advertising. Plaintiff Deborah Douez had clicked the "like" button for an organization called "Cool Entrepreneurs". She thought that it would show up in her news feed once, but her friends informed her that her name and photo were showing up in an ad for Cool Entrepreneurs.

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Those people who are concerned with the collection, use and disclosure of personal information by social networking sites must be extra vigilant to explore how these sites will affect their privacy. Youth are particularly at risk since they do not always have an experience of a more private, less technologically-driven world, nor do they fully understand the implications of a loss of privacy. As the ability to share information on these websites increases, so does the complexity of how that information can be disseminated.

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Sexual Harassment is a Continuing Issue in Canada

Linda McKay-Panos

Sexual harassment has long been recognized in Canada as a form of gender discrimination. For several years, gender discrimination (which includes discrimination based on breast feeding, sexual harassment, transgender and pregnancy) was the most commonly alleged ground of discrimination in both federal and provincial human rights commission complaints. More recently, however, disability (both mental and physical) has become the most common ground of complaint. One hoped that this was because long standing human rights cases and education resulted in a decline in sexual harassment. However, recent cases in schools and workplaces indicate that sexual harassment has continued to be a problem, particularly in systemic contexts – for example, throughout a workplace as a whole, rather than single incidents of sexual harassment.

If an individual is faced with sexual harassment in the workplace, there are a number of remedies. Some workplaces have sexual harassment policies that provide for internal investigation and

remedies. Many victims of sexual harassment are reluctant to report the harassment because they fear for their jobs, they do not want to have to discuss personal matters with their supervisors, they feel they will not be believed, or they do not wish to bring trouble to the perpetrator.

In the human rights context, sexual harassment is broadly defined as unwanted sexual attention. It can include physical, verbal and non-verbal conduct.

If the sexual harassment is physical in nature, it may provide evidence of the crime of sexual assault (intentional physical contact of a sexual nature to which there is no consent). This may be reported to the police, who will investigate the circumstances and decide whether or not to lay criminal charges.

In the human rights context, sexual harassment is broadly defined as unwanted sexual attention. It can include physical, verbal and non-verbal conduct. Physical conduct includes slapping, pinching, grabbing and related conduct. Verbal harassment includes propositioning or making unwanted comments of a sexual nature. Finally, non-verbal sexual harassment includes making gestures and posting pictures of a sexual nature. In Canada, a poisoned work environment (e.g., being surrounded by sexually based jokes and images) is also considered a form of sexual harassment. The usual remedies provided for sexual harassment by human rights commissions include:

- an apology from the harasser;
- the employer instituting a sexual harassment policy;
- providing anti-sexual harassment education sessions; and
- paying a small amount of money for hurt feelings.

In some circumstances, victims who resigned as a result of the harassment can be re-instated. The purpose of human rights remedies is educational and is not meant to punish workers or employers.

While there is no recognized tort of discrimination (or sexual harassment), more recently, victims of sexual harassment are launching civil suits against employers and perpetrators for the intentional tort of infliction of emotional/ mental suffering, the intentional tort of sexual assault and battery, or wrongful or constructive dismissal. These actions can result in the award of damages for lost income, loss of future income, cost of future care and other expenses. Sometimes tort cases also involve the award of punitive (punishing) or aggravated (individual special circumstances) damages.

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In 2012, over 200 policewomen and former officers filed a class action lawsuit against the Royal Canadian Mounted Police (a federal police force). The suit alleges that the system has had numerous problems with regard to sexual harassment over several years, which have not been adequately addressed by the RCMP. Litigants allege that complaints of sexual harassment were not dealt with. (see: Press TV Canada "Policewomen file sex harassment

lawsuit against federal police". Allegations range from pervasive abuse resulting in post traumatic stress disorder to being passed over for promotions. The federal government (and the British Columbia government who use the RCMP as a police force) have filed a statement of defence in which they deny the allegations. These cases will likely take years to resolve.

The purpose of human rights remedies is educational and is not meant to punish workers or employers.

While it may be more desirable to use the human rights system in cases of sexual harassment, it appears that the representatives of these policewomen have decided that a systemic remedy is needed to address what they believe is a pervasive problem. Perhaps we will witness other professions launching similar lawsuits to address systemic sexual harassment. It should be noted that some of the worst offenders are occupations which are traditionally male or female. For example, many male nurses report that they are sexually harassed on the job. Thus, the problem with female police officers may be explained (but not excused) by this phenomenon. We can hope that a positive work environment for everyone will be the result of these cases.

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Considering Custody

Rochelle Johannson

I recently received this question: How can I get sole custody of my four-year-old son? I don't have a relationship with the father, and we were never married.

Let's talk about terminology first, so that if you have to meet with a lawyer, you'll both be on the same page. "Custody" means the ability to make decisions about a child. For example, if the parents share custody of a child, then each parent gets to make decisions for and about the child. Custody is a term that is used in the *Divorce Act*. The *Divorce Act* only applies if the child's parents were married. So, if you weren't married and the child was born in Alberta, then the law that you want to know about is the *Family Law Act* (*FLA*). Just to make things more confusing for people, the FLA does not use "custody" at all. Instead, the *FLA* uses the terms "guardianship" and "parenting order."

Generally speaking, the parents are guardians of the child. There are certain powers/responsibilities that are given to guardians (and you can read about them at section 21(5) and (6)). For example, guardians have the power to make day-to-day decisions for the child, to approve medical decisions, where the child will go to school, etc.

Guardianship can be revoked (section 25(1)), but it is extremely rare for a court to do so. Instead, the court may use parenting orders to give certain rights to one guardian, and not to the other. For example, a judge can order that one guardian is to have control over certain decisions relating to the child, and the other guardian only the power to know about those decisions (but not have any input on the decisions). Also, the court can set down a parenting schedule, and make decisions on when and how the guardians can have contact with the child. In other words, judges tend to think that it is in the child's best interest to have both parents as guardians. So, instead of completely removing one guardian, the judge will usually try to create an order that fits best with the

circumstances. This isn't to say that a guardian won't ever be removed, just that the circumstances under which that would occur are limited (for example, in cases of neglect or abuse).

The other issue that is very important to know about is that the judge will only make an order if the judge believes that it is in the child's best interest to do so. The "best interests of the child" is the legal test for all orders that relate to the child. So, this means that the judge will look at all of the evidence in front of him/her and then ask, for example, "is it in the child's best interest for me to remove this person as a guardian of the child?" The *FLA* sets out factors that determine the best interest of the child at section 18.

Now, if you already have an order that deals with guardianship and parenting time, then you would be making an application to vary the order that already exists. This means that when you go before the judge, you have to prove that there has been a change in the needs or circumstances of the child since the time the last order was made. So, if a "big" event has happened in the life of the child, and the parenting order no longer works, then the judge would have to decide whether or not it is in the best interests to vary the order, given the "big" event that happened. A common example is when one parent wishes to move to another province with the child, and so makes an application to change the parenting order that is in place so that the child can move with him/her. There is a kit that has all of the paperwork that needs to be completed to make a variation order.

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If you do not already have a parenting order, then you would be making an application for a parenting order. You can find the paperwork online.

There are other options that you may want to consider. You can try to negotiate with the other side on your own. If you can negotiate an arrangement that you can live with, then you can simply put this in writing, and both keep a copy. You do not necessarily have to formalize it into a court order, but you can if you want.

You may also want to consider mediation. If you've never been involved in a mediation before, it's basically a chance for both sides to sit down with an impartial 3rd party and talk about what they want to happen in the future. There is no pressure to reach an agreement, but if you are able to, then the mediator will usually write it out, and can explain how you can make it into a court order.

The Edmonton Law Courts Building also has the Family Law Information Centre and you may want to talk with a worker there. They have all of the forms needed to make an application and can explain the different avenues available for you to use, in the courts and outside of the courts.

All of the above assume that you are going to be dealing with this issue on your own. You could also choose to hire a lawyer. Many firms offer free consultations, which means that you can sit down with the lawyer and talk to them for a half hour or hour for free. Then you decide if you want to hire that lawyer. You can simply call some law firms to see if they offer the consult for free. If you

know someone who has used a family lawyer in the past, then contact them and see if they would recommend that lawyer. If not, then you can simply do an Internet search for family law lawyers in the area where you live and go from there. There is also the Lawyer Referral Service, which you phone into at 1-800-661-1095, and you will get the names and contact info of three lawyers. You then call them and set up the appointment yourself and you automatically receive a free half-hour consultation. Other provinces may have similar lawyer referral services.

For more information about the *FLA*, you can go to this Alberta government website.

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Miss Julie's Revenge, or Men Who Hate Women, Please Meet Lisbeth Salander

Rob Normey

One of the great events of our summer in Edmonton is the Fringe Festival which offers an amazing assortment of acting talent, both local and international. While there is certainly something for everyone amongst the plays and musicals on offer, many are on the zany or surreal side. When I noticed that a serious drama, August Strindberg's *Miss Julie*, was to be performed I jumped at the chance to take it in. The local theatre group that put it on, 50 % Fruit, offered a rather unorthodox take on the play and made a mistake in my mind by updating the time frame (the play was written in 1888). There was a lack of *gravitas* in the approach. That being said, it was acted with enthusiasm and led me to haul out my old copy of this one-act play and re-read it with total absorption. I next viewed the classic film adaptation, Alf Sjoberg's 1951 version which won an Oscar. Sjoberg was able to open the play up, taking it out of the kitchen where the original had been confined, into the Swedish countryside at the time of the Midsummer's Eve celebrations.

Miss Julie is a naturalistic drama depicting a desperate and titanic struggle between the aristocratic head (along with her father, the Count) of a country estate and Jean, manservant to the Count. We witness a searing power struggle and a battle of the sexes (major class issues confront us as well). The pair quickly develops something of a love/hate passion for one another during the carnival period of Midsummer's Eve and after making love, hatch plans to flee the estate and indeed Sweden itself to set up a "distinguished" restaurant in Italy. Before long it becomes apparent to this desperate, unconventional woman, raised as a boy and developing into an ardent bluestocking, that her lover has no desire to do anything beyond using her and her supposed wealth for his own mercenary ends. The full complexity of their relationship can only be grasped by reading Strindberg's remarkable text. The play ends, as it must, with the tragic suicide of the tormented woman, with the suggestion that the manservant has hypnotized her prior to her slashing her throat.

Miss Julie is a naturalistic drama depicting a desperate and titanic struggle between the aristocratic head (along with her father, the Count) of a country estate and Jean, manservant to the Count.

It is worth noting that the depressive playwright drew on real-life situations and models for his plot, and at least in part, for his characters. Strindberg was a commoner who had launched himself into a torrid affair with a beautiful young baroness, involving first a suicide attempt on his part and then his partner's divorce from her husband. She then married the penniless playwright and is said to have capped that shocking event by promptly going on the stage, before long even playing Miss Julie herself. However, the playwright claimed there was at least one other more obvious model for Miss Julie…a general's daughter who behaved scandalously. As well, another close correlation was to the Swedish novelist Victoria Benedictsson. She had left behind an unhappy, highly circumscribed marriage to a widower with five children and, with great effort and resourcefulness, established a successful career as a writer of fiction. This "bluestocking novelist," one of a limited number of independent women in her era, embarked on a love affair with Scandinavia's most powerful literary critic, Georges Brandes. The combination of his breaking off the relationship and his brother's extremely negative review of what turned out to be Benedictsson's last novel, led the distressed and vulnerable writer to take her life.

While *Miss Julie* was not at all a programmatic work designed to demonstrate sexual inequities (indeed some say quite the opposite), it certainly sparks considerable reflection on the part of the reader or viewer on the serious obstacles a woman like Miss Julie might face in attempting to break out of a stifling, conformist environment to establish an independent life for herself. Discriminatory and repressive laws and customs in Swedish society, as with similar situations elsewhere, had the effect of hemming in all but the boldest and luckiest of middle and upper class women in the closing decades of the nineteenth century. Many professions were closed to women and, in any event, their education would not have been geared toward long-term careers.

A Swede who a lot more Canadians would have been thinking about over the past few years was the late crusading journalist turned powerhouse novelist, Stieg Larsson. His *Millennium* trilogy,

beginning with *The Girl With the Dragon Tattoo*, has sold a gazillion copies and been made into films in Swedish, English and no doubt Swahili. A major reason for the success of this intermittently fast-paced thriller chock full of murders, sexual assaults, libel claims and ensuing trials, is Larsson's creation of at least two fascinating characters. One is the crusading journalist Mikael Blomkvist and the other is, of course, the trilogy's strongest hero, the underdog who has been knocked down but is not out, possesses a savage bite and is seeking revenge, Lisbeth Salander. She is a feisty woman with, indeed, a prominent tattoo, at times a Mohawk hairdo and rebellion to burn. She has superhuman will power and computer skills second to none. Hacking into the accounts of firms and the email and facebook accounts of others goes with the territory – secrets are not safe from her or Blomqvist. Part of the plot's fascination lies in the attraction but also simultaneous distrust Lisbeth has for her would-be journalist ally. Ultimately, when it counts she does assist the editor of the anti-fascist magazine *Millennium*. In return, her best friend and ally in her time of need is Blomqvist.

As a reader, coming from the world of literary fiction, I found aspects of *The Girl* books difficult to accept. The novels are a unique blend of popular fiction, with a classic good versus evil conflict. The good is apparently outgunned at every turn but possesses tenacious resolve, and has elements of journalism focused on social justice and fundamental rights, with parallels to actual aspects of contemporary Swedish society. The characters are compelling if sometimes given incredible powers that beggar the imagination. That being said, I certainly admire the ability Larsson has to provide us with a propulsive storyline that does explore major issues of freedom of expression, women's equality and fear of physical harm with verve. The literal translation of the first volume is *Men Who Hate Women.*

There are a few substantial differences, apparently, between Swedish law and Canadian law that a reader will want to bear in mind as she marvels at the intrepid determination of crusading journalists like Blomqvist to refuse to provide information on sources for the explosive stories filed by the magazine *Millennium*. The combination of Lisbeth hacking her way into an unsuspecting capitalist shark's email, and her writing partner Blomqvist asserting that his source was anonymous and to be protected, would almost certainly have led to a lengthy and exhausting court case for the pair should they have operated in Canada. With greater constitutional protection for his journalism, the Swede can shoot off zingers in his article, like "[the corporate superman] was devoting himself to fraud so extensive it was no longer merely criminal." (Recognize that the trilogy opens with Blomqvist being found guilty of defamation but this hardly stops him or his magazine in their advocacy of social and legal justice.) For a first rate article on Larrson's novels which touches on the legal issues, I urge you to read Paul Wilson's piece "The Archivist," from the March 2011 issue of *The Walrus*. In addition, consider the landmark 1986 decision of *Goodwin v. United Kingdom* by the European Court of Human Rights, holding that an attempt to force a journalist to reveal his source violated Article 10 of

> A Swede who a lot more Canadians would have been thinking about over the past few years was the late crusading journalist turned powerhouse novelist, Stieg Larsson.

the European *Convention on Human Rights*. This line of reasoning can be contrasted to some extent with the case-by-case approach to claiming journalist-source privilege adopted by the Supreme Court of Canada in *Globe and Mail v. Canada* (2010).

The final volume, *The Girl Who Kicked the Hornet's Nest*, ends with a lengthy trial scene. Lisbeth herself is on trial for the attempted murder of her father and with various grievous bodily harm offences, unlawful threats and break and enter – and that's just what I can remember. Her defence counsel is none other that Mikael's sister Giannini, which is convenient, because Mikael has explosive evidence that he has gathered and is able to entrust with her. We sit in on a case of various twists and turns in true legal thriller fashion, most of which seem at least slightly implausible to someone familiar with the workings of courts, but why spoil the general reader's fun? I like the emphasis on violation of constitutional rights that springs up from time to time in the proceedings. I do think that anyone wishing to emulate Lisbeth should think twice before donning lurid garb to go with a Mohawk haircut if they are placed in the uncomfortable position of appearing in the dock. Further, while it may be tempting to insolently refuse to answer the prosecutor's question on the grounds that it is not really a question but an assertion, remember Shakespeare's adage that "discretion is the better part of valour."

The combination of Lisbeth hacking her way into an unsuspecting capitalist shark's email, and her writing partner Blomqvist asserting that his source was anonymous and to be protected, would almost certainly have led to a lengthy and exhausting court case for the pair should they have operated in Canada.

In any event, Lisbeth is indeed someone who not only serves as an updated version of the Pippi Longstocking character whom every Swedish child knows in depth, but also a Miss Julie who is ready and able to fight the male establishment to the bitter end and prevail against considerable odds. Her life is bound to end with a bang, not a whimper.

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The Law of Embellished Credentials

Peter Bowal and Michael Khodosko

Introduction

Human resources professionals say up to 30% of claims on resumes of job applicants have been exaggerated. Job seekers, inclined to present themselves in the best possible light, are tempted to inflate their credentials, especially during recessionary times when jobs are scarce and competition is fierce.

According to a recent anonymous survey, over 80% of all resumes are misleading, 20% list fraudulent degrees, 30% show altered employment dates, 40% have inflated salary claims, 30% have inaccurate job descriptions and 27% falsify references. Popular websites are specifically designed to help job seekers fake their resumes.

All occupational categories see resume misrepresentation, but few cases get detected and publicized. Recently, the CIO of Yahoo stepped down because he lied about having a degree in computer science. The former CEO of RadioShack claimed a fictional college degree. Bausch & Lomb's chairman falsely reported an MBA.

What are the possible legal consequences of overstating your employment qualifications?

Crime

Theoretically, resume padding could be prosecuted as criminal fraud, but such charges are virtually never laid in Canada. Few employers, if they detect serious misrepresentations, go further than disqualifying the candidate. They do not take the matter to the police and, even if they did, the police are not likely to view the matter as a serious public interest concern.

At least 11 U.S. states make misrepresentation of employment qualifications a criminal offence; half of them classify this as a felony punishable by several years in prison.

Should a potential employee disclose his criminal past when applying for a job? Human rights legislation in a few Canadian provinces deem it illegal to discriminate against anyone with a criminal record for crimes unrelated to performance of a job. Those employers cannot ask about unrelated criminal convictions. However, today it is probably safe for convicts to self-disclose serious records when applying for most jobs. Employers generally rely on the honesty of the applicants but often take some steps such as Internet searches to verify applicants' backgrounds, especially for key positions.

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Robert Sarvis was hired to teach ethics (ironically) and business law at the University of Vermont. Shortly after, the University was notified by Sarvis's parole officer that Sarvis had been previously convicted on five counts of bank fraud with over $12 million in restitution and sentenced to 46 months in prison. The University terminated Sarvis's employment with cause. The professor sued for wrongful dismissal in 2001 and the court agreed with the University that the dismissal as justified, given the seriousness of the crimes and the misrepresentation.

Employer Lawsuit for Damages

In addition to being cause for firing, an employee may also be successfully sued in civil court by an employer for damages resulting from the misrepresentation. Employees who are fundamentally deceptive about their qualifications can be considered in a breach of the duty of trust implied in every employment contract. The false or non-disclosure could be an intentionally fraudulent misrepresentation of important fact that induced the employer to hire the worker. Employer compensation might include the costs of finding a replacement employee, recruitment agency fees and any training costs incurred, but no cases of this kind have been found in Canada. Most employers will not sue the dishonest former employee, often seeing this as a private embarrassment and 'throwing further good money after bad.'

Sufficient Cause for Firing

If the deception is discovered only after an employee is hired, it might constitute cause to fire him or her. Both the lack of the employee's integrity and the materiality of the misrepresentation contribute to cause. If one of the main qualifications for the job is found lacking, such as a professional designation, the employee may be fired for failing to satisfy the pre-conditions for the job.

Employees who are fundamentally deceptive about their qualifications can be considered in a breach of the duty of trust implied in every employment contract.

In the 1999 Saskatchewan case of *O'Donnell v. Bourgault*, the court concluded O'Donnell significantly overstated his qualifications when he applied for work at Bourgault, and misrepresented his capability for the work he was hired to do. O'Donnell claimed in his resume that he was a team player and a very skilled HR professional. He was dismissed after just five months. His manager testified that after receiving numerous complaints about O'Donnell's work style from colleagues, he determined O'Donnell was not a "team player." The judge said, "Bourgault had a right to expect that O'Donnell was qualified to do the things his resume held him out as capable of." The fact that he could not perform to the degree stated in his resume was "grounds for dismissal."

The most common misrepresentation during the interview process is rounding up one's salary 10 to 15%. This overstatement is minor and, if detected, might lead to being passed over for the job but will not be enough to support a dismissal.

The most common misrepresentation during the interview process is rounding up one's salary 10% - 15%. This overstatement is minor and, if detected, might lead to being passed over for the job but will not be enough to support a dismissal. In the 2002 *Islip v. Coldmatic Refrigeration of Canada Ltd.* case, the employee was dismissed for overstating his previous employment salary during the salary negotiation phase. The employer argued that the dishonesty alone provided sufficient cause for dismissal. The court found that the salary amount was not a critical factor in the hiring decision made by Coldmatics, and accordingly, the dismissal could not be justified. This result was affirmed on appeal.

Embellishment of credentials might be used later to justify dismissals. An employee might be fired for an unrelated reason such as absenteeism or bad behaviour. Employers might then attempt to strengthen their position by rigorously checking the former employee's resume for deception. Although this might not have contributed to the dismissal decision, it can make a useful negative impression against the employee. In the 2005 wrongful dismissal case of *Zadorozniak v. Community Features,* Zadorozniak was fired from his general manager position for being dishonest. At trial, the employer presented evidence that Zadorozniak was dishonest during the interview process when he did not mention the circumstances under which he left his previous employer – he had forged a receipt and had an affair with the wife of one of the other managers. The judge dismissed this evidence because it did not contribute to the dismissal and was not given as a reason for it at the time.

Embellishments of credentials might be used later to justify dismissals. An employee might be fired for an unrelated reason such as absenteeism or bad behaviour. Employers might then attempt to strengthen their position by rigorously checking the former employee's resume for deception.

However, this result is contrary to established law that if sufficient cause existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Firings can be

justified with facts ascertained subsequent to dismissal and on grounds differing from those known and stated at the time. This was set out as early as 1960 by the Supreme Court of Canada in *Lake Ontario Portland Cement Co. v. Groner*.

More recently, in *Clark v. Dube Management Ltd.*, the employee was dismissed in 1995 from the Vice-President of Finance position at Dube Management for being engaged in a side business. Clark and his wife owned a few stores in Saskatchewan. Although Clark was not directly involved in these stores' daily operations, he was dismissed for breaching his contract of employment by not "devoting his full time to the business (Dube Management)." At trial, it became clear that Clark had not disclosed other important, relevant facts. The wrongful termination suit was dismissed. The judge said "an employer's after-acquired knowledge of misconduct can stand as justification for the earlier dismissal of an employee." This principle can be applied to post-dismissal detection of resume misrepresentation.

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Protecting Your Personal Information When You Rent

Rochelle Johannson

When tenants apply to rent somewhere to live, they usually have to fill out long pages of information about themselves, and they often don't question why or how the landlord is going to use the personal information that they are providing. Tenants should be concerned about protecting their personal identity and guarding what information they give out to businesses and organizations.

When a tenant fills out an application form, there are a few questions that the tenant should think about before deciding whether or not to provide certain information.

Does the landlord need this information in order to decide whether or not to rent to you?

Landlords are only legitimately allowed to request information from applicants that will directly help the landlord decide whether or not to rent to the applicant. This means that the landlord can, for example, ask for confirmation of your income. Whether or not you can afford to pay the rent is a major determining factor for receiving the approval of the landlord.

If the landlord has a valid reason for asking for this information, is there another method of delivering the information that is less invasive to your privacy?

Now that you know that the landlord can ask for confirmation of income, let's say that in the application the landlord is asking for contact information for your boss so that the landlord can call the place where you work. If you are uncomfortable with the landlord contacting your boss directly, you can offer to provide the information that is needed in an alternative way. All that the landlord needs to know is how much you make, so how else could you provide that information? You could give the landlord a copy of your T4, pay stubs, or a letter from your employer. Remember to block

out information that you don't want the landlord to know. For example, your T4 has your social insurance number (SIN) listed, so you should consider blocking that information out.

You should never release your SIN to the landlord. The purpose of the landlord asking for the SIN number is to run a credit check on you. Your landlord can also receive a credit check if you provide your full name and birthday. There is the risk that if someone shares your birthday and name, then the check could produce more than one credit report.

If the information is not necessary for the landlord to know about, then what should you do?

What if the landlord asks for something that you think is unreasonable? For example, let's say the landlord asks for all of your banking information and a void cheque in the application. The landlord does not need this information in order to determine whether or not to rent to you. You can talk to the landlord about the information, and explain your reasons for refusing to provide the information. In this case, you may want to give an alternative and offer to provide banking information at a later date, if you are accepted as a tenant. Keep in mind that most provinces do not have a law that states how rent must be paid, so the landlord cannot usually demand that you pay by automatic withdrawal.

Once you are accepted and become a tenant, then your landlord may be able to request additional information from you. For example, your landlord may require you to provide emergency contact information, or the make, model and licence plate number of your car if you use parking provided by the landlord. You should still keep the questions in mind when you are asked to provide information, because there are limits on the information that the landlord needs to know.

Now that you've given a lot of personal information to your landlord, what is he or she allowed to do with it?

The landlord has an obligation to take reasonable steps to protect your personal information. The landlord will usually have to get your consent before releasing your personal information to anyone. There are times when the landlord may not have to get your consent, including if it's an emergency situation or if another law requires disclosure of that information. One thing to keep in mind is that your landlord can probably use the information that you provided to collect unpaid rent from you. For example, your landlord may be able to pass your contact information on to a collection agency.

Every province has an Office of the Information and Privacy Commissioner. Most provinces have developed resources specifically for privacy issues between landlords and tenants. Those offices can also answer questions if you have concerns about the information you are being asked to release.

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Questioning Jurisdiction

Peter Broder

One of the great unanswered questions in Canadian charity law is just how far the federal government's jurisdiction extends over "Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions". That is the language used in s. 92(7) of the 1867 *Constitution Act* to describe the exclusive provincial jurisdiction that applies where such bodies are "in and for the province".

When the Canadian Constitution was drafted, however, the voluntary sector was very different than it is today. It was quite common for charities to operate only in one or two locations. Certainly, no charities had a national presence as a result of promoting itself or its cause on the Internet.

Back then, much charitable work was carried out through trusts and there was no special income tax treatment of charitable or not-for-profit work because income tax, as we know it today, had not yet come into being. Indeed, the *Income Tax Act* registration regime was not initiated until the 1960s. Some tax privileges were afforded to certain groups prior to that, but there was no systematic federal regulation.

Although the framers of the Constitution deemed charity matters largely a matter of provincial jurisdiction, it wasn't long before a case arose where the extent of a province's authority in this area was put in issue. In 1882, *Dobie v. The Board of Management of the Temporalities Fund of the Presbyterian Church of Canada*, led the Privy Council to consider the scope of that authority. The case considered whether a provincial legislature could pass a statute binding on a charitable corporation operating in more than one province. The Privy Council held that an Act of the Legislature of the

Province of Quebec that interfered directly with the *Constitution* and privileges of a corporation that was an interprovincial charity was *ultra vires* – beyond the powers – of the province.

Matters became even more complicated when, early in the next century, the federal government began to include measures in tax legislation giving special treatment to certain charitable and not-for-profit groups. Moreover, what started out as merely exempting a narrow range of entities from federal tax on their income eventually grew into a full-fledged regulatory regime. This regime entailed, as well as the income tax exemption for a much wider range of groups, deductions or credits on donations made to them, a host of controls and obligations over various types of activities they might undertake, and a comprehensive annual reporting protocol.

When the Canadian *Constitution* was drafted, however, the voluntary sector was very different than it is today. It was quite common for charities to operate only in one or two locations.

Provinces generally acquiesced to this federal oversight and extended corollary provincial tax privileges to charities recognized by the federal government. In some cases they passed legislation enabling them to regulate limited aspects of charities' operations, such as fundraising. The most comprehensive oversight of charities' day-to-day work was in Ontario. It passed the *Charities Accounting Act* and invested the Office of the Public Guardian and Trustee with broad powers to protect the public interest in charitable property. By-and-large, however, most provinces were and remain inactive in policing charities' activities.

The growth of the federal charities' regulatory system, which occurred in parallel with expansion of national government oversight in numerous other areas, could conceivably be characterized as falling within the Trade and Commerce powers and/or broad taxing authority provided to the federal government under the Canadian Constitution. However, this has never been fully tested.

Recently, this issue has gained new importance. As benefits associated with status as a federally registered charity have evolved, concern over abuses and improprieties has become more pronounced. This occurred because of the media giving a higher profile to problematic conduct and because a number of large-scale illicit schemes were associated with significant loss of tax revenue over the last decade. In response, the government is now imposing rules in areas where it had not previously regulated.

Most notable in this regard are amendments to the *Income Tax Act* introduced in 2011 giving the Canada Revenue Agency the discretion to deny registration to, or revoke the registration of, a group where an "ineligible individual" holds a position where he or she directly or indirectly controls or manages the organization. An "ineligible individual" is someone having been found guilty of certain other offences or having taken part in certain other impugned conduct.

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The federal regulatory regime has, in the past, always relied heavily on the common law definition of charity, and past rules

regarding fundraising, business and political activity have largely been drafted seeking to mirror requirements governing common law charities (that is, charities not registered under the *Income Tax Act*). This approach allowed *Income Tax Act* charity regulation – at least in theory – to exist without coming into conflict with provincial oversight of charities. The "Ineligible Individual" rules, however, have no equivalent at common law. Thus, the federal government is asserting novel authority by purporting to disallow particular persons from serving as directors or senior managers of a registered charity.

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Because it featured a similar scenario – the federal government regulating an area where the provinces are seemingly constitutionally empowered to act, but where their interest in doing so has not always been manifest – the recent Supreme Court of Canada case of *Reference re Securities Act* appeared to potentially offer some guidance as to whether the federal government could become the charities' default regulator. That case, however, turned heavily on the extent of the federal government's authority under the Trade and Commerce powers. It found that legislation establishing a national regulator able to take over the role of provincial regulators overreached, given the nature of the industry and the interests of the provinces. It proposed a co-operative approach as a possible alternative.

That may be a hint of how the Supreme Court would deal with a charities' jurisdictional issue. But in the realm of charities regulation, federal taxing authority would likely loom much larger than use of the Trade and Commerce powers. Indeed, in the limited instances where there has been judicial commentary of jurisdictional issues – mostly by the Federal Court of Appeal in cases such as International Pentecostal Ministry Fellowship of Toronto v. Canada (National Revenue) – there are indications that the taxing authority is the operative consideration.

Whether that taxing authority can be used to justify federal regulatory involvement in governance decisions of registered charities, remains to be seen. And it is a question that perhaps ought to be answered sooner rather than later.

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Whatever Happened To . . . *Roncarelli v. Duplessis*

Peter Bowal

> [A]ction dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. – *Roncarelli v. Duplessis*, [1959] S.C.R. 121, per Rand J. at page 142.

Introduction

The rule of law is such a foundational principle of our legal system that it is enshrined in the Preamble to the *Canadian Charter of Rights and Freedoms*.[1] It is an abstract concept, not easily defined. It means that "we are governed by laws, not by people," that we are all equally subject to the law regardless of our wealth and political power.

Therefore, government action must not be arbitrary, but must be rooted in law. Every law has a purpose and it must be applied according to that purpose, and not to achieve extraneous objectives, such as punishing government and political opponents. Every public official may only act under authority of specific law.

The rule of law may be hard to define precisely but, like obscenity laws, it is easy to recognize a case that violates it. In Canada, the rule of law found its footing in 1959, in the case of *Roncarelli v. Duplessis*. It is interesting to note that this case happened a generation *before* the *Charter of Rights* and its Preamble.

Frank Roncarelli was a successful restaurateur in Montreal. His restaurant, Quaff, was in a busy section of the city and had been passed down to him by his father. The restaurant had received a liquor licence for every one of the last 34 years. Roncarelli was well-educated and enjoyed a very good reputation for running a popular high-end restaurant.

The government and the public became irritated by the Jehovah Witnesses attacking the Church, being issued tickets for doing so and returning to the streets to continue more of the same, thanks to Roncarelli.

He was also a Jehovah's Witness. Members of that religion were good at rattling the established Roman Catholic church in Quebec in the 1950s, the largest social influence in the province at the time. As Justice Rand describes, at page 131:

> The first impact of their proselytizing zeal upon the Roman Catholic church and community in Quebec, as might be expected, produced a violent reaction. Meetings were forcibly broken up, property damaged, individuals ordered out of communities, in one case out of the province, and generally, within the cities and towns, bitter controversy aroused. The work of the Witnesses was carried on both by word of mouth and by the distribution of printed matter, the latter including two periodicals known as *The Watch Tower* and *Awake*, sold at a small price.
>
> In 1945 the provincial authorities began to take steps to bring an end to what was considered insulting and offensive to the religious beliefs and feelings of the Roman Catholic population.

A city by-law was enacted requiring a licence "for peddling any kind of wares." The police rounded up and arrested close to one thousand young Jehovah Witness men and women who were offering their leaflets on the street corners. The fine was $40, a large sum at the time. The accused all pleaded "not guilty." When they asked to be released on bail Roncarelli stepped forward and pledged tens of thousands of dollars to help his fellow Jehovah Witnesses.

While the prosecutor planned to run a test case of this charge, the unlicenced distribution of the tracts on the streets continued and many Jehovah Witnesses were repeatedly charged with violating the by-law. The government and the public became irritated by the Jehovah Witnesses attacking the Church, being issued tickets for doing so and returning to the streets to continue more of the same, thanks to Roncarelli. Although Roncarelli was doing nothing illegal, the Duplessis government in Quebec saw him as helping his accused friends make a mockery of the justice system, and the public continued to blame Roncarelli. According to the Supreme Court of Canada, people in Quebec:

> … sought other means of crushing the propagandist invasion and among the circumstances looked into was the situation of [Roncarelli]. Admittedly an

> adherent, he was enabling these protagonists to be at large to carry on their campaign of publishing what they believed to be the Christian truth as revealed by the Bible; he was also the holder of a liquor licence, a "privilege" granted by the Province, the profits from which, as it was seen by the authorities, he was using to promote the disturbance of settled beliefs and arouse community disaffection generally. (p. 132)

Another Witness, Saumur, had been harassed by the police and arrested 103 times for distributing the literature before he challenged the legal basis for the arrests on the basis that the municipality lacked jurisdiction and that this was religious and political censorship.

The all important liquor licence at Roncarelli's restaurant was coming up for renewal by the Quebec Liquor Commission. The chief prosecutor in Montreal and the head of the Commission discussed it. Then the Commission head called Premier Duplessis to ask what to do about Roncarelli. The Premier agreed the matter was most serious but they should be certain this man who wanted the liquor licence renewal was the same person involved in the surety bails. A private investigator was hired to confirm his identity.

The next Jehovah Witness tract was another bombshell. Under the banner, "Quebec's Burning Hate", the Witnesses seared the province by condemning what they called the savage persecution of Christians.[2] Now the line had been crossed. The Premier, who was also the Attorney-General, ordered that all copies of this tract were to be seized and one Witness was charged with the obscure crime of seditious libel. Within the week, which also happened to be when Roncarelli applied for the renewal of his restaurant's liquor licence, the licence was denied and the Premier declared that no further liquor licence would ever be granted to him. This decision on December 4, 1946 was presumably to punish Roncarelli and to curtail his financial ability to support people charged with offences. It was a warning to others that they would similarly be stripped of provincial "privileges" if they persisted in supporting the Witnesses.

Charges Struck Down

The Jehovah Witnesses took their fight against Quebec police and political harassment to court. In 1951, the man accused of the crime of seditious libel was acquitted. The Supreme Court of Canada said mere criticism of the government is not a crime (*R. v. Boucher*).

The bylaw under which all the Jehovah's Witnesses were charged and arrested for distributing their leaflets to the public without the necessary permits was found to be unconstitutional seven years later (*Saumur v. The City of Quebec*). Another Witness, Saumur, had been harassed by the police and arrested 103 times for distributing the literature before he challenged the legal basis for the arrests on the basis that the municipality lacked jurisdiction and that this was religious and political censorship. In a 5 to 4 decision, the Supreme Court of Canada said the subject matter of the bylaw related to "speech" and "religion" which were both in the exclusive constitutional jurisdiction of the federal government. All three francophone judges found the law to be valid, which was a prelude to what Roncarelli would eventually face.

This decision led to the dismissal more than 1000 cases against Witnesses in the Province of Quebec. Ultimately all charges were dropped against those Witnesses whose attendance in court Roncarelli had vouched for.

Roncarelli Goes to Court

When the liquor licence was not renewed, Roncarelli's restaurant business declined and was sold within six months. He was not charged with any offence like the two other Jehovah Witnesses; he would have to start his own action to take on the Premier if he was to obtain any redress. There was no precedent for someone in Roncarelli's position and it would not be easy for a vilified man to extract compensation from a powerful Premier. He launched a lawsuit seeking $119,000 in damages.

Thirteen years passed before the Supreme Court of Canada issued its decision. After a five-day hearing in the Court, the two francophone judges (both sons of previous premiers of Quebec) were the strongest defenders of Duplessis and found no legal wrong in what he did. They had taken the same position in other cases of abuse of power by the Duplessis government. Six of the other judges ruled against Duplessis, saying that that there is no such thing as unlimited discretion or power in public authorities, including the Premier. Rand J. stated at pp. 140:

> [legislation does not confer] an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. … 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

Continuing at pp. 141- 142:

> The act of [Duplessis] through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward [Roncarelli]; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. …

In the end, Premier Duplessis was ordered to personally pay Frank Roncarelli a total of $46,132 for damages and court costs, only a small fraction of his actual loss. The moral victory was much sweeter. This case was likely the first one where a person had sued the premier of a province, and won.

Conclusion

In the end, Premier Duplessis was ordered to personally pay Frank Roncarelli a total of $46,132 for damages and court costs, only a small fraction of his actual loss. The moral victory was much sweeter. This case was likely the first one where a person had sued the premier of a province, and won.

The language used by the judges suggested that even they were troubled by the tactics of the Jehovah Witnesses who had fomented so much civil unrest. Quebec society and its provincial government clearly were at war with the Witnesses. The law, however, is blind to popularity. What is constitutionally monumental is the objective judicial conclusion that the Premier did *not* have untrammelled powers to punish the most unpopular people. He would have to follow the law.

The law, however, is blind to popularity. What is constitutionally monumental is the objective judicial conclusion that the Premier did *not* have untrammelled powers to punish the most unpopular people.

Roncarelli v. Duplessis remains today a landmark constitutional decision. More accurately, it is the trilogy of Supreme Court of Canada decisions (*Boucher, Saumur* and *Roncarelli*) from 1951 to 1959 that collectively stand tall as the inspiring pre-*Charter of Rights* fortress for the rule of law in Canada.

After losing his restaurant, Roncarelli found work in highway construction and moved to the United States. He died within a few years of the decision that vindicated him.

Notes

1. The Preamble reads: "Whereas *Canada is founded upon principles that recognize* the supremacy of God and *the rule of law*" (emphasis added)
2. The Jehovah Witnesses were widely despised in Quebec society. Even 13 years later, Supreme Court justices would refer to the Jehovah Witnesses as a "militant religious sect."

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