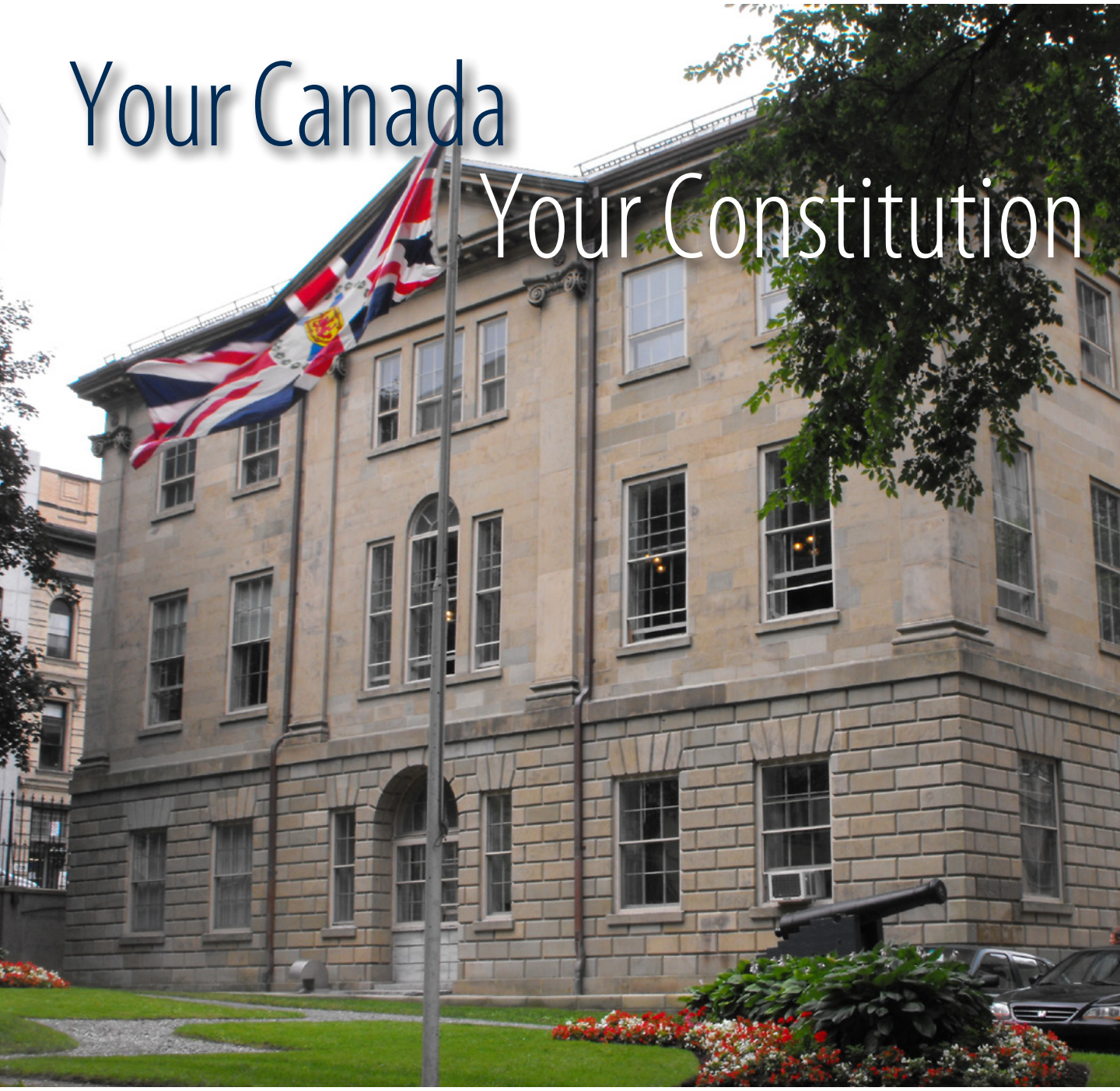


# LAW NOW

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Do Constitutions matter? Indeed they do. Just ask the Egyptian people protesting, confronting, and even dying over the drafting of their new constitution.

Cover image: Province\_House\_(Nova\_Scotia).jpg  
[http://en.wikipedia.org/wiki/Province\\_House\\_%28Nova\\_Scotia%29](http://en.wikipedia.org/wiki/Province_House_%28Nova_Scotia%29)

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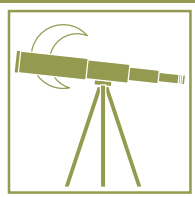
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# Let's hear more indigenous success stories

*Brian Calliou*

**A**sk your average Canadian their impression of this country's indigenous people and their hopes for prosperity, stability and success in their communities. In all likelihood, you will hear about a story they read recently involving an aboriginal community's struggle with housing, education, youth motivation or even suicide.

What you probably won't hear is an answer that demonstrates even a basic knowledge of Canada's indigenous people's involvement in the economic growth of this country; the initiatives they have under way for preparing the large numbers of indigenous youth poised to enter Canada's work force; or even the names of two or three aboriginal organizations achieving remarkable success with their enterprises.

Here at the Banff Centre, we have spent the past two years in an intensive investigation of what makes an aboriginal community successful. "What are the wise practices that lead to success?" we asked as we set out with a team of applied researchers, shadowed by a video crew and a group of highly engaged and eager aboriginal youth, to visit enterprises operated by four indigenous communities in Alberta. The resulting case studies, details of which are now available to all interested in learning from them, were developed from research and conversations with the Miisew Group of Companies, Métis Crossing, the Alberta Indian Investment Corp.; (AIIC) and Blackfoot Crossing Historical Park.

Rocky Sinclair, a principal with the AIIC, headquartered just outside Edmonton, was one of the representatives from the research communities presenting at an international symposium at the [Banff Centre](#) last month.



Mr. Sinclair shared the AIIC's struggles and triumphs since its formation in 1987, as well as its numerical and personal markers of success. This "developmental" lender has provided more than 800 loans worth \$53 million to aboriginal start-up businesses. Even more powerful: "We're seeing generational success – we're lending to the kids of people we loaned to 20 years ago," he said.

The success stories depicted in these studies – along with the energetic and thoughtful dialogue of the symposium speakers and delegates from Canada, the United States, Australia and New Zealand – form a collective wisdom that we believe can and will help other indigenous leaders in shaping their communities' futures.

The topic of youth and their involvement in the future success of aboriginal communities in Canada was never far from the top of the agenda at the symposium, with many speakers making note of the astounding potential for aboriginal youth to shape their communities and the country's economic future. Canada cannot ignore the fact that more than 600,000 aboriginal youth will have entered the labour market between 2001 and 2026.

Roberta Jamieson, president and CEO of Indspire (formerly the National Aboriginal Achievement Foundation), spoke about the creation and support of a positive future for aboriginal youth throughout her keynote speech at the symposium.

"Canada cannot afford to squander the opportunity," she said, adding that it will take more than political will to advance the prospects of aboriginal youth. "This is not a game to watch from the sidelines ... If it's going to impact Indian people, Indian people have to lead it."

Another case study involves the Mikisew Group of Companies based in Fort Chipewyan, Alberta, owned by the Mikisew First Nation. This highly diversified enterprise – with a hand in everything from sport fishing to energy services and transportation – not only seeks opportunities within the booming oil sands, but also trains and supports Fort Chipewyan youth as they seek careers that will keep them close to home and contributing to their community.

Applied research into the wise practices of Canada's indigenous people is a long-term goal for us at the Banff Centre. Our recent symposium demonstrated many examples of the positive, successful, extremely resilient and determined enterprises that exist today. It is our hope that these positive examples – and the wise practices we have begun to share – will not only inspire and educate our young indigenous population, but move them to believe they too can achieve great things.

Here at the Banff Centre, we have spent the past two years in an intensive investigation of what makes an aboriginal community successful. "What are the wise practices that lead to success?"

Brian Calliou is Director of Indigenous Leadership and Management at the Banff Centre in Banff, Alberta. This article was first published in the *Globe and Mail* on October 15, 2012 and is reprinted with the author's permission.



## 1. Special Needs; Special Education

The Supreme Court of Canada has ruled that a British Columbia school district discriminated against a dyslectic student when it did not provide the remedial help he needed at his public school. The child ended up in private school, at great expense to his parents. The B.C. Human Rights Tribunal found that the boy had been denied “a service customarily available to the public”, ordered systemic remedies to be undertaken by the school district and the province, and ordered that the parents be reimbursed their tuition expenses. The Tribunal’s decision was set aside and the B.C. Court of Appeal dismissed the parents’ appeal. The Supreme Court of Canada reinstated the Tribunal’s decision. The Court wrote: “There is no dispute that J.’s dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his disability. The question then is whether J. has, without reasonable justification, been denied meaningful access to the general education available to all children in British Columbia based on his disability.” The Court concluded that he had. It ruled that the district did not provide the intensive remediation needed to give him access to the education to which he was entitled. Private school became the only alternative. The Court rejected the District’s argument that it faced a budget crisis. It found that the District had other budgetary options, that cuts were made disproportionately to special needs programs, and that it undertook no assessment of what alternatives could be reasonably available to accommodate special needs students.

Moore v. British Columbia (Education) 2012 SCC 61 (CanLII)

## 2. Two Spouses; One Deceased

Ronald Carrigan had a legal spouse, whom he married in 1973, and a common law spouse, whom he began living with in 2000. He died in 2008. Both spouses claimed the death benefit under his pension. One provision of the Ontario *Pension Benefits Act* states that the person who is his or her spouse on the date of death is entitled to the deceased’s death benefit, but another section says it does not apply to spouses living apart at death. The trial judge ruled that this meant that the legal wife could not receive the pension benefit and it should go to the common law wife. A majority on the Ontario Court of Appeal decided in favour of the legal wife. Justice Juriansz wrote that the section of the Act stipulating that the spouses could not live apart at the time of death could only mean a legal spouse, since “it makes no sense to conceive of a common law spouse living separate and apart” from the pension holder. He reasoned that the “living separate and apart” requirement cancelled out the provision about entitlement. He then turned to another section of the Act dealing with designated beneficiaries. He ruled that the legal spouse and the deceased’s two daughters were entitled to the death benefit because they were the designated beneficiaries of the deceased’s pension plan.

Carrigan v. Carrigan Estate 2012 ONCA 736 (CanLII)

### 3. Trial Judge Plagiarism

Two judges, one in British Columbia and one in Alberta have been found to have copied large amounts of material filed by the parties arguing cases before them into their judgments. Justice Lee of the Alberta Court of Queen's Bench was criticized by the Alberta Court of Appeal for issuing two sets of reasons in two separate chambers applications involving the same parties. In one he copied 72 paragraphs and in the other he copied 79 paragraphs. The Alberta Court of Appeal ruled that the parties would have to re-argue their applications. The Court found that Justice Lee's reasons were inadequate because there was no meaningful discussion of conflicting evidence, no analysis of competing arguments, his line of reasoning was completely obscured and there was no clear indication of how he reached his conclusions. The Court observed, tartly, that "it is clear that judges...are not mere scribes, collators of evidence, collage artists, or way stations on the road to justice."

The British Columbia case has recently been heard by the Supreme Court of Canada. That case involved a severely brain-damaged infant, whose parents were awarded \$4million in damages by trial Judge Joel Groves. However, the British Columbia Court of Appeal overturned the judgment when it found that Justice Groves had copied 321 out of 368 paragraphs from written submissions by one of the applicants. The Appeals Court wrote "None of the parties to this litigation was fairly treated by the failure of the trial judge to properly grapple with this case." The plaintiffs appealed to the Supreme Court of Canada, which has not yet released its decision.

University of Alberta v. Chang 2012 ABCA 324

Cojocaru (Guardian ad litem) v. British Columbia Women's Hospital and Health Centre, 2011 BCCA 192 (CanLII)

### 4. Sperm Donor Dads Remain Anonymous

A British Columbia woman who wants to know the identity of her sperm donor father has been turned down by the British Columbia Court of Appeal. She challenged the provincial *Adoption Act*, arguing that her *Charter* right to equality under the law was breached because adopted children could access information about their biological parents but sperm donor children could not. However, the British Columbia Court of Appeal unanimously turned down her challenge, writing: "However desirable it may be that persons have access to information about their biological origins, Ms. Pratten has not established that such access has been recognized as so 'fundamental' that it is entitled to independent constitutionally protected status under the Charter."

The Court noted that adoptees have their legal status changed when they are adopted, but no such legal change occurs with sperm donor children. Ms. Pratten intends to appeal to the Supreme Court of Canada.

Pratten v. British Columbia (Attorney General) 2012 BCCA 480



The Fathers of Confederation, as shown in Robert Harris's famous painting.

# Evolution, Not Revolution:

## Canada's Constitutional History and the *Constitution Act, 1867*

You say you want a revolution,  
Well, you know  
We all want to change the world  
You tell me that it's evolution  
Well, you know  
We all want to change the world...  
You say you'll change the constitution  
Well, you know  
We all want to change your head

*Barbara Billingsley*

From "Revolution" by John Lennon and Paul McCartney



Although they are not famous for their knowledge of constitutional law or history, John Lennon and Paul McCartney got it right when they linked the idea of constitutional change to the processes of revolution and evolution. Inevitably, the content and character of a nation's constitution is largely determined by the circumstances in which that nation is created. A constitution drafted along with a country's gradual evolution toward independence will have a very different emphasis than a constitution drafted on the heels of a political revolution. The point of this article is to briefly explain how Canada's constitution, and especially the *Constitution Act, 1867*,<sup>1</sup> reflect the fact that our country became an independent nation through a process of evolution rather than revolution.

### What Does a Constitution Do?

In order to understand how Canada's constitution reflects our development as a nation, it is first necessary to understand the role that a constitution plays in modern society. Over the course of world history, many societies have been ruled by people who took power by force or by birthright. In these societies, laws governing the conduct of the general population were created more or less at the whim of the ruler.<sup>2</sup> With the rise of democracy, however, came the idea that laws should reflect the public interest rather than the particular interests or idiosyncrasies of the lawmakers. In other words, in order to be legitimate in a democracy, laws must be: (1) predictable; (2) enforceable against everyone (including the people making the laws); and (3) created in accordance with defined systems which appropriately limit the power of law-makers. The notion that laws should fulfill these requirements is known as the rule of law or constitutionalism.

A constitution, then, is a set of rules, written or unwritten, by which a society agrees to govern itself. Unlike most ordinary laws, however, the purpose of a constitution is not to set out detailed rules for controlling or regulating the conduct of individuals. Instead, a constitution sets up the mechanisms for making laws: these mechanisms both authorize and limit the power of the state, or government, to create ordinary laws. Because it creates the systems of government, which are in turn used to create and enforce ordinary laws, a constitution is often called the "supreme law" of a country.<sup>3</sup>

A constitution drafted along with a country's gradual evolution toward independence will have a very different emphasis than a constitution drafted on the heels of a political revolution.

### Canada's Constitutional History and the *Constitution Act, 1867*<sup>4</sup>

In its earliest days, Canada did not have a written constitution. The territory now considered Canada was populated by colonists from France and the United Kingdom and the colonists were governed by the laws of their home countries. As the territory of Canada became more populated and the United Kingdom assumed authority over both French and English colonists, however, it became

apparent that some system of local law-making was required to take account of the unique, regional needs of the colonies. From the mid-1700s to the mid-1800s several laws were passed by the United Kingdom in order to establish mechanisms for governance in the colonies. These documents were steps along the way to the United Kingdom's enactment of the *British North America Act, 1867*, known today as the *Constitution Act, 1867*. This statute united the colonies into a single Dominion of Canada and set up a system of local law-making.

The decision to unite the colonies was not done with the intention or purpose of having Canada break away from the United Kingdom. Unlike the United States, Canada was not born of revolution. Instead, the union of colonies was formed for primarily pragmatic reasons, such as fostering economic and trade relations between the colonies and strengthening military defences against a possible invasion from the United States. Whereas the constitution of the United States was drafted by 'the people' following a successful war against the United Kingdom, Canada's initial constitution was drafted by statesmen loyal to the British Empire. So, while the *Constitution Act, 1867* created mechanisms for local governance within the territory of Canada, it was drafted with the intention and understanding that Canada would continue to be subject to the authority of the United Kingdom.

Several features of the *Constitution Act, 1867* reflect the colonies' intentions to remain subject to British rule. Most obviously, the *Constitution Act, 1867* did not include any mechanism for amendment. This means that the constitution of Canada could only be changed by the United Kingdom – a clear indication of the intention that the United Kingdom would hold ultimate legal power over Canada. Further, laws of the United Kingdom continued to apply in Canada despite the fact that the *Constitution Act, 1867* created law-making bodies within Canada. It was also an unwritten assumption of the *Constitution Act, 1867* that many of the principles of government employed in the United Kingdom would be applied in Canada even if they were not specifically mentioned in the constitution. (For example, it was assumed that Canada would apply the British Parliamentary tradition of having the monarch or his/her representative ask the leader of the political party winning the most seats in a general election to form a government. Likewise, as in the United Kingdom, it was understood that the leader of the governing party [at the federal level] would be called the Prime Minister. Even today, such traditions form part of Canada's 'unwritten' constitution). In addition, while the *Constitution Act, 1867* provided for the creation of a Canadian court system, court cases from Canada could be appealed to the United Kingdom.

In short, the Dominion of Canada, as created by the *Constitution Act, 1867*, was not an independent nation. Instead, the *Constitution Act, 1867* represents only a step (although admittedly a significant one) in Canada's evolution towards independence. It was not until much later that laws

In short, the Dominion of Canada, as created by the *Constitution Act, 1867*, was not an independent nation. Instead, the *Constitution Act, 1867* represents only a step (although admittedly a significant one) in Canada's evolution towards independence.

were passed in the United Kingdom to provide more autonomy for Canada. For example, it was not until 1931 that United Kingdom laws ceased to automatically apply in Canada<sup>5</sup> and not until 1949 that the Supreme Court of Canada became the highest appeal court for Canadian court cases.<sup>6</sup> Ultimately, from a constitutional point of view, Canada did not become a fully independent nation until the passage of the *Constitution Act, 1982*,<sup>7</sup> which includes a constitutional amending formula empowering Canadian law-makers to change the written constitution without the approval of the United Kingdom.

The system of local law-making established by the *Constitution Act, 1867* is a federal system. This means that law-making power is divided between a central or federal parliament and regional or provincial legislatures. Once again, the decision to adopt a federal law-making system in Canada is a result of Canada's historical evolution. In large part, the decision to make Canada a federation resulted from a recognized need to accommodate the religious, linguistic and cultural interests of French-speaking Catholics in a country predominantly populated by English-speaking Protestants. Previous attempts by the United Kingdom to assimilate the French colonists had been unsuccessful and had contributed to political unrest. The constitutional solution crafted to address these problems was to create a law-making system in which the federal parliament would have authority to pass laws in relation to matters affecting the whole dominion while the provincial legislatures would have power to pass laws in relation to matters of more local, or

Ultimately, from a constitutional point of view, Canada did not become a fully independent nation until the passage of the *Constitution Act, 1982*, which includes a constitutional amending formula empowering Canadian law-makers to change the written constitution without the approval of the United Kingdom.



Government House for the Charlottetown Conference - Photo by George P. Roberts on September 11, 1864.

regional, concern. In particular, the provincial authority extended to matters such as education and civil rights, which were seen as being particularly relevant to the preservation of local language, cultural and religious practices.

Finally, because the Dominion of Canada was not created on the heels of a revolution, the drafters of the constitution were not particularly concerned about the state oppression of individual rights or freedoms. As a result, unlike the constitution of the United States, the *Constitution Act, 1867* did not include any express protections for human rights. Again, this was not changed until the adoption of the *Constitution Act, 1982*, which includes the *Canadian Charter of Rights and Freedoms*.

By setting out the rules by which a society agrees to be governed, a constitution reflects the values of that society. The *Constitution Act, 1867* provides a picture of the values of Canadians at the moment when Canada first became a nation.

## Conclusion

By setting out the rules by which a society agrees to be governed, a constitution reflects the values of that society. The *Constitution Act, 1867* provides a picture of the values of Canadians at the moment when Canada first became a nation. Because of the history of the colonies which united to form the Dominion of Canada, two of the primary values reflected in the *Constitution Act, 1867* are loyalty to the United Kingdom and respect for minority language and religion. These values have shifted over time, giving rise to the constitutional changes made by later documents, including most significantly the *Constitution Act, 1982*.

## Notes

- 1 <http://lois.justice.gc.ca/eng/Const/page-1.html>
- 2 (Think of Yule Brenner's performance as Ramses II in *The Ten Commandments* and his character's authoritative declarations of law: "So it is written, so it shall be done." <http://www.youtube.com/watch?v=3bQnxlHZsjY>)
- 3 In fact, s. 52(1) Canada's *Constitution Act, 1982* expressly states that "The Constitution of Canada is the supreme law of Canada ..." See: <http://lois.justice.gc.ca/eng/Const/page-16.html#h-58>
- 4 This is a very brief discussion of Canada's constitutional history. For a more detailed explanation, see P.H. Russell, *Constitutional Odyssey* (3rd Edition), University of Toronto Press, 2004.
- 5 This was achieved by the *Statute of Westminster*. See: <http://canada.justice.gc.ca/eng/pi/const/lawreg-loireg/p1t171.html>
- 6 This was achieved by the combined effect of the Statute of Westminster and an amendment to Canada's *Supreme Court Act*. For further explanation, see: <http://www.jstor.org/stable/1335884>.
- 7 <http://lois.justice.gc.ca/eng/Const/page-15.html#h-38>

Barbara Billingsley is a Professor of Law at the University of Alberta in Edmonton, Alberta.





# O Patria: The Patriation Struggles

*Rob Normey*

Should a government fail to respect natural rights, wrote Locke and Rousseau, then disobedience and rebellion were justified. Thus was born the modern notion of human rights. So responsive was this notion that the greatest social revolutions in the history of the western world took place – one in America and the other in France – in order to preserve for individuals the rights which they claimed belonged to them.

– Pierre Elliot Trudeau, Minister of Justice,  
from *A Canadian Charter of Human Rights*, Canadian Government, 1968

## Introduction

On April 17, 1982, Canada reached a milestone, the most significant in our constitutional and legal history since Confederation itself. The date marked the coming into force of a hard-won agreement between the federal government and all provinces save Quebec. This high degree of consensus was a truly remarkable achievement which enabled our long-suffering nation (on the constitutional front) to at long last patriate our Constitution and, at the same time, enshrine protection of fundamental rights and freedoms. Canada has given the world a new word – patriation – to describe the process of reaching an agreement between governments on how to assert control over our own constitution and finally end the pivotal role played by the British Parliament.

Political and legal drama of a kind rarely experienced in Canadian history, beginning in 1980, led to the breakthrough agreement in November of 1981, composed primarily of the following elements:

- a *Charter of Rights and Freedoms*;
- protection of Aboriginal and treaty rights;
- protection of language rights;
- a formula for amending the Constitution in the future; and
- protection of provincial natural resources.

As a lawyer who has practiced for many years and is a student of our history, I can say without hesitation that the creation of the *Constitution Act, 1982* marked genuine progress in our legal and political systems and can be compared with any of the other major developments in the postwar era. As a young barrister appearing before our courts before the *Charter of Rights* came into force, I can attest to the numerous ways that the introduction of protection of basic rights for citizens has improved our system of justice. In the field of criminal law, for instance, rights such as the right to counsel or to proper advance disclosure of the Crown's case against an accused now receive protection, leading to fairer trials and more just results. The number of wrongful convictions has surely been reduced since the introduction of the *Charter*.

Currently I review and analyze proposed and existing laws and regulations in relation to the *Charter* and to s.35, the aboriginal and treaty rights clause and can readily perceive the ways in which our new Constitution encourages governments and officials to legislate and to act in ways that are fairer and less likely to discriminate. So, in this article I wish to salute the creation of the *Constitution Act, 1982* as part of the celebrations marking the 30<sup>th</sup> anniversary of its existence. I was proud and excited to attend a celebration at the University of Alberta in which participants in some of the first *Charter* cases from Alberta to appear before the Supreme Court of Canada relived the heady days of early litigation in the new era. *Charter* and Aboriginal litigation then, as now, allows Canadians to observe the interplay of competing rights and interests as we seek to realize our fundamental values in real-life contexts. The *Charter* dialogue spoken about in law review articles is not limited to a dialogue between the courts and the legislatures, but exists in similar and distinct ways between lawyers and judges and between citizens as well as organizations.

I also attended a remarkable conference in late 2011 put on by the Centre for Constitutional Studies, University of Alberta, which took place in the Fairmont Hotel Macdonald. We met in rooms that were minutes away from one of the rare copies of the portrait of the Fathers of Confederation, painted shortly after a much earlier momentous agreement was forged. The event was the Patriation Negotiations Conference and featured presentations by

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many of the key participants in the 1980-81 process who are still living. One wonders if they will ever be assembled together again. I must say that in light of these welcome opportunities to celebrate patriation, and particularly the *Charter of Rights* and the Aboriginal rights provisions, it is disappointing that the federal government apparently chose not to celebrate the occasion with an event of its own in 2012.

The *British North America Act, 1867*, which came into force at Confederation, was a British statute and confirmed Canada's attachment to the Mother Country even while becoming a mostly independent nation.

### The Background – Early Attempts to Find a Suitable Amending Formula and Bring our Constitution Home

The *British North America Act, 1867*, which came into force at Confederation, was a British statute and confirmed Canada's attachment to the Mother Country even while becoming a mostly independent nation. The Preamble to the Act, (now called the *Constitution Act, 1867*) speaks not only of the four former colonies wishing to be united into one Dominion, and specifies that our Constitution will be similar in principle to that of the United Kingdom. However, it failed to specify amendment procedures. It also did not specify fundamental rights and freedoms to be protected from actions taken by the exercise of their powers by the federal or provincial governments.

In a federal system, there are two levels of government, each with distinct powers set out in the Constitution. However, the language employed in the *British North America Act* did not supply an undisputed answer to the question of which government exercised power over a given subject matter. The *BNA Act* quickly became a hotly contested ground of contention between the federal and provincial governments. As the decades wore on, the struggle between governments over the division of powers also eventually extended to competing positions on what would be required for the federal government to make a proper request to the British Parliament, the ultimate custodian of the Act. It remained the only entity that could enact legislation to alter the Constitution. Even before serious disputes arose, it was apparent that there were several reasons why Canada should bring its Constitution home and assert full control over it. It was clear that the federal and provincial governments, prone to squabbling in all manner of constitutional matters, would have to reach agreement on the formula for making future amendments to the Constitution itself.

The patriation process of 1980-81 was the latest in a long line of seemingly endless federal-provincial conferences aimed at breaking the constitutional gridlock. Given the lack of rules on how to amend our existing constitution, it was unclear whether the government under Prime Minister Pierre Trudeau would be able to act unilaterally to patriate the constitution, or whether it would need the consent of the majority of the provinces, or perhaps even all of the provinces. This high degree of uncertainty acted as a wild card as negotiations unfolded.

The national government seems to have first perceived the need to resolve the constitutional issue in the years following the First World War. Canada's immense contribution to the effort led to an awareness that Canadians and their political representatives deserved a constitution in the

control of the country itself. The sacrifice of Canadians at Vimy, Pasaschendale and elsewhere led to calls that Canada become a fully sovereign nation. However, while other nations within the Empire like South Africa, New Zealand and Australia accomplished the goal of securing control over their own constitutions in 1926, Mackenzie King's government had to report back to Britain, while eating a fair degree of humble pie, that Canada could not agree on a formula for amending its own Constitution. The Mother Country would rather embarrassingly remain the custodian of our supreme law. This continued at numerous federal-provincial conferences for decades. Even when a basic agreement, called the *Victoria Charter*, was reached in 1971, Quebec exercised a veto power and refused to ratify it. Frustrated Prime Minister Lester Pearson and his Minister of Justice, Pierre Trudeau, were forced to let the matter languish in uncertainty.

If the issue of bringing home our Constitution had been limited to finding a satisfactory compromise on future amendments, the lack of excitement coupled with the high probability of failure would have convinced most Prime Ministers and the majority of the population to let that particular sleeping dog lie, at least until a new dynamic could be created. Indeed, although few in the 1970s would have dreamed it possible, the determined zeal of Prime Minister Trudeau and his federal



Pierre Elliott Trudeau

team in the aftermath of the Quebec Referendum of 1980 created the momentum that finally proved to be the successful ice breaker.

To understand the passion that drove the Prime Minister over the 1980-81 period, we must understand that he and a number of other scholars and human rights advocates had begun in the postwar period to link achieving sovereignty through patriation with the need for a charter of rights to place freedoms and rights on a solid foundation. Frank Scott wrote eloquently of this dream, which came to embody an important aspect of the progressive vision in Canadian politics. Scott acted as an indispensable intellectual guide to Pierre Trudeau at McGill University in Montreal in the 1950s and beyond. Indeed, it was almost certain that an important *raison d'être* for Pierre

Trudeau's move away from academia to the hurly burly world of politics was his drive to implement constitutional reform and entrench protection of fundamental rights in the Constitution. Accordingly, he came to Ottawa along with his friends Gerard

If the issue of bringing home our Constitution had been limited to finding a satisfactory compromise on future amendments, the lack of excitement coupled with the high probability of failure would have convinced most Prime Ministers and the majority of the population to let that particular sleeping dog lie . . .

Tommy Douglas, the long-time CCF Premier of Saskatchewan, had recommended at federal-provincial conferences in the 1950s that Canada move to give full constitutional protection for rights.





Tommy Douglas

Pelletier and Jean Marchand (dubbed the “Three Wise Men”) as fresh and powerful voices. Trudeau became Minister of Justice and advocated for a charter of rights almost immediately, building on the work of a few progressive politicians across Canada. One, Tommy Douglas, the long-time CCF Premier of Saskatchewan, had recommended at federal-provincial conferences in the 1950s that Canada

move to give full constitutional protection for rights. He offered the prescient advice that with such an approach, federal and provincial leaders would have greater political capital to tackle the difficult task of agreeing on an amending formula.

Progressive Conservative leader John Diefenbaker became another strong advocate for rights protection in the 1950s. Having witnessed the jaw-dropping violations of fundamental rights in the aftermath of the Gouzenko espionage affair, his concerns culminated with the *Canadian Bill of Rights*, enacted during his term as Prime Minister. It offered quite limited protection in comparison with constitutional protection but, in retrospect, can be viewed as a stepping stone to the creation of the *Canadian Charter of Rights and Freedoms*.

The stage was thus set for Prime Minister Trudeau to seize the initiative and develop a “People’s Package” which would include a charter of rights and minority linguistic rights. When various provincial premiers developed a defensive alliance, dubbed “The Gang of Eight,” he resolved to push forward with a referendum on his proposed constitutional package, which would hold out the electrifying possibility of politicians pitching their competing visions of our fundamental values and laws to the entire country.



Jean Chrétien

To understand the many political and legal actors who participated in the high-stakes constitutional negotiations, I recommend Ron Grahams’ fine 2011 account of the final patriation round, *The Last Act: Pierre Trudeau, The Gang of Eight and the Fight For Canada*. Graham draws on extensive interviews with key participants and archival research to help readers better understand this momentous event. He provides insight into the manner in which Jean Chrétien, federal Minister of Justice and the Prime Minister’s lieutenant on the constitutional team, translated his affable style in closed door meetings with his provincial counterparts to develop a measure of trust and cooperation. The tough-talking but

The tough-talking but unpretentious Chrétien described his efforts during this period as those of a fullback on the federal team. Trudeau, as quarterback, handed the ball to him time and again to issue strong statements, but also to sound out his counterparts on their requirements for the making of a deal.

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## Supreme Court of Canada Decision on Patriation

Given provincial resistance to the bold federal plan, various provinces initiated references to their Courts of Appeal to determine if Ottawa could proceed unilaterally in the absence of agreement. The federal government countered with its own reference to the Supreme Court of Canada. It ruled in 1981 that, while Parliament had the legal authority to request that Britain amend the *BNA Act* and hand future control over to Canada, it was an unwritten convention that the federal government should seek a “substantial degree” of provincial consent before doing so. Both sides – Mr. Chrétien for the federal forces and various representatives for the holdout provinces – claimed victory. But once the dust cleared, two key consequences emerged. First, Prime Minister Trudeau agreed that in light of the judgment his government would make one final attempt to resolve the matter through negotiations. Second, it was now clear that convention did not require unanimous consent for provinces – a province like Quebec no longer could claim that it held a veto power. The Court’s judgment assisted with the realization on both sides that an attempt at a negotiated settlement was preferable to hard-line positions.

A highly dramatic three days of meetings on patriation took place in November, 1981 at, ironically enough, Union Station, the converted railway station used as a conference centre in Ottawa.

## Negotiation of a Deal for the Nation

A highly dramatic three days of meetings on patriation took place in November, 1981 at, ironically enough, Union Station, the converted railway station used as a conference centre in Ottawa. The first two days of meetings provided no breakthrough and many participants thought



Roy Romanow

the final day would end in failure. The evening of November 5, 1981 began the process of reaching an accommodation of key provincial requirements with the creation of the “Kitchen Accord”, which is now part of constitutional lore. Chrétien and his good friends, the Attorney General of Saskatchewan, Roy Romanow, and the Attorney General of Ontario, Roy McMurtry, provided the framework of a deal by beginning with a careful summary of the main elements of the federal plan and establishing points where compromise might be possible. Of course, there remained a critical role for individual premiers and federal negotiators to play in forging an actual agreement but the Kitchen Accord was the spark that lit the flame. The agreement that was reached early the following day was signed on to by the



Roy McMurtry

federal government and nine provinces. Rene Levesque's negotiating team was presented with the deal as a virtual *fait accompli* that morning, having gone to bed the previous evening believing the conference was doomed to failure. It was discourteous to have left the Quebec contingent on the sidelines while a deal was being forged, but the others were well aware of the position staked out by Quebec and probably felt that it was unlikely it would see the new development in a positive light. Certainly, the perception that Quebec was intentionally left out at such a critical juncture has led to bitterness and unwillingness to embrace the patriated Constitution. The night has been commemorated in Quebec historical lore as "the Night of the Long Knives."

In any event, with movement on a few key points, the other participants reached an agreement. Perhaps the greatest concession was made by the federal side, in accepting the insertion of a notwithstanding clause in the *Charter of Rights*. (When utilized, this clause means that laws may operate without being subject to the *Charter*.) Although a purist who favours rights might blanch at the existence of the clause, which was limited to a five-year term, in reality it has rarely been used. The exception was the province of Quebec. After the initial five-year period, however, Quebec ceased to use that clause and enacted legislation in a manner fully subject to the national *Charter of Rights*.

Other changes were made to accommodate the two sides and what resulted was a constitution which I believe many Canadians properly look upon as a major advancement in our political and legal systems. With the coming into force of the *Constitution Act, 1982* we became a mature liberal democracy with much greater rights protection for vulnerable minorities and all citizens. The November deal was improved in a number of ways by citizen participation both before and after. For instance, the aboriginal rights protection advocated by the federal government had not been acceptable to many provinces at the patriation conference. Nonetheless, pressure from aboriginal organizations and their supporters led to its reinstatement and so, s. 35 now recognizes and affirms existing aboriginal and treaty rights. The *Constitution Act* has indeed proved to be a genuine "people's package" and has become a model for other nations in their quest for constitutional reform. The *Charter of Rights* has continuously garnered high levels of support from Canadians. A sophisticated and relatively balanced body of jurisprudence has developed over the various parts of the new Constitution which surely refutes the more alarmist criticisms that were raised in 1981. We can all claim to have a vested interest in "our constitution."

Rob Normey is a lawyer who has practised in Edmonton for many years and is a long-standing member of several human rights organizations.



## The *Canadian Charter of Rights and Freedoms*: An Integral Part of our Constitution

*Linda McKay-Panos*

*T*his year marks the 30<sup>th</sup> anniversary of the *Canadian Charter of Rights and Freedoms*. The *Charter* has had a significant impact on our governments and courts and it is a part of our Constitution. How does the *Canadian Charter of Rights and Freedoms (Charter)*, the *Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, relate to our current Constitution, the *Constitution Act*, 1867, 30 & 31 Victoria c 3 (UK)?

A brief review of some events in the days leading up to the *Charter* follows. In January 1968, a federal-provincial first ministers' conference was presented with a document penned by Pierre Elliott Trudeau, "A Canadian Charter of Human Rights" (P. Macklem and J. Bakan et al,



*Canadian Constitutional Law 4<sup>th</sup> ed* Toronto: Emond Montgomery Publications Limited, 2010 at page 719 (“Macklem and Bakan”)). This document traced the historical evolution of human rights around the world, and the history of rights recognition in Canada. For example, before Canada passed the *Charter*, we had the *Constitution Act 1867*, common law principles that recognized rights, and a *Canadian Bill of Rights*, 1960.

The existing *Constitution Act, 1867* addressed the division of law-making powers between the federal parliament and the provincial legislatures. Civil liberties and human rights in Canada were addressed by common law cases and by the *Bill of Rights*. The *Bill of Rights (Bill)*, though, had its limitations. It was focused only on federal legislation and could be amended by Parliament the same way any law passed by Parliament could be amended.

During the late 1960s and 1970s, Pierre Trudeau and others sought to repatriate our Constitution and add a charter of rights. Since this would affect the notion of Parliamentary supremacy, it was difficult to obtain consensus from the provinces. In June 1978, the federal government introduced Bill C-60 (the *Constitutional Amendment Bill*), which set out the government’s proposed constitutional changes, and included the government’s intention of giving Canada a new constitution before 1981 (Macklem and Bakan, page 729).

In 1982, Canada experienced a “constitutional renovation” (Macklem and Bakan, page 719). In addition to repatriating Canada’s Constitution, we adopted the *Charter*. Some viewed and currently view this adoption as very positive; others are not so sure. Some of the resistance to the *Charter* was based on our British heritage. At the time, Britain did not have a written constitution, let alone a document like the *Charter*. Their government was based on the notion of parliamentary supremacy.

The course of debate and compromise that took place in the years leading up to the repatriation of the Constitution and the passing of the *Charter* are the subject of an article by Rob Normey in this issue. The impact, though, of these events is significant. First, while the majority of Supreme Court of Canada constitutional cases leading up to 1982 dealt with division of powers issues (federalism), currently there are more *Charter* cases. Division of powers cases still have an important place, but the *Charter* has a very significant place in our case law.

One momentous development is that the *Charter*, like the rest of the Constitution, is the supreme law of Canada. In fact, the *Constitution Act* section 52(1) provides that any law that is inconsistent with the provisions of the Constitution is of no force or effect. In addition, the Constitution and *Charter* are entrenched. This means that it is difficult but not impossible to amend. Canadians can be confident that their rights will not be easily removed or changed. Before 1982, the Constitution had no amending formula; changes had to be enacted through acts of the United Kingdom’s Parliament, upon request by our federal government on behalf of the House of Commons and Senate. Under the repatriated Constitution and *Charter*, most amendments can be passed only if the House of Commons, the Senate and a two-thirds majority of the provincial legislatures

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representing at least 50% of Canada's population adopt identical resolutions. In this way, Canadians have a direct say in the content of our Constitution and *Charter*. As a result of the entrenchment, people with minority interests can obtain remedies from the courts when perhaps legislators would be more responsive to majority interests (Macklem and Bakan, page 737).

The provisions of the *Charter* codify provisions that ensure legal safeguards for accused persons and accountability for the police (see, for example *Charter* ss 7 to 14 and 24(2)). Equality rights for women, the LGBT community and the disabilities community among others are addressed in *Charter* s 15(1). The *Charter* has provided linguistic rights for francophones outside of Quebec (s 23) and has strengthened aboriginal rights (*Charter* s 25 and *Constitution Act, 1982*, s 35).

The advent of the *Charter* has expanded the scope of judicial review in Canada. While before 1982, judges were able to rule on whether legislation was inconsistent with the Constitution, they now can also rule on whether laws are inconsistent with the provisions of the *Charter*.

A brief comparison of the nature of judicial review cases under the Constitution compared to those under the *Charter* reveals some of the changes in judicial scope. In the federalism analysis, the court is to determine whether a law was validly passed by the federal or provincial government. The court first seeks to identify the “pith and substance” or the true meaning of a challenged law. Courts will look to the purpose and effect of the law, by looking at the law itself or at extrinsic evidence (e.g., the Hansard debates during the time the law was being passed).

Next, the court seeks to characterize the law as falling under a federal or provincial head of power. Laws may be found valid even if they have an incidental effect on a law that is within the other jurisdiction's authority. Sometimes laws are valid under both federal and provincial jurisdictions, because they deal with differing aspects of the same matter. This is called the dual aspect principle. If there is a conflict between the two provisions, the Constitution sometimes provides which jurisdiction's law is paramount, or, if the Constitution is silent on the matter, the federal law will prevail. A newer form of analysis examines whether a law impairs the core of a federal or provincial undertaking. If so, that law is inapplicable to the undertaking (this is called the interjurisdictional immunity principle).

On the other hand, *Charter* review requires a two-stage process. First, the court determines whether the challenged law infringes a *Charter* right. The court must characterize the challenged law (its purpose or effect) and then must define the meaning of the right. Then, the court must determine whether the right has been violated. Often, it is the effect of the law that actually indicates a violation of the *Charter* right. Second, the court must examine whether the law may be saved by *Charter* section 1. Under this stage, the government must demonstrate whether the law is demonstrably justified in a free and democratic society. The court examines whether the challenged law's objective is pressing and substantial, and whether the means chosen are reasonable and demonstrably justified (e.g., they are not arbitrary or unfair) or proportional (i.e., does the benefit gained from the law outweigh the seriousness of the law's infringement on the *Charter* right?).

Sometimes laws are valid under both federal and provincial jurisdictions, because they deal with differing aspects of the same matter. This is called the dual aspect principle.

If there is a conflict between rights under the *Charter*, it is largely silent about which right is to prevail. Sometimes the conflict is resolved by way of *Charter* section 1 (justification) and in other cases, the court tries to find ways to have the rights mutually modify each other or be harmonized.

The *Charter* is believed to have expanded the scope of judicial review because *Charter* provisions are quite heavily policy laden (Peter Hogg, *Constitutional Law of Canada, Student Ed.* Toronto: Thomson Reuters Canada Limited, 2011 page 36-5 (“Hogg”). Many of the terms in the *Charter* are vague and may come into conflict with other Canadian values, thus requiring judicial interpretation and balancing (Hogg, pages 36-5 to 36-6). While some have criticized this development as resulting in judicial activism, in reality the *Charter* contains provisions that create a balance with legislative objectives: sections 1 and 33 (Hogg, page 36-9). Thus, the *Charter* provides opportunities for the legislative branch of Canada to offset the judicial branch and vice-versa.

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Even where the court has found that the government has violated a Canadian’s *Charter* right, the government has the opportunity under *Charter* section 1 to defend its law or action as being reasonable and demonstrably justified in a free and democratic society. If the court finds the violation “has been saved by *Charter* section 1”, the law is upheld as reflecting an appropriate compromise between an individual’s rights and societal values. Various studies have calculated that in as many as 40% of the cases, the government’s violation of a right is actually saved by section 1 (see, for example, S. Choudhry and C. Hunter “Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v NAPE*” (2003) 48 McGill Law Journal 525 at pages 548 to 9).

The *Charter* as a whole, and particularly *Charter* sections 1 and s 33 (the notwithstanding clause), provide the opportunity for dialogue between the legislative and judicial branches. This is demonstrated by the option available to the legislative branch to revise laws in a manner consistent with the *Charter*, when those laws are found by the courts to be in violation of the *Charter*, and unable to be saved by section 1. It is not unusual that the revised law will be tested in a subsequent case and found to be consistent with the *Charter*.

Alternatively, legislatures can use the notwithstanding clause (section 33) to indicate that the law operates notwithstanding the *Charter*. While some people were concerned that this clause effectively gives too much power to Parliament and the provincial legislatures to override *Charter* rights, in practice, the political cost of using the notwithstanding clause has kept the various governments in check.

The advent of the *Charter* has ensured that individual rights are entrenched in Canada. It may have expanded the role of judges, but it has also increased the dialogue between the legislative and judicial branches of government. It has certainly also raised public awareness of the courts, rights and the law.

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Birthplace of Canada, Charlottetown, PEI  
[http://en.wikipedia.org/wiki/Province\\_Prince\\_Edward\\_Island](http://en.wikipedia.org/wiki/Province_Prince_Edward_Island)

# The Constitutions of the Maritime Provinces

*Mark Ricksts*

To understand the constitutional makeup of Canada, one must appreciate an important historical fact: the constitutional heritage of the country is older than the country itself. This is so because several of the provinces that would eventually become part of the Dominion of Canada had their own colonial constitutions before Confederation – before the enactment of Canada’s federal constitution in the form of the *British North America Act (BNA Act), 1867* (now *Constitution Act, 1867*).

The oldest of these pre-confederation constitutions belong to the Maritime provinces: Nova Scotia, New Brunswick and Prince Edward Island. This is no accident. History is the mother of the law, and in the constitutional context, the earliest settled (or conquered) colonies were vested by the British Crown with the earliest constitutions.



The pre-confederation constitutions of the Maritime provinces provided the machinery of government for these British colonies of North America, and defined the relationship between the Crown and early legislative assemblies. The early constitutions of the Maritime provinces are still relevant to the post-Confederation constitutional framework, since they were retained (with only slight modifications) as each province entered confederation.

For Nova Scotia and New Brunswick, two of the founding provinces of Canada, the *BNA Act, 1867* affirms the continuation of the “Constitution of the executive authority” (s.64) and the “Constitution of the Legislature” (s.88) as they existed at the time of union. The continuation of the constitution for each province is made “subject to the provisions of this Act” (the *BNA Act*), and until altered under the authority of the Act.

The *BNA Act, 1867*, section 146, contemplated the addition of other British North American colonies to the Dominion of Canada as provinces, after Confederation, by way of order-in-council. It was pursuant to this section that Prince Edward Island was admitted to Canada as a province by Imperial Order-in-Council in 1873. In terms similar to those used in the *BNA Act* for the other provinces, and to like effect, the Order continued the “constitution of the executive authority and of the legislature of Prince Edward Island”, as existing at the time of the Union; subject to the *BNA Act, 1867*, and until altered under the authority of that Act.

## The Maritime Constitutions – Form and Content

Therefore, to appreciate the constitutional structure of the present-day Maritime provinces, it is necessary to delve into the question of how these former colonies acquired their constitutions, and what these constitutional provisions were.

The constitutions of the Maritime provinces were established through the royal prerogative – the executive power vested by the common law to the Crown. Under this prerogative the Crown, outside of Parliament, could legislate to establish the instruments of government for British colonies, in certain circumstances.

The source of these early colonial constitutions made their form unique. The constitutions for the Maritime colonies did not exist by way of formal charter or single, written constitutional document. Rather, they consisted of prerogative instruments issued through the executive power of the Crown. The following general description of the Nova Scotia Constitution, by a former Lieutenant Governor, is equally applicable to describe those of New Brunswick and P.E.I:

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“No formal charter or constitution ever was conferred, either on the province of Nova Scotia or upon Cape Breton while that island was a separate province. The constitution of Nova Scotia has always been considered as derived from the terms of the Royal commissions to the Governors and Lieutenant-Governors, and from the “instructions” which accompanied the same, moulded from time to time by despatches from Secretaries of State, conveying the will of the Sovereign, and by Acts of the local legislature, assented to by the Crown; the whole to some extent interpreted by uniform usage and custom in the colony.”

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The constitutions for New Brunswick and Prince Edward Island were modelled on the prerogative instruments which were the foundation of the Nova Scotia Constitution. The Nova Scotia Constitution traces its origins to the Royal Commission and Instructions, issued in 1749, to then Governor Edward Cornwallis. Prince Edward Island’s Constitution is based upon the 1769 Commission and Instructions to Governor Walter Patterson; while New Brunswick was given its Constitution through the Commission and Instructions to Governor Thomas Carleton, in 1784.

The British Crown’s tendency to follow the constitutional pattern laid out for Nova Scotia, in how it dealt with New Brunswick and Prince Edward Island, is not a surprise: Nova Scotia at one time included within its borders the lands comprising New Brunswick and Prince Edward Island.

The substance of the Maritime constitutions followed their form, with those of New Brunswick and Prince Edward Island closely tracking the provisions of the Nova Scotia Constitution.

### The Nova Scotia Constitutional Model

As with most Canadian constitutional developments, Nova Scotia holds the founding position in constitution-making. Nova Scotia is the oldest of the British North American colonies that would eventually form Canada, and has the country’s oldest constitution.

The Commission of Edward Cornwallis, by letters patent dated May 6, 1749, called for the appointment of the Governor, and gave him authority to appoint an Executive Council to advise the Governor in colonial matters. As noted by J.E. Read in “*The Early Provincial Constitutions*”, 1948 Can. Bar Review 621, at p.626, this Council served not only as an executive council, but also in the capacity of a Legislative Council – a second chamber of the Legislature; and the “Principal Court of Judicature”.

The constitutions for New Brunswick and Prince Edward Island were modelled on the prerogative instruments which were the foundation of the Nova Scotia Constitution.

On the legislative front, Cornwallis's Commission granted the Governor the authority, with the advice and consent of the Council, to summon a General Assembly of the "freeholders and planters within your government according to the usage of the rest of Our colonies and Plantations in America." The Governor, with the advice and consent of the Council and Assembly, was given the full power and authority to "make, constitute and ordain Laws, Statutes and Ordinances for the Publick peace, welfare of our said province and of the people and inhabitants thereof." Through this latter provision, legislative authority for Nova Scotia was vested in the Governor, the Legislative Council, and General Assembly. However, so that "nothing may be passed or done by our said council or assembly to the prejudice of us (the Crown), our heirs and successors", the Governor was given a general veto power over any laws so passed.

The terms of the 1749 Commission required the Governor to comply with its provisions, and to govern according to the Instructions therewith, or thereafter given. In the Instructions dated April 29, 1749 the Governor was ordered, among other things, to establish a Principal Court of Judicature, in the form of a General Court consisting of the Governor and his Council; and inferior courts with a right of appeal to the General Court. The 1749 Instructions further provided that the Governor take care to ensure the speedy and impartial administration of justice in the courts, and the preservation of the legal rights and property of subjects of the province through the writ of *habeas corpus*.

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## Prince Edward Island and New Brunswick



Legislative Assembly of New Brunswick

[http://en.wikipedia.org/wiki/New\\_Brunswick\\_Legislative\\_Building](http://en.wikipedia.org/wiki/New_Brunswick_Legislative_Building)

The Commission and Instructions to Governor Patterson in Prince Edward Island, and those to Governor Carleton in New Brunswick, were patterned on the Nova Scotia model. The result was that the constitutions for both P.E.I and New Brunswick provided for an Executive Council to advise the Governor, a Legislative Council and a general elective assembly.

In P.E.I, the constitutional instructions stipulated that the province's judicial institutions were to be based on the Nova Scotia model. However, the summoning of an assembly required the calling of a Council Assembly, rather than a General Assembly like in Nova Scotia. (J.E. Read, "*The Early Provincial Constitutions*", p.630) Consequently, in 1773, an appointed Legislative Council was joined with the elected House of Assembly in P.E.I, to form a bi-cameral legislature.

In New Brunswick, in terms similar to those used in Nova Scotia, the Governor's Commission authorized him to summon a General Assembly. The New Brunswick constitution also followed the Nova Scotia provisions in relation to the establishment of a Council, legislative power, Governor's veto power, and the establishment of courts of justice.

### Changes to the Maritime Constitutions through the *BNA Act 1867*

The colonial constitutions of Nova Scotia, New Brunswick and P.E.I were continued after their admission to the Canadian union, subject to the provisions of the *BNA Act, 1867*. For all three, this meant a change in the way the executive head of the province was appointed (the Lieutenant-Governor appointed by Governor General, s. 58), and a curtailment of the legislative powers of the provincial assemblies through the division of powers in sections 91 and 92 of the *BNA Act, 1867*.

Furthermore, section 92 of the *BNA Act* allows the legislature of each province to make laws that amend the constitutions of each province. The Maritime legislatures have taken advantage of this provision to abolish the Legislative Council in each of their respective provinces.

There have been other changes to the constitutional machinery of the government in the Maritime provinces over the years, but the broad outlines of the colonial constitutions have remained. By virtue of the nature and scope of their provincial constitutions, in the Maritime provinces, it can truly be said that the choices of the future are rooted in the decisions of the past.

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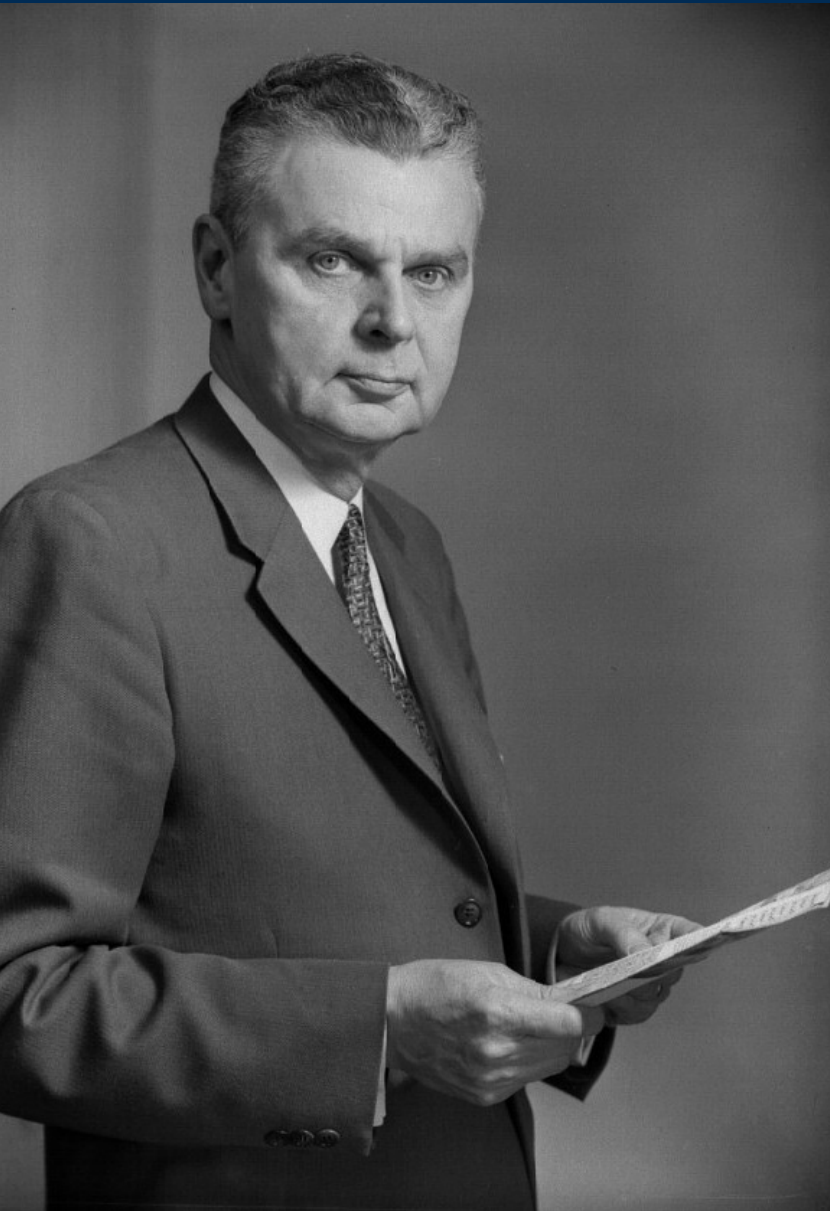
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*Peter Bowal  
and Dustin Thul*

## Bills of Rights in Canada

*The Canadian Bill of Rights was enacted by Prime Minister John Diefenbaker's government on August 10, 1960.*

*W*hen Canadians think of human rights law, the *Charter of Rights and Freedoms* and their provincial human rights Acts are most likely to come to mind. These are the best known and most important human rights instruments. But what is a Bill of Rights and how is that different from these other two human rights statutes with similar sounding names?

### What's in a Name: Bill of Rights Versus Human Rights Act (or Code)?

In addition to the *Canadian Bill of Rights* (SC 1960, c 44) and the *Alberta Bill of Rights*, (RSA 2000, c A-14) Canadian jurisdictions also enacted various human rights Acts (or Codes, which means the same thing). The federal Parliament also enacted a human rights Code and created a parallel enforcement Human Rights Commission in 1977 ( *Canadian Human Rights Act*, RSC 1985 c H-6).

Ontario was the first province to consolidate its human rights legislation into a *Human Rights Code* (1962), which included provisions for the *Code* to be administered by a Commission (*Human Rights Code*, RSO 1990 c H.19). The other provinces and territories have also established human rights legislation and Human Rights Commissions to administratively enforce this law.

So today, the federal government and Alberta have both Bills of Rights and Human Rights Acts. Other provinces and territories have combined both Bill and Act provisions into a one-stop Human Rights Act (or Code).

What is the difference in nomenclature? A Bill of Rights normally contains only rights and freedoms extended or guaranteed by the Crown. These are the types of rights and freedoms that only the public authority can truly ensure, including the rights to liberty and to vote in elections, and the freedoms of religion, speech, assembly, association and the media. The *Alberta Bill of Rights* is reproduced in full below in the Appendix. It is brief and imposes limits on the Alberta legislature only.

Individuals do not have any obligations under a Bill of Rights – they only have rights. The emphasis in these Bills of Rights is human-ness, so corporations are unlikely to avail themselves of these rights (which is not the case under the *Charter* where the encompassing legal term “person” is used). Enforcement of Bill rights and freedoms is always against government which explains why court is where one obtains a remedy (eg. to strike down legislation). The Bill of Rights model is closely reflected in the *Canadian Charter of Rights and Freedoms* of 1982. The *Canadian Charter of Rights* is also exclusively concerned with government action.

A Human Rights Act, by contrast, generally confers the one major right of equality (or non-discrimination) and extends this particular right completely through to the private sector. This is the most recent and controversial extension of human rights. Therefore, residential landlords, employers, professions and businesses generally must grant equality to all those individuals who would do business with them. Private parties such as businesses have no ability to ensure one has the right to vote in elections and they even cannot guarantee free speech, so their sole legal obligation in human rights is to treat their tenants, employees or customers (as the case may be) with equality. This is monitored by reference to specific “prohibited grounds of discrimination” such as religion, gender, race, disability, etc.

In the end, therefore, all Canadian governments have legislated restraint of themselves from interfering with individual freedoms and they have extended similar basic human rights. They all have also restricted the private sector from discriminating against individuals on the basis of enumerated

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attributes. Two jurisdictions (federal and Alberta) continue to separate these public and private dimensions by maintaining both a Bill and an Act. The other jurisdictions combine them in one piece of human rights legislation, variably called an Act, Code or Charter.

### Differences between the *Canadian Bill of Rights* and the *Canadian Charter of Rights*

The 1960 *Canadian Bill of Rights* was almost entirely reproduced in similar or broader language in the 1982 *Canadian Charter of Rights and Freedoms*. There are only three provisions in the *Bill* that were not included in the *Charter*: freedom against arbitrary exile of any person [section 2(a)], the right to “enjoyment of property and the right not to be deprived thereof except by due process of law” [section 1(a)], and the right “to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations” [section 2(e)].

Section 6 *Charter* mobility rights replace protections from arbitrary exile. The *Charter* contains no guarantee of a fair procedure or fair compensation for expropriation of property, akin to the *Bill*’s “enjoyment of property” right. The *Charter*’s protection of “life, liberty and security of the person” also seems narrower than the *Bill*’s section 2(e) which might extend to economic rights. The right to “enjoyment of property” is the only provision in the *Alberta Bill of Rights* not covered by the *Charter*.

The federal and Alberta Bills of Rights continue in force alongside the *Charter*. Their continuing value, therefore, is that they add to *Charter* rights in these limited ways. Ironically, the Supreme Court of Canada seems to have breathed more life into the *Canadian Bill of Rights* after the *Charter* than it granted before 1982. For example, in the 1985 case of *Singh v. Minister of Employment and Immigration* the Supreme Court agreed that the *Bill*’s section 2(e) extended farther than the *Charter*’s section 7.

There are several other instances of the Canadian and Alberta Bills and the Quebec *Charter* being held to grant more rights than the Canadian *Charter*. They also do not have a limitation clause similar to section 1 of the Canadian *Charter*, which states that the guarantees are subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In theory, this should allow the federal and provincial Bills/Quebec *Charter* to have broader application than the Canadian *Charter*. However, the lack of such limitation in the *Canadian Bill of Rights*, in conjunction with its lack of status as regular non-entrenched legislation, has resulted in a conservative approach to interpreting them.

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The federal and Alberta Bills of Rights continue in force alongside the *Charter*. Their continuing value, therefore, is that they add to *Charter* rights in these limited ways

## Conclusion

The *Canadian Bill of Rights* and the *Alberta Bill of Rights* remain as the only two stand-alone Bills of Rights in Canada. These ordinary statutes purport to limit government control over individuals' lives. All other jurisdictions combine this self-limiting legislation with equality rights enforceable against the private sector in broader human rights Acts or Codes (*Charter* in Quebec). The federal and Alberta governments also enforce equivalent human rights statutes in their respective private sectors. The Supreme Court of Canada has said that all regular human rights legislation enjoys a “quasi-constitutional” status.

The merely statutory (ie. not constitutional) human rights Bills and Acts and the constitutionally-entrenched *Canadian Charter of Rights and Freedoms* share similar origins, purposes and language. It is not surprising, therefore, that they overlap to a considerable extent. Yet, there are still some interesting differences in scope and content. In numerous small ways, the provincial legislation actually reaches farther and is more generous than the Canadian *Charter* in conferring human rights and freedoms.

Quebec's [Charter of human rights and freedoms](#) RSQ c-12 is distinctly broader than the other Bills of Rights, and human rights Acts and Codes – it includes a number of social and economic rights as well. These additional provisions of Quebec's *Charter* continue to play significantly into case law. An example is the section 5 right to individual privacy: “[e]very person has a right to respect for his private life.” In this way, the Quebec *Charter* supplements the Canadian *Charter*.

These quasi-constitutional Bills, Acts and Codes of human rights in Canada all serve to ensure equality in the private sector. They may, in modest ways, also extend human rights beyond what is available from the *Canadian Charter of Rights*.

See:

(British Columbia) *Human Rights Code*, RSBC 1996 c 210;  
 Alberta *Human Rights Act*, RSA 2000 c A-25.5;  
 Saskatchewan *Human Rights Code*, SS 1979 c S-24.1;  
 (Manitoba) *The Human Rights Code*, CCSM c H175;  
 (Newfoundland & Labrador) *Human Rights Act*, 2010, SNL 2010, c H-13.1;  
 (New Brunswick) *Human Rights Act*, RSNB 2011 c 171;  
 Quebec *Charter of Human Rights and Freedoms*, RSQ c-12;  
 (Nova Scotia) *Human Rights Act*, RSNS 1989 c 214;  
 (Prince Edward Island) *Human Rights Act*, RSPEI 1988 c H-12;  
 (Yukon) *Human Rights Act*, RSY 2002 c 116;  
 (Northwest Territories) *Human Rights Act*, SNWT 2002 c 18;  
 (Nunavut) *Human Rights Act*, SNU 2003 c 12



## Appendix

### ALBERTA BILL OF RIGHTS

RSA 2000, c A-14, <http://canlii.ca/t/j8x8>

WHEREAS the free and democratic society existing in Alberta is founded on principles that acknowledge the supremacy of God and on principles, fostered by tradition, that honour and respect human rights and fundamental freedoms and the dignity and worth of the human person;

WHEREAS the Parliament of Canada, being desirous of enshrining certain principles and the human rights and fundamental freedoms derived from them, enacted the Canadian Bill of Rights in order to ensure the protection of those rights and freedoms in Canada in matters coming within its legislative authority; and

WHEREAS the Legislature of Alberta, affirming those principles and recognizing the need to ensure the protection of those rights and freedoms in Alberta in matters coming within its legislative authority, desires to enact an Alberta Bill of Rights;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

#### Recognition and declaration of rights and freedoms

- 1 It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely
  - (a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
  - (b) the right of the individual to equality before the law and the protection of the law;
  - (c) freedom of religion;
  - (d) freedom of speech;
  - (e) freedom of assembly and association;
  - (f) freedom of the press.

- 2 Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the *Alberta Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.
- 3
  - (1) Nothing in this Act shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated herein that may have existed in Alberta at the commencement of this Act.
  - (2) In this Act, “law of Alberta” means an Act of the Legislature of Alberta enacted before or after the commencement of this Act, any order, rule or regulation made thereunder, and any law in force in Alberta at the commencement of this Act that is subject to be repealed, abolished or altered by the Legislature of Alberta.
  - (3) The provisions of this Act shall be construed as extending only to matters coming within the legislative authority of the Legislature of Alberta.
- 4
  - (1) If in any action or other proceeding a question arises as to whether any law of Alberta abrogates, abridges or infringes, or authorizes the abrogation, abridgment or infringement, of any of the rights and freedoms herein recognized and declared, no adjudication on that question is valid unless notice has been given to the Minister of Justice and Attorney General.
  - (2) When the Minister of Justice and Attorney General has notice under subsection (1), the Minister may, in person or by counsel, appear and participate in that action or proceeding on such terms and conditions as the court, person or body conducting the proceeding may consider just.

Peter Bowal is a Professor of Law at the Haskayne School of Business, University of Calgary, Dustin Thul recently earned his BA and BComm from the University of Calgary in Calgary, Alberta.

# Privacy and Cloud Computing

*Martin Kratz, QC*

**T**he term ‘cloud computing’ refers to the provision of services through websites available on the Internet. These services are typically on demand and scalable such that the user can expand her or his use of the services dramatically. Storing picture, emails or materials on the Internet is use of cloud computing.

The services are typically also provided on a per usage basis (a pooled resource or utility model where resources may be shared and pooled) although many consumer-based services may be provided without charge (such as Google’s ‘Gmail’, Facebook’s social media service or similar such services) and on terms where the user agrees to accept ads in exchange for the service. Broad network access is typically a feature of such services.

The use of cloud-based services often is at very low cost: the services may be accessible from anywhere an Internet connection is available and, therefore, the services provide many benefits. The May 2010 Report of the Office of the Privacy Commissioner of Canada's Consultations on Online Tracking, Profiling and Targeting, and Cloud Computing states:

Some of the benefits to users (businesses, especially small and medium-sized enterprises, governments and individuals) include scalability (offers unlimited processing and storage capacity), reliability (eliminates the concern of losing valuable data in paper format or via the loss of laptops or hard drives; enables access to applications and documents anywhere in the world via the Internet), cost savings, efficiency (frees up resources to focus on innovation and product development) and access to new technologies. Some ... noted that since cloud users do not have to invest in information technology infrastructure, purchase hardware or buy software licences, the benefits are low up-front costs, rapid return on investment, rapid deployment, customization, flexible use and Internet scale solutions that can make use of new web-based innovations.

As a result, there has been considerable growth in the provision of cloud-based services and increasingly users are saving their personal data and information on cloud-based services. In such a case it is useful to review the requirements of mandatory privacy law in addressing cloud computing issues.

In its assessment of Facebook, the Privacy Commissioner of Canada found that users can not opt out of receiving Facebook ads which are provided to all users, but that such a business model was reasonable and was accepted under *Personal Information Protection and Electronic Documents Act (PIPEDA)*.<sup>1</sup>

The Commissioner went on to examine if the advertising purposes were "explicitly specified" (Principle 4.3.3) and whether Facebook is making a reasonable enough effort to notify users of those purposes (Principle 4.2.3).

The *Facebook* decision sets the stage for an assessment of privacy in the cloud computing context. Social media services, email services, and many other services are provided on the Internet and are all forms of cloud computing. Many organizations may find that some parts of the organizations are already using the cloud (the Internet) for some services such as online document collaboration services, email or remote access services. The first step in seeking consent of users to such services is to clearly disclose the purposes for which personal information is being collected by the cloud service provider.

increasingly users are saving their personal data and information on cloud based services. In such a case it is useful to review the requirements of mandatory privacy law in addressing cloud computing issues.

Social media services, email services, and many other services are provided on the Internet and are all forms of cloud computing.



Another factor and a key risk of sharing personal information with others is that inadequate security may be provided for the information and some of the personal information may be improperly disclosed or used without the applicable individual's consent. This is, of course, also a risk for cloud-based computing as the Internet structure requires many entities to be involved in the provision of an applicable service.<sup>2</sup> Data may be stored in locations unknown or unfamiliar to users and there is the risk of accidental or deliberate breaches of security.

Data may be stored in locations unknown or unfamiliar to users and there is the risk of accidental or deliberate breaches of security.

Many cloud-based services available to Canadians are based in the United States or other countries. It is clear that under Canada's mandatory private sector privacy legislation one may use a foreign based service provider. The Federal Privacy Commissioner has ruled (case #313) that *PIPEDA* does not prohibit a businesses' use of foreign based third-party service providers.

Where a Canadian business is having personal information of third parties that it has collected processed by others, then that business remains accountable for the proper care, use and protection of that personal information, including limiting its use to the purposes for which it was collected, and for the provision of appropriate security to safeguard the information. Of course, Canadian organizations must have provisions in place when using third party service providers to ensure a comparable level of protection for the personal information with that in Canada.

The Federal Commissioner has recommended that a company in Canada that outsources information processing (such as what occurs in cloud-based processing) to the U.S. or other foreign jurisdiction should notify its customers that the information may be available to the U.S. or other foreign agencies under a lawful order made in that country (case #313).

Some provincial privacy laws, such as in Alberta, also speak to this issue. Alberta's *Personal Information Protection Act (PIPA)* requires organizations to provide notice to individuals at or before the time of collection of their personal information, if their personal information will be transferred to a service provider located outside of Canada.

Users should review the terms of the agreements with cloud service providers to understand the risks of the relationship so that the user can make informed decisions suitable for their circumstances.

Since cloud-based services are intended to be dramatically scalable and very low cost, the cloud vendor often provides the services on the basis of standard terms which are protective of the service provider's operations and often on an 'as is' basis. Such terms may not meet the minimum needs for some degree of accountability that many business users will require. Businesses should be careful to review and, if not appropriate, not adopt consumer grade terms for business critical functions.

Some provincial privacy laws, such as in Alberta, also speak to this issue. Alberta's *Personal Information Protection Act (PIPA)* requires organizations to provide notice to individuals at or before the time of collection of their personal information, if their personal information will be transferred to a service provider located outside of Canada.

Among the privacy considerations items that a user should review and understand in a cloud service provider's agreement include:

- what commitments are made to confirm control over the personal information by the user (e.g. confirmation that the data belongs to the user, audit rights, etc.);
- commitments that the personal information/data will not be used for any purpose other than as set out in the privacy policy;
- confirmation that the uses proposed in the privacy policy are reasonable to the user – e.g. the user should review and understand what those uses are and look especially for any secondary uses she or he might object to;
- arrangements made by the service provider to provide for reasonable security of the personal information/data and how the user will get its data back should it terminate use of the service;
- any limits on the liability of the service provider's liability for defaults or injuries it may cause to the user;
- any limits on the remedies of the user in case of breaches by the service provider
- which law will apply; and
- any agreed form for dispute resolution.

Users should review the terms of the agreements with cloud service providers to understand the risks of the relationship so that the user can make informed decisions suitable for their circumstances.

A useful list of considerations was developed by the Alberta, British Columbia and Federal Privacy Commissioners<sup>5</sup> and serves as a guide for small businesses seeking to consider taking advantage of the efficiencies and cost effectiveness of cloud-based services. This document provides a good preliminary checklist of issues that a business or other organization should consider before adopting a cloud-based solution.

There are, of course, many differently nuanced concerns that should be addressed during any proposed move to embrace cloud computing in mainstream business operations. The following list provides a range of some of the terms that such a company may wish to include in a cloud computing contract, beyond the standard terms and conditions.

- Services are to be provided in a “good and workmanlike” or “professional” manner.
- Data belongs to the customer (or customer's customers) and will be returned on demand in a useable format.
- Prohibition against suspension of service without sufficient notice from provider; fee disputes will not be a sufficient reason to suspend the service.
- No deletion of dormant accounts without sufficient notice to the customer.
- Termination assistance: the cloud provider is required to provide transition and conversion assistance so that data and functionality can be moved to another system after termination (usually at the customer's cost, but at the vendor's normal rates).

- Caps on fee increases year-over-year.
- Litigation or regulatory change co-operation assistance (such as changes to privacy laws, breach reporting requirements, and so on) usually at the customer's cost, but at the vendor's normal rates.
- Systems perform to specifications, which are rational.
- Systems as operated will not infringe third-party IP rights.
- Vendor bears some responsibility for data losses (not included in limitation of liability clauses) and obligation to provide disaster recovery plan (beforehand) and assistance (afterward) at no additional cost.
- Vendor is obliged to identify third-party service providers and subcontractors, and the customer has the right to audit. (There is not much else the customer can do.)
- Vendor to permit the customer to audit security, subcontracts, data recovery and backup plans (periodically).
- Vendor has a duty to report (auditable) service level compliance (uptime, lag and latency, and so on).
- Data Location. Some agencies are regulated as to where data can reside or be processed or stored (for example, health care, financial services, and public bodies.) This must be imposed on the vendor (who must impose it on subcontractors).
- No secondary commercial use or disclosure of customer data (or the customer's customers' data) by cloud provider or its subcontractors.
- Compatible applicable law, dispute resolution procedures, etc.
- Regulatory and customer enquiry or complaint "pass-through" obligations (on the vendor) so that the customer is not blind-sided.

A useful list of considerations was developed by the Alberta, British Columbia and Federal Privacy Commissioners and serves as a guide for small businesses seeking to consider taking advantage of the efficiencies and cost effectiveness of cloud-based services.

A thoughtful and informed understanding of the privacy implications of the use of cloud computing and taking reasonable steps to confirm satisfactory control, limit uses and disclosure of that personal information by a cloud service provider will help the user to make more informed decisions and seek to benefit from the many advantages of cloud computing.

## Notes

- 1 See PIPEDA Case Summary #2009-008, “Report of Findings into the Complaint Filed by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) against Facebook Inc. Under the *Personal Information Protection and Electronic Documents Act*”, July 16, 2009.
- 2 There are typically many organizations involved behind the scenes to make a service available and they might include a data centre operator, operating system service provider, application service provider, data recovery service provider, providers of the infrastructure, data storage and tools used to provide the service as well as all participants involved in the provision of the internet connectivity to and from the service provider’s website.
- 3 See “Cloud Computing for Small and Medium-sized Enterprises: Privacy Responsibilities and Considerations” jointly issued by the OIPC Alberta, Office of the Privacy Commissioner of Canada and OIPC of BC, June 14, 2012. Web link is at: [http://www.priv.gc.ca/information/pub/gd\\_cc\\_201206\\_e.asp](http://www.priv.gc.ca/information/pub/gd_cc_201206_e.asp)

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# Canada's New Anti-Spam Legislation: What to Expect



Ralph Kroman

*Mark Borkowski*

Recently, I spoke with Ralph Kroman about Canada's new Anti-Spam Legislation. I learned some very interesting information about this new legislation.

Ralph Kroman is a business lawyer with WeirFoulds LLP. He helps his clients deal with intellectual property and technology matters such as the acquisition of information technology, and the licensing and protection of copyright, trade-marks and confidential information.

**Mark Borkowski (MB):** Let's start with the basics. What is Canada's new "Anti-Spam" law?

**Ralph Kroman (RK):** Canada passed the *Fighting Internet and Wireless Spam Act*, unofficially referred to as the "*Anti-Spam Act*", in December of 2010. It has not yet entered into force but once it does, likely sometime in 2013, it will regulate certain activities to deter damaging and deceptive forms of spam and will ultimately promote the efficiency of our economy by prohibiting electronic threats to commerce.

**MB:** How will this new law impact Canadians and how they run their businesses?

**RK:** This Act will have a significant impact on Canadians and their businesses, specifically regarding how they handle electronic means of conducting commercial activities. For instance, the main application of the Act relates to electronic messages sent to encourage participation in a commercial activity including the purchase of goods or services by the recipient. These are referred to as "commercial electronic messages" and include messages sent through e-mail, social networking sites and text messages. Individuals and businesses are prohibited from sending these messages without the consent of the recipient, identification of the sender and corresponding contact information, and inclusion of an unsubscribe mechanism.

Even if you send a single electronic message targeted to one individual person, it may be subject to the Act. So, businesses will definitely want to review this law now in order to prepare for compliance.

**MB:** In addition to sending commercial electronic messages without consent, what other activities are prohibited by the Act?

**RK:** Some of the other prohibitions involve the installation of computer programs without express consent; the alteration of transmission data resulting in electronic messages being delivered to a different destination without express consent; the use of false or misleading representations online in product or service promotions; and the collection of personal information and electronic addresses through computer programs without permission. The full list of prohibitions can be found at [fightspam.gc.ca](http://fightspam.gc.ca).

**MB:** It seems like the key factor where most of these prohibitions are concerned is consent. Can you elaborate a bit further on this requirement?

**RK:** The Act is in place to protect Canadian consumers and businesses and lead to a safer, more secure online environment. The bottom line is we can't send commercial electronic messages to people who haven't allowed us to.

There are two types of consent to consider, express and implied. Express consent occurs when the recipient has outwardly agreed to the receipt of the messages. Implied consent occurs when

there is an existing business relationship between the sender and recipient. Implied consent usually expires two years after the most recent business transaction between the sender and recipient.

**MB:** How will implied consent be monitored as we transition to the *Anti-Spam Act*?

**RK:** Once the Act comes into force, we are given a transitional period where the consent of a person who has an existing business relationship is implied only until they either retract consent, or until three years after the day the Act came into force, whichever is earlier.

**MB:** What happens if someone, whether an individual or a business, is caught violating the *Anti-Spam Act*?

**RK:** With respect to violations involving the absence of consent, there is a reverse onus obligation where, if investigated, you must be able to prove that you obtained consent, express or implied.

There are serious implications and penalties for violating the Act. Individuals can be fined up to \$1 million per violation, while entities, such as corporations, can be fined up to \$10 million per violation.

**MB:** How can Canadians and businesses protect themselves from these implications?

**RK:** Compliance is the key to protection, and awareness and preparation are needed for compliance. Review the regulations, understand them, and take the necessary steps to ensure you comply.

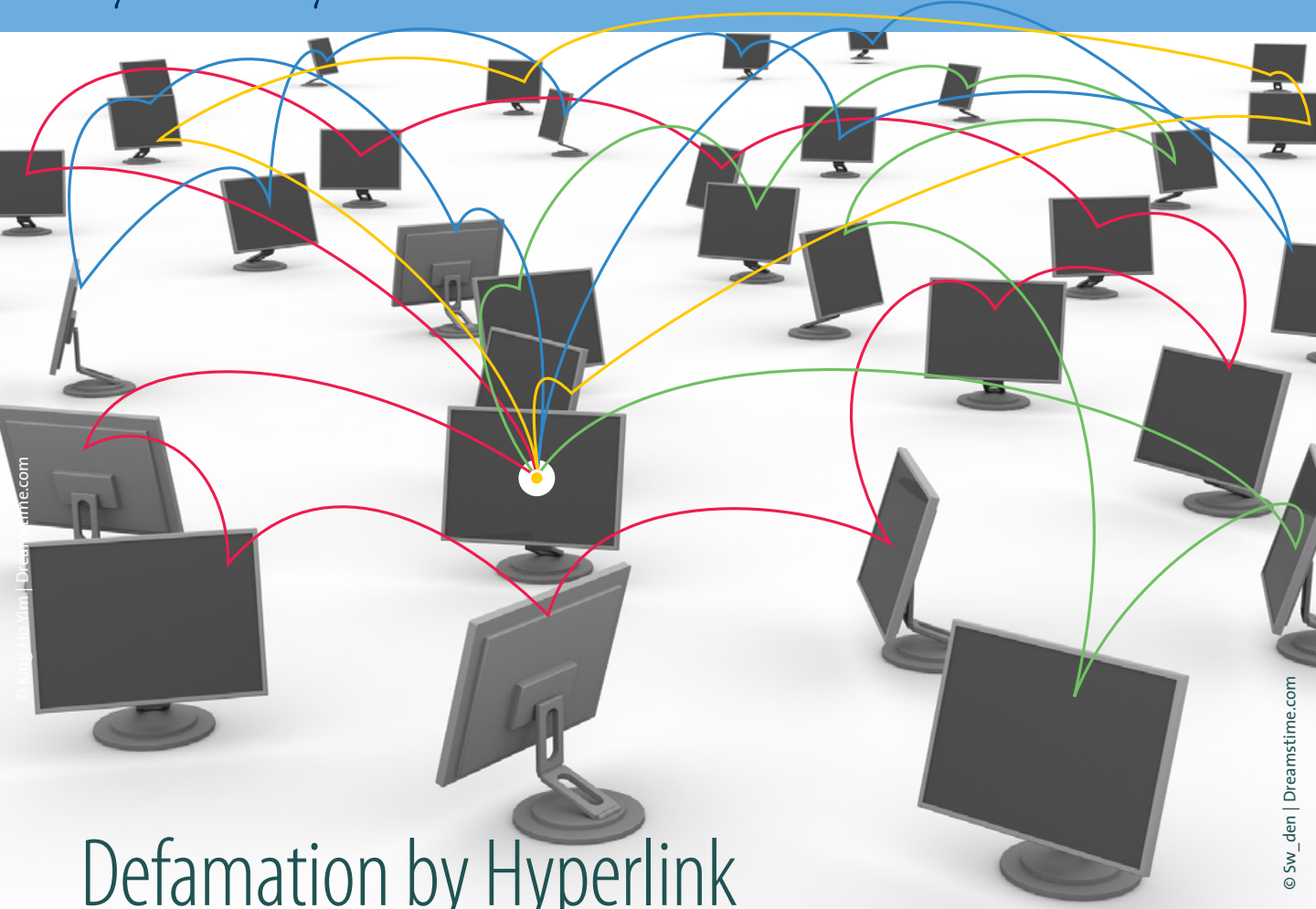
Look at your electronic communications and determine which ones would be classified as commercial electronic messages and be caught by the Act. Then, review your database of contacts and determine where consent is required for future communications.

You will also want to establish procedures for obtaining express consent, for maintaining lists of recipients who fall under implied consent, and for removing recipients when implied consent expires.

Finally, make sure all communications comply with the Act and include all requisite information and the unsubscribe mechanism.



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## Defamation by Hyperlink

*Peter Bowal and Kelsey Horvat*

### Introduction

The Internet is often called a “lawless frontier” and for good reason. The law is not good at regulating even simple forms of technology because, among other reasons, it operates on the basis of delimited territorial jurisdiction using conceptual frameworks and doctrines developed in an era of physical things and slow, deliberate communication. The ubiquitous global reach and anonymity of the Internet present extraordinary challenges to its legal regulation.

The Supreme Court of Canada’s 2011 decision in the case of [Crookes v. Newton](#) is a prime example of how individual rights as ephemeral as reputation must be balanced with other freedoms, such as expression, in this powerful, evolving medium of the Internet.

## Facts

Website owner Jon Newton posted an article on his site that contained two hyperlinks to allegedly defamatory articles regarding Wayne Crookes, a British Columbia businessman. Newton did not convey any obvious or independent support for the content in the articles hyperlinked. Crookes and his lawyer contacted Newton to ask him to remove the hyperlinks, but Newton refused to take them down. Crookes sued, claiming that by posting the hyperlinks and not removing them after receiving notification that they were defamatory, Newton was responsible for publishing defamatory material and was therefore liable to Crookes in damages.

Hyperlinks are images or words that, when clicked, take one to another site. Deep hyperlinks direct a website user straight to the destination page, while surface or shallow hyperlinks only bring the user to a different website's homepage.

## Hyperlinks and Defamation

Hyperlinks are images or words that, when clicked, take one to another site. Deep hyperlinks direct a website user straight to the destination page, while surface or shallow hyperlinks only bring the user to a different website's homepage.<sup>1</sup> Newton's article contained both a shallow hyperlink which brought a web user to a homepage of a website called *OpenPolitics*, and a deep hyperlink which sent users directly to an article about Crookes on the website *www.USGovernments.com*.

A simple – yet indispensable – feature of the Internet, the hyperlink is something web users take for granted today, despite a litigious history. In 2000, British Telecom sued one of the first Internet Service Providers (ISPs) for patent infringement. BT claimed one of its decades-old patents embraced hyperlinking and sought compensation for the ISP's use of these hyperlinks. The court eventually concluded the ISP's use of hyperlinks did not infringe upon BT's patent.<sup>2</sup>

Hyperlinks originated with the Internet but defamation as crime and a tort has a much longer record. In Canadian common law, defamation is a strict liability tort. This means one is liable even if one did not intend to defame or realize that the defamatory remarks were false. Liability flows from proof of purposely or negligently publishing defamatory material to a third party.<sup>3</sup> Courts attempt to balance personal reputation and freedom of expression. Technology adds a twist to reconciling these conflicting interests.

## The Judicial Decision

All judges of both lower courts concluded there was no publication of defamatory material on Newton's part. Hyperlinks were mere references, devoid of defamatory content of their own. They simply facilitated users to find it themselves. While Newton's article containing the hyperlinks had been viewed 1788 times, there were no data on the number of times the hyperlinks were activated or the defamatory articles viewed. This meant there was no proof

A simple – yet indispensable – feature of the Internet, the hyperlink is something web users take for granted today, despite a litigious history.



any third party had actually accessed one of the articles. Like many websites, the ones that Newton linked to did not record the number of people who had opened and viewed the articles involving Crookes.

All nine judges of the Supreme Court of Canada determined Newton's hyperlinks *not* to be publications, but they were divided on the reasons and on what would constitute a publication. The majority of the Court reasoned that hyperlinks are nothing more than references. The hyperlinker has no control over the content to which the hyperlink is connected. Links merely enable a reader to find something already made available to an Internet audience. They are essential to the Internet. The inevitable "chill" arising from liability could destroy the Internet's functionality: the Court wrote: "strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity."

The Court went on to say that the person writing and posting the content is the publisher of it. A hyperlink is "content neutral" in that "it expresses no opinion, nor does it have any control over the content to which it refers." Only if the hyperlink itself contains defamatory text or repeats any defamatory wording contained in the article to which it is linked could a hyperlinker be found liable for defamation. This perspective is consistent with two American cases where references to allegedly defamatory material – one mentioned in a printed newsletter and the other on the radio – were found not to be publications.

## Analysis and Conclusion

The Supreme Court was called to apply the centuries old tort of defamation to the modern Internet context. The Internet compels such flexibility. The Court had respect for Crookes' reputation, but it also had to be mindful of the impact this decision would have on Internet usage and the flood of potential lawsuits that might be generated by a more expansive liability.

The decision offered protection to hyperlinkers who only draw attention and allow access to content already published. A conclusion that hyperlinks are *never* a publication for defamation purposes unless they repeat or add to something that has already been published can accommodate the broad, multi-layered, public utility scope and function of the Internet. Rendering hyperlinkers liable would do nothing to discourage its creation or to remove the defamatory content from the Internet.

The Supreme Court did not clarify what level of endorsement would make hyperlinkers liable for defamation. One of the British Columbia Court of Appeal judges (Madam Justice Prowse) was of the view that Newton's article *did* encourage readers to follow the

All judges of both lower courts concluded there was no publication of defamatory material on Newton's part. Hyperlinks were mere references, devoid of defamatory content of their own.

... strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity...

hyperlinks. This judge, along with one of the dissenting Supreme Court judges (Deschamps J.), was willing to assume that at least one of the 1788 viewers of Newton's article, other than Crookes, had hyperlinked to the defamatory articles. Clearly, endorsing Hyperlinkers can escape liability if plaintiffs cannot identify at least one reader of the defamatory material accessed from the hyperlink.

Even tacit endorsement and re-publication, as the law now stands, will not be obvious thresholds to liability for defamation. There is almost always some text to accompany a hyperlink, if only something as terse as "see." To generally suggest that an article be read for whatever reason might yet constitute endorsement. Likewise, endorsement and re-publication might be reached where the hyperlinker describes a linked-to text as "interesting," "relevant or "noteworthy." Therefore, liability for endorsement and re-publication remains vague and may be elusive in practice. This awaits refinement in future cases.

The *Crookes v. Newton* case represents an excellent example of the modern challenge facing judges to support both the Internet and individual interests such as reputation. While all these Supreme Court judges arrived at the same conclusion, they differed on the essential role hyperlinks play in defamatory publication.

... liability for endorsement and re-publication remains vague and may be elusive in practice. This awaits refinement in future cases.

## Notes

- 1 Hasan A. Deveci, "Hyperlinks Citations, Reproducing Original Works," (2011) 27, *Computer Law & Security Review* 465 at 466-68.
- 2 Heather Rowe, Lovells Baseby, and Francesca Baseby, "Case Report – BT Hyperlink Dispute – Did BT Invent the Hyperlink? Obviously Not as the US Courts Have Said So" (2002) 18:6 *Computer Law & Security Report* 439.
- 3 Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, loose-leaf, 2d. ed., Vol. 1 (Toronto: Carswell, 1999). ch. 3 at 1.

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# The Supreme Court Changes Direction

*Linda McKay-Panos*

**T**he case law on disability and discrimination has had its highs and lows over the past decade and a half. A recent decision of the Supreme Court of Canada, *Moore v British Columbia (Education)* 2012 SCC 61 (“*Moore*”), provides hope for those with disabilities, particularly learning disabilities, and their families.

First, it should be noted that *Moore* is a case based on British Columbia’s *Human Rights Code*, rather than the *Charter*. However, in many human rights cases, the courts rely on discrimination case law based on the *Charter* (particularly *Charter* section 15(1)).

Jeffrey Moore’s father, Frederick, filed a human rights complaint against School District No. 44 (North Vancouver) and the British Columbia Ministry of Education alleging that Jeffrey had been discriminated against because of his disability and had been denied a service customarily available to the public contrary to B.C.’s *Human Rights Code*, section 8. Jeffrey had a severe learning

disability and the intense remedial instruction he needed for his dyslexia was not available in the public school system. Based on the recommendation of the public school psychologist, Jeffrey was enrolled in specialized private schools that charged tuition (paid by his family). The Human Rights Tribunal concluded that the failure of the public school system to give Jeffrey the support he needed to have meaningful access to the educational opportunities offered by the Board was discrimination under the *Human Rights Code*. In addition, the Tribunal ordered that Jeffrey's parents be reimbursed for the costs related to his attendance at private schools, as well as \$10,000 for pain and suffering (para 20). The Tribunal also found that there was systemic discrimination by the District because of the underfunding of the Severe Learning Disabilities programs and the closing of a Diagnostic Centre aimed at providing services to students with severe learning disabilities. Thus, the Tribunal ordered a wide range of systemic remedies against both the District and the Province of B.C.

The Human Rights Tribunal concluded that the failure of the public school system to give Jeffrey the support he needed to have meaningful access to the educational opportunities offered by the Board was discrimination under the *Human Rights Code*.

The Supreme Court of B.C. overturned the Tribunal's decision, finding that Jeffrey's situation should be compared to other special needs students and not to the general student population. This failure to compare Jeffrey with the appropriate comparator group had tainted the whole discrimination analysis and, as a result, the Court overturned the Tribunal's decision. A majority of the B.C. Court of Appeal agreed with the B.C. Supreme Court, stating that he should not have been compared to the general student population. One dissenting Justice would have allowed the appeal, holding that special education was the means by which meaningful access to educational services was achieved by students with learning disabilities.

The Supreme Court of Canada (SCC) agreed with the dissenting Justice, and held that if Jeffrey was compared only to other special needs students, full consideration cannot be given to whether he had had genuine access to the education that all students are entitled to in British Columbia.

The SCC next looked at whether B.C. or the District had any justification for their conduct (e.g., in closing the Diagnostic Centre). While the Tribunal had accepted that the District faced financial difficulties, it also found that the cuts were disproportionately made to special needs programs. Also, the District had not looked at any alternatives that could be made available to accommodate special needs students if the Diagnostic Centre were closed. Thus, the finding of discrimination against Jeffrey was restored.

However, the SCC declined to uphold the Tribunal's finding that systemic remedies were necessary. The Tribunal had ordered the following :

- That the Province allocate funding on the basis of actual incidence levels, establish mechanisms ensuring that accommodations for Severe Learning Disabilities students are appropriate and meet the stated goals in legislation and policies, and ensure that districts have a range of

Thus, the Supreme Court of Canada restored the finding of discrimination against Jeffrey.



services to meet the needs of Severe Learning Disabilities students.

- That the District establish mechanisms to ensure that its delivery of services to Severe Learning Disabilities students meet the stated goals in legislation and policies, and ensure that it had a range of services to meet the needs of Severe Learning Disabilities students.
- The Tribunal remained seized of the matter to oversee the implementation of its remedial orders.

The SCC held that since the claim was made on behalf of Jeffrey, the remedies should address his situation. The other systemic remedies were too remote. While evidence of systemic discrimination was admissible to demonstrate discrimination against Jeffrey, the remedy should address the individual complaint.

Some disabilities advocates are disappointed that the systemic remedies were not upheld, but this does not mean that other people cannot benefit from the ruling in the case. If they are in the same situation as Jeffrey, they can complain to the Human Rights Tribunal or they can expect that the Province and District will provide appropriate assistance so as to avoid future human rights complaints.

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# Relocation Advisory Guidelines — an idea whose time has come?

*Rosemarie Boll*

**L**aw professor Nicholas Bala of Queen's University in Kingston, Ontario, took a close look at 750 Canadian cases<sup>1</sup> where one parent asked for the court's permission to move a child against the other parent's wishes. Even though mobility cases seem 'rule-less' and the decisions give the impression of being arbitrary, he did identify 13 patterns of evidence that tended to tip the scales either for or against the relocating parent. He published his findings in the [\*Canadian Family Law Quarterly\*](#)<sup>2</sup> Bala analysed those 13 patterns and identified the underlying principles. Then he used those principles to develop his Relocation Advisory Guidelines (RAGs). The RAGs are a series of presumptions that he believes Canadian judges are already applying in relocation cases. Bala does not say that his RAGs are what the law should be. He says they are the presumptions that are already guiding judges' decision-making. He hopes his RAGs spark a discussion about much-needed reform in relocation cases.

The RAGs are based on legal presumptions. A legal presumption works this way: if you prove a certain fact, then a judge can go ahead and presume another fact to be true, even though there is no specific evidence for it. For example, the fact that someone has completely disappeared for at least seven years lets a judge presume that the person is dead, even if there is no body or other evidence of death.

Bala says that judges are applying the following presumptions:

**Relocation is in the child's best interest and should be permitted once the moving parent has proved that:**

1. the other parent has been abusive. This goes beyond a mere allegation. The relocating parent must *prove* child abuse or spousal violence. If the violence or abuse happens after separation, it is an exceptionally persuasive fact. Once the relocating parent has proved abuse, the judge will presume that the move will be in the child's best interests because moving will give the parent and child some physical or emotional protection.
2. he or she has sole custody. 'Sole custody' doesn't depend on clauses in a court order – there needn't be a court order at all. Instead, the judge scrutinizes each parent's role in the child's life. If the child doesn't have a positive relationship or much involvement with the 'access' parent, the judge is more likely to presume that moving with the custodial parent will be in the child's best interests.
3. the child wants to move. If the child is mature enough (and this can be a hard fact to prove), the child's wishes matter. However, if the child seems to be manipulated, threatened or pressured by a parent, the judge may disregard the child's views.

**Relocation is not in the child's best interest and should be denied when:**

1. the judge is satisfied that the moving parent has significantly exaggerated or completely fabricated the abuse allegations. This behaviour raises all sorts of red flags. The judge will be concerned that the moving parent won't foster the child's relationship with the other parent. This justifies a presumption against relocation.
2. the parents have shared physical custody and the child is with the non-moving parent at least 40% of the time. The more the non-moving parent is involved, the greater will be the disruption and risk of emotional loss if the child is relocated.
3. the relocating parent has already moved the child. Parents should not move first and ask permission later. Self-help should be discouraged. A parent who has already moved must justify her behaviour or the presumption will be applied against her.
4. the child is mature and says she doesn't want to move. Bear in mind that a child should never be pressured by anyone to express an opinion or take sides.
5. the case is still at an interim stage. Relocations profoundly affect parents and children. Judges do not like to make such important decisions without all of the evidence in front of them. Interim orders often turn into final orders – if a child already moved six months ago, how likely is it that a trial judge will disrupt her life again and order her returned? A relocating parent needs a very strong case to obtain permission to move before there's been a full trial.

'Sole custody' doesn't depend on clauses in a court order – there needn't be a court order at all. Instead, the judge scrutinizes each parent's role in the child's life.

### A judge should not apply either presumption when:

1. the moving parent has alleged abuse but the judge can't decide if the allegation is valid. Violence and abuse often occur without witnesses and behind closed doors. A victim who is unable to prove abuse shouldn't be penalized for raising the allegation (unless she is clearly exaggerating or making it up). When the situation is uncertain, there should not be a presumption for or against relocation.
2. the parents have joint legal custody. 'Joint legal custody' means that the parents have equal decision-making power. Because shared decision-making can continue even after a move, this arrangement does not raise a presumption either way. (Of course, there might be facts that slot the case into one of the other categories where there is a presumption.)

Suppose a non-moving parent has the child more than 40% of the time and wants the child to stay, but the child says he wants to go. How does the judge balance the two presumptions?

### What happens when there are conflicting presumptions?

Suppose a non-moving parent has the child more than 40% of the time and wants the child to stay, but the child says he wants to go. How does the judge balance the two presumptions?

This is a grey area. Some facts are more important than others. The highest-ranking fact is proven abuse. The judge will give it a lot of weight when assessing the case. The safety of victims of family violence is a top priority. The next most important fact is the custody arrangement. The others follow along in no particular order.

### Where do we go from here?

Relocations are risky. It is impossible to predict how things will turn out whether a child stays or goes. The legal presumptions underlying the RAGs might help guide parents and judges faced with making difficult relocation decisions. Nevertheless, legal presumptions aren't facts – just because you haven't heard from me in seven years doesn't mean I'm not alive and well, sipping a cold drink on the sandy beach of a South Pacific island.

### Notes

1. Cases written in English between 2001 and 2011
2. Nicholas Bala & Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" [2012] 30 CFLQ 271

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# The Confidentiality of Commercially Valuable Information

*Peter Bowal and Leo Dragos*

## Introduction: the Cymbal Business

In an age when multi-billion dollar companies struggle to survive, a small family-owned company called Zidjian continues to manufacture cymbals as it has for almost four hundred years. It controls almost 65% of the world's cymbal market, with annual revenues close to \$50 million. The formula of the special alloy used to manufacture these cymbals is even kept from family members until their trust is earned.<sup>1</sup> If the Zidjians had protection for the alloy formula through a patent, that protection would have expired and their business viability would have been lost long ago.

The protection the Canadian legal system can offer through intellectual property (copyright, patent, trademark and industrial design law) is limited in scope and time. Businesses mightily relying on valuable information may be better off doing what the Zidjians did: protect that information from disclosure through their own efforts.

## Risk of Unauthorized Employee Disclosure and Mis-Use

Commercially valuable information must be carefully protected today. Employees collectively represent one of the greatest risks to unauthorized disclosure of valuable information. Inadvertent disclosure, such as accidentally leaving a memory stick at an off-site meeting, can be planned for and mitigated to some extent by appropriate training and embedded locks. Deliberate disclosure is best prevented by meticulously selecting and monitoring employees and limiting their access to sensitive



information. The main protective legal instrument is the employer – employee confidentiality agreement. Ultimately, however, once valuable information has been improperly disclosed, it is impossible to get it back. It is very difficult practically to limit its further dissemination, even with an injunction, or to receive adequate compensation for the disclosure. The best approach is prevention.

Today's highly competitive business environment encourages employees to continuously seek better rewards for their skills by moving between jobs and companies, often in the same industry and geographical area. This adds to the challenge of protecting confidential information because employees are often hired for what they know. Organizations bleed information with each employee who resigns to take a job with a competitor.

As with the breach of contracts in general, the remedies sought for breach of confidentiality may be an injunction to stop further exploitation of the confidential information, but more often, monetary damages for lost revenues.

Commercially valuable information must be carefully protected today. Employees collectively represent one of the greatest risks to unauthorized disclosure of valuable information.

## The Nunes Case

John Nunes was the manager and long-serving employee of Graham Funeral Homes (Graham), the only funeral home for the 10,000 people living in Oliver and nearby Osoyoos, British Columbia. In 2008, after he had made several unanswered offers to buy the business from the owner, Service Corporation International Canada Ltd. (SCIC), Nunes resigned. Together with Pottinger, the only other full-time employee at Graham, Nunes opened a competing business, Nunes-Pottinger Funeral Service & Crematorium Ltd. (NP). SCIC alleged Nunes and Pottinger, before their resignations from Graham, made copies of the existing pre-need client files and used that information for unfair competition, soliciting Graham customers who transferred 208 pre-need contracts to the upstart NP. SCIC sued for breach of contractual and fiduciary duties and claimed \$551,000 in damages for lost profits and more for punitive damages (*Service Corporation International (Canada) Ltd. (Graham Funeral Home Ltd.) v. Nunes-Pottinger Funeral Services & Crematorium Ltd.*, 2012 BCSC 586).

Nunes pointed to his reputation in the small communities he served for more than 20 years. He said the Graham client contact information was immaterial to NP's success in attracting these former Graham clients. The defendants admitted to copying SCIC files but said those clients would have followed them to their new business in any case.

In April 2012, the Supreme Court of British Columbia found the defendants NP, Nunes and Pottinger jointly and severally liable to SCIC in amount of \$280,285 as compensatory damages and punitive damages of \$10,000 against Mr. Nunes. It was not the mere possession of SCIC's confidential information that mattered, but how the defendants used that information to deprive the rightful owner of it and, in the process, obtain undeserved benefits. Even where

Organizations bleed information with each employee who resigns to take a job with a competitor.

NP only used the names and the insurance policy numbers to eventually transfer these clients to their new business, this use of the former employer's information was illegal. Mis-use of proprietary confidential information opens the door to punitive damages "if, but only if, compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation." (*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*).

The best an employer can do is to have an enforceable confidentiality agreement entered into at the time of hiring.

## Conclusion

Throughout history, being possessed of knowledge and information superior to that of one's competitors has been critical to military, political or business success. Employers enjoy a competitive advantage when they own technologies and processes that their competitors cannot easily replicate. Computers and photocopiers can collect, sort and store tremendous amounts of data that can be readily transferred into unauthorized hands. Employers have a *property* interest in this information which they have generated. Commercially valuable information is a valuable corporate asset, just like a unique high-demand product or service, a dedicated and skilled set of employees or well-located real estate.

The best an employer can do is to have an enforceable confidentiality agreement entered into at the time of hiring. This will discourage departing employees from taking valuable information with them when they resign their employment. An employee should depart a job with nothing more than what may be stored in his or her head.

As the recent *Nunes-Pottinger* case shows, an employer may be able to recover damages for the breach of implied duty of confidentiality, especially where the departing employees were originally entrusted with the valuable information and themselves personally gained from its misappropriation.

Employers and employees alike should be reminded of how the cymbal business continues to both make lovely music and remain resolutely quiet at the same time.

## Notes

- 1 <http://www.bbc.co.uk/news/business-18261045>

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# Who Cares about Internet Law and Policy?

*Marilyn Doyle*

*H*ow familiar are these stories?

“When I got to work this morning, our Internet service was down. There was almost nothing I could work on without my online databases and email.”

“The place we went for holidays had no Internet or cell phone service. Wow, did I ever feel cut off from the world!”

These stories remind us of how integral the Internet has become in our lives. As a result our ears prick up when we hear such headlines as:

- Canadian government under international pressure to pass controversial Internet surveillance bill
- Internet freedom debate intensifies at UN conference
- Supreme Court Protects Privacy and the Cyberbullied in Discovery Judgment

Clearly, Internet law and policy has the potential to impact us.

Let's look at some of the key online sources dealing with areas of law that are related to the Internet. We'll begin with three broad-based organizations.

A good place to start is the [Canadian Internet Policy and Public Interest Clinic \(CIPPIC\)](#). Through student-centered research and advocacy, this clinic at the University of Ottawa, Faculty of Law represents consumer and other public interests in such areas as intellectual property, consumer protection in e-commerce, domain name governance, personal information protection and privacy. Within each topic area there are links to FAQs, relevant news articles and background commentary as well as information on law reform, litigation, CRTC proceedings, PIPEDA complaints, and CIPPIC projects.

If you want to expand your research to explore what is happening in the United States and internationally, a frequently referenced source is the [Electronic Frontier Foundation](#). EFF focuses on civil liberties issues related to technology. Their work involves defending digital rights in the courts, advising policymakers and educating the press and the public.

On a more basic level, [MediaSmarts](#) is dedicated to digital and media literacy. Its goal is that young people become informed digital citizens that are not just safe, but savvy. It provides materials for teachers, parents and others who work with youth. Some specific digital issues covered are cyberbullying, cyber security, online marketing, intellectual property, gambling, pornography and privacy. Although its target audience is young people, anyone could learn a lot on this site.

Then there are resources that focus on specific Internet-related issues. We'll examine:

- copyright;
- privacy;
- consumer issues; and
- identity theft.

The wide range of content types and content creators on the Internet inevitably raises the issue of copyright. One of the pre-eminent authorities in Canada on this topic is Dr. Michael Geist, a law professor at the University of Ottawa who holds the Canada Research Chair in Internet and E-commerce Law. He is author of a [popular blog](#) on Internet and intellectual property law issues.

For teachers and students, the [World Intellectual Property Organization](#) provides some practical and appealing materials including a series of comic books exploring trademarks, copyright and patents. While they are primarily geared towards students from 8 to 12 years old, higher-level students and adults have found them useful in providing a basic understanding of IP issues.

When it comes to information about privacy, no one can beat the [Office of the Privacy Commissioner of Canada](#). The plethora of materials on this site includes guidance, news releases, research, speeches, videos, podcasts and presentations. It also authors a lively site for youth (which includes a special section for parents and teachers) called [myprivacy. mychoice. mylife.](#)

For consumer issues, the [Office of Consumer Affairs](#) has a number of resources. Its Canadian Consumer Handbook has an article about [shopping safely online](#). Also of interest to both consumers and businesses is the [Canadian Code of Practice for Consumer Protection in Electronic Commerce](#).

The recently launched [Canadian Identity Theft Support Centre](#) offers free, expert advice to Canadians who have become victims of identity theft and must undertake the often long and difficult road to recovering their identities. The Centre also strives to educate people about identity theft and to collect research on the nature of identity theft harms in Canada.

Bookmark some of these sites, and you'll be ready to investigate the next time those headlines have you scratching your head about Internet law and policy.

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# Proposed Bill, Though Well-intentioned, Raises Questions

*Peter Broder*

*I*n what is becoming a quite regular occurrence, the latest Parliamentary session saw introduction of a Private Member's Bill related to charities. Bill C-458, sponsored by Kitchener-Waterloo MP Peter Braid and given first reading in the House of Commons in late October, calls for an annual National Charities Week in late February and extension of the period for which charitable receipts can be claimed for a calendar year into the first 60 days of the following year.

On their face, the measures proposed in the Bill are not as troublesome as the provisions contained in the last charity-related Private Member's Bill, C-460. That Bill passed the House of Commons but died on the Senate Order Paper when the last election was called. Bill C-460 would have imposed salary reporting requirements on registered charities that would have been administratively cumbersome for both the organizations themselves and for the Canada Revenue Agency (CRA) and which could have had untold consequences for staff recruitment and retention by charitable sector groups.

Bill C-458's goals are laudable. It is designed to foster increased charitable giving through the awareness-raising associated with having a designated week for charities and by aligning treatment of receipted charitable donations with current practice with respect to the treatment of Registered Retirement Saving Plan (RRSP) contributions. The latter changes would, as with RRSPs, create a 14-month receipt eligibility period for each calendar year.



It might be wise, however, to temper enthusiasm for the Bill until some possible effects of its proposed measures have been thoroughly studied. Among the things that ought to be considered are:

- any administrative burden that the provisions might place on either the CRA or charities themselves;
- how the changes would impact on charities that have structured their fundraising campaigns to coincide with traditional holiday giving; and
- with respect to timing, the impact of placing charitable donations in direct competition with RRSP contributions.

Smaller organizations, or those that rely heavily on volunteers, may not even be aware of the change and may not respond as quickly in adopting to the new rules.

Many large charities have sophisticated fundraising infrastructure in place and will be easily able to modify their systems to accommodate changes to solicitation materials and receipting practices stemming from the extension of eligibility 60 days into a subsequent calendar year. Smaller organizations, or those that rely heavily on volunteers, may not even be aware of the change and may not respond as quickly in adopting to the new rules. All-volunteer groups are always difficult to communicate with when regulatory change occurs, so an education effort by the CRA would be desirable, if not essential.

While such education and systems changes may seem like a small matter, not moving quickly enough to update their dealings with donors and administrative practices could further disadvantage groups who are already often out-resourced and dwarfed by bigger players in the fundraising marketplace.

As well, the costs of any changes to processes, either within charities, or in the CRA should be factored into assessing the merit of adopting a fourteen-month giving window.

It should also be recognized that it may be difficult to judge the impact – positive or negative – of this change after the fact. If the change is implemented in conjunction with other measures, and even if it isn't, determining an effect on giving patterns or donation amounts may not be feasible owing to the plethora of other factors that can influence donations in any given year. In light of this, establishing some assessment criteria prior to implementation would be worthwhile.

Also, the current approach, adopted by many groups of tying their campaigns to the December holiday season needs to be dealt with. If the intention is merely to extend the period during which a high volume of donations is generated, that may be more easily said than done. Experience with “donor fatigue”, which was noted a number of years back after spate of international disasters happened in quick succession, suggests that there may be an absolute limit to people's willingness to give no matter how repeated the “asks” and how compelling the case for support.

Moving donations out of December into the New Year could be even more problematic, given the number of organizations that use cash flow models based on a large influx of funds at the end of the calendar year. Also worth considering is the significant portion of the population most apt to give who typically travel south in the early months of the year.

Potential further drawbacks to encouraging donations in the way contemplated by the Bill are that it may put donation expenditures in competition with RRSP contributions. Indeed, many taxpayers borrow money to finance RRSP contributions in the early months of the year, making it unlikely that they would have extra cash to devote to charitable gifts. Also, as many people are faced with large credit card bills after the holiday season, this might reduce the chances that they would have resources available for giving in the proposed 60-day window.

Bill C-460 fell because it never made it through the Senate – commonly called the “chamber of sober second thought”. With a majority government in place and the next election not expected until 2015 that is unlikely to happen with Bill C-458. That’s all the more reason to ensure that any potential unintended consequences associated with it are aired and understood at an early stage. If some of the possible shortcomings of the Bill are manifest, the damage could be hard to undo.

Experience with “donor fatigue”, which was noted a number of years back after spate of international disasters happened in quick succession, suggests that there may be an absolute limit to people’s willingness to give no matter how repeated the “asks” and how compelling the case for support.

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# Whatever Happened to . . .

## *R. v. Sault Ste. Marie:* the Due Diligence Defence

*Peter Bowal and Lindsey Iss*

There is an increasing and impressive stream of authority which holds that where an offence does not require full *mens rea*, it is nevertheless a good defence for the defendant to prove that he was not negligent.

– *R. v. Sault Ste. Marie*, per Dickson J. at page 1313

### Introduction

In 1985, shortly after he became Chief Justice of Canada, Brian Dickson was speaking to a large group of law students at the University of Alberta. The last question he was asked was “what was your favourite judicial decision that you were involved in?”

The Chief Justice paused. The audience sat quietly, enthralled about what case, if any, he would pick from his already prolific 12-year career on Canada’s top court. Most assumed he would name one of the seminal interpretive *Charter of Rights* cases and principles to which he made major contributions.

“My favourite case was *Sault Ste. Marie*,” he replied confidently. “That case is a good example of creating doctrine to serve important legal purposes. This article describes the decision in the case of *R. v. Sault Ste. Marie* [1978] 2 SCR 1299 and its impact on Canadian law.

### Proof of Criminal or Regulatory Guilt

To obtain conviction on a crime, the Crown must, by its own evidence, prove full mental intention (*mens rea*) beyond a reasonable doubt. That is a high standard of proof, one that is justified by the serious consequences that flow from criminal conviction.

Prior to 1978 in Canada, persons accused of public welfare regulatory offences such as liquor law offences, pollution, misleading advertising, traffic infractions and securities offences, were convicted if the Crown prosecutor could merely prove the accused did the offence. No intention at all needed to be proven for these many less serious municipal, provincial or federal regulatory offences. This *absolute liability* rendered it almost impossible for someone to defend against such charges. If the offence had occurred, one was judged guilty, even though one did not intend to do it or had acted reasonably to prevent the offence from occurring.

Mr. Justice Dickson, writing for a unanimous Supreme Court of Canada in *R. v. Sault Ste. Marie* pointed out that treating all these public welfare offences with the same absolute liability served to punish the innocent and add nothing to deterrence. He wrote at para 1311:

There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of a breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others?

He went on to judicially adopt a middle (“half way”) category of intent for some of the more business-related regulatory offences such as pollution. This category is known as the *strict liability* offence, and it gives rise to the *due diligence* defence.

Persons charged with many such regulatory offences are not now automatically guilty under absolute liability principles. They can take the stand at trial to convince the judge of their innocence on the basis of what they did to prevent the offence from taking place. This new middle category of strict liability allows the courts to protect the public from harm without the harsh punishment of absolute liability on one hand and without burdening the Crown to prove guilt beyond a reasonable doubt that accused intended to commit the offence.

Prior to 1978 in Canada, persons accused of public welfare regulatory offences such as liquor law offences, pollution, misleading advertising, traffic infractions and securities offences, were convicted if the Crown prosecutor could merely prove the accused did the offence.

## Facts of the Sault Ste. Marie Case

The Ontario city of Sault Ste. Marie hired Cherokee Disposal as a contractor to dispose of the city's waste. Cherokee Disposal's disposal site bordered Cannon Creek, which ran into Root River. This site had fresh water springs that flowed into the creek. Cherokee Disposal submerged the springs and disposed the municipal waste. Some of this waste seeped through the artificial barrier into the groundwater, polluting the creek and eventually the Root River. The Root River also flows into the St. Mary's River which in turn empties into the eastern end of Lake Superior. Surface water intake in Lake Superior supplies about half of the municipal water to the 75,000 residents of Sault Ste. Marie.

The pollution of Cannon Creek and Root River led to charges against both the City and Cherokee Disposal, under s. 32(1) the *Ontario Water Resources Commissions Act*:

... every municipality or person that discharges, or deposits, or causes, or permits the discharge of deposits of any material of any kind into any water course, or any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence...

The trial judge found that the City had nothing to do with the actual operations. Cherokee Disposal was an independent contractor and its employees were not city employees.

Justice Dickson defined and inserted the category of strict liability as a halfway point between full *mens rea* and absolute liability.

## Supreme Court of Canada Decision and Impact

Justice Dickson (as he then was) defined and inserted the category of strict liability as a halfway point between full *mens rea* and absolute liability. He recognized different standards of proof according to three categories of offences (pp 1325-26):

There are compelling grounds for the recognition of three categories of offences rather than the tradition two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care, this involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonable believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all the reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

4. Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as “wilfully,” “with intent,” “knowingly,” or “intentionally” are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

Public welfare regulatory offences are strict liability offences. After proof that the offence occurred, the burden shifts to the accused to show that reasonable care was taken to prevent the wrongful act. In a prosecution for an environmental offence, for example, the Crown would demonstrate that the accused discharged a harmful substance into the river. The accused may then show that this was a mistake or that many precautions were in place to prevent this from happening. The accused faces a negligence-type standard of proving reasonable and prudent actions in the circumstances, even though the offence still occurred. This “due diligence” defence is today written in to most regulatory offence legislation.

The corporate manager may show what reasonable steps were taken to prevent the offence. What is reasonable will depend upon the circumstances of the case, including that manager’s role in the corporation and in the offence.

This middle category strikes a fair compromise to both the accused and the Crown on behalf of society. The Crown does not have to prove fault and mental intention beyond a reasonable doubt. The accused can explain what happened and escape liability where one’s actions were reasonable.

The Requirement of <i>Mens Rea</i> According to Type of Offence		
Full <i>Mens Rea</i>	Strict Liability	Absolute Liability
proof of a guilty act committed with full intention beyond a reasonable doubt	<ul style="list-style-type: none"> <li>- <i>prima facie</i> proof of commission of the offence</li> <li>- due diligence defence</li> </ul>	<ul style="list-style-type: none"> <li>- commission of offence proved</li> <li>- <i>mens rea</i> assumed; no defence on basis of lack of intention</li> </ul>
CRIMINAL CODE CRIMES	WIDE RANGE OF REGULATORY OFFENCES	



### The City of Sault Ste. Marie 35 Years Later

Water pollution concerns in St. Mary's River were not identified until 1985, seven years after the Supreme Court decision.

Sault Ste. Marie is a border town – with cities of the same name in Michigan and Ontario. The pollution had originated from various industrial sources. Environment Canada and the Ontario Ministry of the Environment, the U.S. Environmental Protection Agency and the Michigan Department of Environmental Quality all signed a Letter of Commitment toward ecological restoration of this area. A three-stage remediation plan was created on the Canadian side. The city has committed to keep its water clean through continuous surveillance and maintenance, something that started with this pollution prosecution 35 years ago.

This “due diligence” defence is today written in to most regulatory offence legislation.

Peter Bowal is a Professor of Law and Lindsey Iss is a B.Comm. student at the Haskayne School of Business, University of Calgary, in Calgary, Alberta.



## Renting with a Pet

*Rochelle Johannson*

**A**fter a long day at work, you might think it would be nice to be greeted at the door by a wagging tail and enthusiastic licks from a stalwart companion. Or to look up as you're leaving for the day and see your feline friend watching you leave from the window. Before choosing to get a pet, however, tenants need to make sure that they know their rights under the law, if they have any at all.

### 1. What does the law in your province say about renting with pets?

Each province has their own law that applies to landlords and tenants who live there. That means that the law changes from province to province. Some laws state that the tenant is allowed to have a pet in the rental property, and some laws leave it up to the landlord to decide whether or not pets will be allowed. Also, some provinces allow landlords to charge the tenant a pet fee or pet rent in order to have a pet on the property. The [Canadian Mortgage and Housing Corporation](#) has developed [tipsheets](#) that provide basic information about renting in each province and can act as a good starting point to find out about the law.

If a tenant has a qualified service dog, then the landlord must accommodate the tenant's disability up to the point of undue hardship. This means that the landlord usually cannot refuse to rent to someone who has a service dog. You can find out more about human rights and accommodation by contacting your provincial human rights office. This [website](#) has a list of the human rights organizations in each province.

## 2. What does your lease say?

If the law in your province is silent on the issue of pets, or states that the landlord can choose whether or not to allow pets in the rental property, then you should look at your lease. The lease is the contract that you entered into with the landlord, and usually will state whether or not you can have a pet. You can also choose to talk to your landlord to see if the landlord is agreeable to having pets in the rental property. If you and your landlord can come up with an agreement about pets, then you should put this agreement in writing. You can take a look at a [sample pet agreement](#).

## 3. What kind of property do you rent, and does the property have special laws about pets?

Certain kinds of property come with additional legal obligations. For example, if you rent a condominium unit, then you are bound to follow the renting law in your province as well as the condominium law in your province. Most condominiums will have extra rules that the tenant must follow, and if the tenant does not obey these rules, then the condominium board can evict the tenant. This means that if, for example, a condominium building does not allow pets in the building, and the tenant brings in a pet, then the condominium board could take action against the tenant. The penalties for infringing the rules vary from condominium to condominium.

The first step to being a responsible pet owner is getting informed before you purchase a pet. If you get a pet first, assuming that your landlord will allow you to keep the animal, or assuming that your landlord will not find out, you have not acted in the animal's best interest and you can potentially be evicted. It is up to you to protect your pet, and if you cannot even provide shelter for the pet, it may not be the right time in your life to have a pet at all.

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