July/August 2013

Renting Expropriating Bullying

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Note to Readers:

In order to better provide our readers with new and interesting material, LawNow will begin to publish articles and columns at the half-way mark of each issue. So, for the July/August issue of LawNow, look for new material to be available on Wednesday, August 7, 2013.

Alberta Real Estate Foundation

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Planning ahead

Jennifer Allford

Not long ago, a class of Grade 4 students in Glenbow Elementary School in Cochrane got to work planning Alberta's future.

First, they watched a series of videos exploring different industrial land-uses such as forestry, energy and agriculture. They also watched videos about other land-use factors including water quality, the health of fish, greenhouse gas emissions, GDP and the human population. After the videos, the students split into groups and presented a poster about an industrial land-use in the province.

And one day later that week, right after recess, the kids settled in with Alberta Tomorrow, a sophisticated, web-enabled tool that uses GIS technology and satellite imagery to simulate the effects of people on Alberta's wildlife habitat, ecosystem services and natural resource production.

The tool lets the students examine a range of indicators and set 30-year goals for Alberta – in essence, they draw the future they'd like to see for the province. It becomes very clear, very quickly, that there are tradeoffs, and in order to create the future they want for Alberta, there needs to be careful planning today. This plain illustration of the benefits and liabilities around various land-uses really gets the students thinking, and talking.

"A typical initial Grade 4 reaction to liabilities is to just stop industrial development to save wildlife habitat," says Jennifer Janzen, who takes Alberta Tomorrow into elementary, junior high and high school classrooms all over the province as executive director of the Alberta Tomorrow Foundation. "One (student) was even heard to say: 'Ya, but that industry contributes to a higher GDP which helps fund our schools!'"

The students have robust discussions around questions such as "How are natural resources used by Albertans?" and "How do Albertans deal with competing demands from land-use?" And it's that kind of conversation that gives the students "a thorough understanding of how industry contributes to our GDP and economy, and how a balance between the economic benefits and environmental liabilities is what's important," says Janzen, a former teacher.

Brad Stelfox a landscape ecologist with ALCES Landscape & Land-Use was inspired to help create Alberta Tomorrow after a number of conversations with politicians in his day job as a consultant delivering land-use cumulative effects modelling tools and strategic land-use planning advice.

"The guidance I was getting back from politicians was yes, this is an important issue but dealing with it also causes challenges," he says. "And until the system can create awareness and there's a really strong signal from normal Albertans, just the average Joe, that they want politicians dealing with not only the benefits, but the challenges, they aren't likely to respond."

A key challenge to delivering Alberta Tomorrow was the need to finish the land-use mapping of the province. That is where the Alberta Real Estate Foundation stepped in, and with their financial contributions, allowed this important gap to be filled.

It became clear, Stelfox says, that to address the pressing land-use issues in Alberta, Albertans needed to learn more about them. So he and his colleagues Matt Carlson, Jennifer Janzen and Noah Purves-Smith got to work developing Alberta Tomorrow to foster that more informed conversation about land-use, whether it be forestry, agriculture, energy, transportation, residential development or tourism.

"There is a lot of knowledge in Alberta about the benefits of land-use. The average Albertan understands land-use is important – it gives us jobs; it gives us royalties," he says. "Land-use creates benefits but it creates problems too, whether its air emissions or water quality or loss of wildlife habitat there are problems and there is not a very good conversation in Alberta about that."

Years and years ago, students were taught the importance of recycling, a message they took home to their parents who saw the benefits and rather quickly caught on to the idea. Alberta Tomorrow is attempting that same model, a "bottom up trajectory" where students teach their parents. "If we can help people understand the balance, then they're more likely to influence their politicians in a more reasonable way," says Stelfox. "That's the hope."

The tool has been adapted to work with existing curriculum in elementary, junior high and high schools. "Teachers are busy, they have a defined curriculum and they only have so many hours in the day," says Stelfox. "So the challenge was to build something they could incorporate into their busy educational curricula."

A key challenge to delivering Alberta Tomorrow was the need to finish the land-use mapping of the province. That is where the Alberta Real Estate Foundation stepped in, and with their financial contributions, allowed this important gap to be filled.

So far, 300 teachers and more than 1,200 students have registered for an account to use the tool, but far more students have seen it "because some teachers, especially in earlier grades like Grade

1, use it as a demonstration, rather than have the students register themselves for an account to use the tool," says Janzen.

Bringing the land-use conversation into the province's classrooms seems to be trickling up from students to their parents. "I've been doing some high level professional work, and some director or CEO will comment about their daughter or son in school using Alberta Tomorrow," says Stelfox. "Looking at my work, they'll say this is the same issue that my child described and brought home from school. It is having an effect."

After spending a handful of classes studying land-use and balancing the tradeoffs, those Grade 4 students in Cochrane wrote letters to the provincial government suggesting how best to balance development and the environment. The province had asked for feedback over land-use in its proposed South Saskatchewan Regional Plan, and the students were happy to provide their very informed recommendations.

For more information about Alberta Tomorrow, visit albertatomorrow.ca

Jennifer Allford is a communications consultant with the Alberta Real Estate Foundation in Calgary, Alberta.

1. Hooking Up with a Pretty Girl

Justice Fergus O'Donnell of the Ontario Court of Justice recently wrote: "Devon Brumble wanted a pretty girl and, as is sometimes the case, he got most of what he wanted, however briefly, and a whole pile of trouble besides". Brumble's friend had offered to set him up with a pretty girl with a long nose and six teeth for $1800. She was a bit old for him at 38, but his friend said she revolved around men. Brumble found himself admiring his new girlfriend in a police van after they intercepted the messages and easily translated their code into a 38 calibre revolver with six rounds of ammunition. The Judge noted that the accused's luck wasn't all bad: the pretty girl's teeth were missing. Justice O'Donnell wrote "I suspect that Mr. Brumble might have been a bit peeved upon discovering that fact that evening, but under the sentencing provisions of the *Criminal Code* the absence of those bullets works significantly in Mr. Brumble's benefit. If Mr. Brumble had been found in possession of the gun, either loaded or with ammunition for it nearby, the *minimum* sentence would be a penitentiary sentence of three years." The Judge sentenced him to a jail term of 18 months, with a 1 to 1 ¼ credit for time served, followed by a probation period of three years, the maximum possible, under strict conditions.
R. v. Brumble, 2013 ONCJ 308

2. Mandatory Workplace Testing

The Supreme Court of Canada has ruled that mandatory random alcohol and drug testing of unionized employees at the Irving Pulp and Paper plant in New Brunswick was unreasonable. The majority opinion stated "A unilaterally imposed policy of mandatory random testing for employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace…In this case, the expected safety gains to the employer were found by the board to range from uncertain to minimal, while the impact on employee privacy was severe." It ruled that the employer had not demonstrated the necessary safety concerns that would justify random universal testing.

Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd., 2013 SCC 34 (CanLII)

3. Water Woes

A Court of Queen's Bench judge has ruled that the provincial Environmental Appeal Board has no jurisdiction to grant public interest standing to interested parties who wish to appeal decisions of the Director of Alberta Environment and Sustainable Resource Development. The applicants wanted to challenge amendments to water licences the Director approved that will allow Irrigation Districts to sell water for other purposes. The Applicants argued that, by way of analogy, the Appeal Board, like the courts, has an inherent jurisdiction to grant public interest standing. Justice R. J. Hall rejected the analogy, writing "While Courts have inherent jurisdiction it is clear law that administrative tribunals do not. Their jurisdiction is solely derived from the statute that provides that jurisdiction. In this case, that statute is the *Water Act*. The *Water Act* does not provide them with any jurisdiction to grant public interest standing." Adam Driedzic of the Environmental Law Centre notes " 'No jurisdiction' means the Court did not need to consider the test for standing. It's a test that these groups could likely meet." The test for granting public interest standing as set out in the recent Supreme Court of Canada decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence* is threefold:

- Is there a serious justiciable issue;
- Do the groups asking for standing have a genuine interest or real stake in the proceedings or is engaged with the issues that it raises; and
- Is this a reasonable and effective means to bring the case to court?

Alberta Wilderness Association v. Alberta (Environmental Appeal Board) 2013 ABQB 44 (CanLII)

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 SCR 524

4. A Jury of Your Peers

The Ontario Court of Appeal has ordered a new trial for an Aboriginal man convicted of manslaughter in 2008. The majority on the Court found that Clifford Kokopenace did not receive a fair trial because the jury that heard his case had no Aboriginal members. Mr. Kokopenace argued that his *Charter* s.11 right to a fair and public hearing by an independent and impartial tribunal, and his s. 15 *Charter* right to equal treatment under the law had been violated. The Court said that the right to an impartial jury is not an absolute right but that the state must use a jury roll that reflects the distinct perspectives that make up the community, thus ensuring that the jury acts as the conscience of the community. It found that the Ontario government had not done enough to ensure that jury rolls in the northern parts of the province adequately represented on-reserve Aboriginal people, who make up about one-third of the population, but accounted for just four percent of the jury roll.

R. v. Kokopenace, 2013 ONCA 389 (CanLii)

Your Principal Residence and Taxes

Hugh Neilson

Capital gains have been subject to taxation in Canada since 1972. At present, only half of any capital gain is included in income.

While this includes property such as real estate, most Canadians are aware that there is a "principal residence exemption", and believe gains on their home will not be taxable. For the average Canadian family, which owns and resides in a single residence at a time, this is the usual result. However, the rules can become complex in many situations, sometimes catching taxpayers by surprise.

The Basics

Every Canadian resident is entitled to designate a property they "ordinarily inhabit" during the year (more on this later) as their "principal residence" for each calendar year. Since 1981, families (spouses, including common law partners, and their minor children) can designate only one property between them. Provided the property sold is designated for at least one year, a portion of the gain is exempt, computed as 1 + the number of years designated/total years owned. Years prior to 1972 are ignored in the computation.

So, when a family sells one residence and acquires a new one, they can designate the property sold as their principal residence for all years prior to the year of sale, and the entire gain will be exempt from taxation. This "1+" rule ensures a family can own two residences in the year they move without

jeopardizing the tax-free status of their homes. Although the legislation requires a form (T2091) be filed to designate a property as a principal residence, the Canada Revenue Agency (CRA) has consistently maintained a policy that this form need not be filed if no portion of the gains is taxable.

> . . . most Canadians are aware that there is a "principal residence exemption", and believe gains on their home will not be taxable. For the average Canadian family, which owns and resides in a single residence at a time, this is the usual result.

Home, Sweet Home(s) – Multiple Residences

The term "ordinarily inhabited" is not defined in the legislation. However, as a property can be ordinarily inhabited at any time in the year, it is not necessary that the property be the family's main home. A summer cottage or other recreational property might be inhabited for only a week or two, but this is sufficient to allow it to be designated. A property may qualify by being ordinarily inhabited by the individual, their spouse or common-law partner, or any of their children.

For families with multiple residences, such as recreational properties, or parents who own properties occupied by their children, a choice must be made about which property to designate. For example, assume Bob and Mary own a house in the city which they purchased in 1994 for $250,000. The value of that property has risen to $750,000 by the date of sale in 2013. They can designate the property their principal residence for 19 years, and exempt 19+1/20, or 100%, of the gains.

However, in 2004 Bob and Mary purchased a condominium in a developing ski resort for $200,000. The property is now worth $500,000. They spend a few weeks each year at this property, so it could also be designated as their principal residence for those ten years. Which property should be designated as their principal residence?

For the years 1994 – 2003, the answer is obvious – they only owned the city house, so that is the property they will designate. But what about 2004 and later years? Every additional year the house is designated will exempt a further $25,000 of gains ($500,000/20 years). However, the condo has appreciated $300,000 over ten years, or $30,000 per year. If they also sold the condo in 2013, the answer would be pretty easy – designate that property for nine years (so the full gain would be exempt using the 1+ rule), and use the remaining 11 years for the house. Their new home can be designated for 2014 and later years, so all gains on that property will be exempt.

As they will retain the condo, they will need to estimate future appreciation – if the condo's value has peaked, the average annual gain will decline, but if its value appreciates, the average gain may rise. Any tax on the house gain is payable immediately, while any taxes on the condo may not be payable for many years. The decision isn't obvious, so Bob and Mary will need to consider this carefully. If they report no gains on the house, the CRA will assume they have designated the house as their principal residence for all years up to 2012. Ultimately, they will have to pay taxes on some gains on the properties. By the way, Bob plans to buy a lake cottage next year …

> . . . it is not necessary that the property be the family's main home. A summer cottage or other recreational property might be inhabited for only a week or two, but this is sufficient to allow it to be designated.

Breaking Up Is Hard to Do – Separation and Divorce

Spouses or common law parties must designate the same property for each year. This restriction does not apply for any year in which the parties are divorced, or are living separate and apart pursuant to a judicial separation or a written separation agreement. Where both spouses maintain a residence during the period of separation, preparing a written separation agreement should be a priority to minimize the number of years that access to the exemption is restricted. Where properties pass between spouses, or former spouses, years of ownership by either spouse are incorporated into the principal residence exemption computations.

Don't Fence Me In – Lot Sizes

A principal residence includes the house, plus up to half a hectare of "subjacent" land. More land can be included if it is "necessary to the use and enjoyment" of the residence, a fairly subjective determination. Often, zoning bylaws are determinative. If the minimum lot size is three hectares, and the residence is situated on five hectares, the parcel cannot be subdivided, so the entire parcel is logically necessary to use and enjoy the residence. If some land is used for some other purpose (e.g. farmed), that portion would likely not be a necessary part of the residence.

Some level of permanence is required for a property to be "ordinarily inhabited". In extreme cases, individuals have "moved in" before the property was complete, sleeping in sleeping bags. This was not sufficient to "ordinarily inhabit" the property.

In a recent court case, *Cassidy v. Canada 2011*, the Federal Court of Appeal ruled that the land must be reviewed every year. In the above situation, if the zoning restrictions were relaxed to permit one hectare parcels after ten years' ownership, gains on the excess land for those later years would be ineligible for the exemption.

Wherever I Lay My Hat – Short Stays

Some level of permanence is required for a property to be "ordinarily inhabited". In extreme cases, individuals have "moved in" before the property was complete, sleeping in sleeping bags. This was not sufficient to "ordinarily inhabit" the property. The courts look to evidence such as moving in furniture and personal effects, changing mailing addresses and similar indicators of ongoing residency.

Where a property is acquired with the expectation of resale at a profit, this "adventure in the nature of trade" is considered a business, so any gain is ordinary income, and cannot be sheltered by the exemption. The CRA has sometimes reviewed land titles records for short periods of ownership to identify speculators whose property sales, often referred to as flips, should be treated as business transactions.

The Other Hand – GST/HST

So far, we have looked at taxes on property gains, but what about sales taxes? The GST (HST in harmonized provinces) rules applicable to real estate are complex. A builder constructs a residential property for resale is required to charge GST/HST on sale of the property. Where an individual

constructs their own property, they are required to self-assess GST/HST on the value of the property when it is substantially completed. This GST/HST payable is reduced by GST/HST paid on the land, construction materials and other costs of construction, to the extent these were not previously recovered.

A "used residential complex", which has already been owned and occupied for long-term personal accommodation, is exempt from GST/HST. This covers most home purchases.

A "used residential complex", which has already been owned and occupied for long-term personal accommodation, is exempt from GST/HST. This covers most home purchases. Where a property has been "substantially renovated", it can be treated as a new property, so that GST/HST will apply. However such renovations are considerable – the legislated definition requires that "all or substantially all of the building that existed immediately before the renovation or alteration was begun, other than the foundation, external walls, interior supporting walls, floors, roof and staircases, has been removed or replaced". Obviously, this goes well beyond finishing the basement or upgrading the bathroom!

A rebate is also available on some new home purchases. The New Housing Rebate will refund up to 36% of the GST paid on purchase or construction of a new home for occupation by the purchaser, to a maximum of $6,300 (36% of GST on a $350,000 purchase price). If the value of the home purchased exceeds $450,000, no rebate is available, and the rebate is eroded for values between $350,000 and $450,000. The CRA's guidebook RC4028 provides more details on this, and related provincial rebates.

Overall

The basic premise – gains on an individual's principal residence attract no taxes – is correct. However, more complex issues often arise in issues that go beyond the most basic. The CRA has recently released the first of its new Income Tax Folios for public comment. Included among this first release is Folio S1-F3-C2, discussing the principal residence. This document is available on the CRA's website, and provides further details of these and other issues. In unusual cases, professional advice is also advisable.

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The Growth of **Green Building**

Justice Building, Sechelt, BC, Sharp & Diamond Landscape Architecture

Tai Ziola

Even if you're not directly involved in the construction industry, chances are good you've heard in recent years about a renewed interest in more environmentally sustainable buildings. Since the 1990s, there has been new attention given to "green" approaches to design and construction, resulting in over 4000 LEED-registered projects in Canada since 2002 – and unfortunately also resulting in a somewhat muddied regulatory environment.

Currently, although Canada's *National Energy Code for Buildings* (2011) requires a minimum level of energy efficiency for most new buildings on par with leading countries in the world for energy efficiency, the current *National Building Code* – and consequently, many of Canada's provincial building Codes – does not explicitly require that new buildings comply with this code. As a result, adoption of minimum energy efficiency standards across the country has been uneven.

In response to the variation in minimum energy efficiency standards, a range of third-party assessment tools have been developed over the last two decades in an attempt to verify or standardize the performance measures associated with green buildings. The most well-known, LEED (Leadership in Energy and Environmental Design) is administered by the Canada Green Building Council (CaGBC). It is based on earlier American versions developed by the U.S. Green Building Council, and has had a high level of uptake particularly on commercial and institutional buildings. The rating system is based on a points approach across a number of categories, addressing site sustainability, water use, energy efficiency, material use, and indoor environmental quality. LEED rating systems have also been developed specifically for a number of project types, including new construction,

building shell spaces, commercial interiors, homes, and entire neighbourhoods. Other key rating systems have also seen increased engagement in recent years, including:

- Built Green, which has been a popular option for new multi-family and larger-scale residential developments;
- *PassivHaus*, a German-imported standard focusing on optimal detailing for energy efficiency; and
- Living Building Challenge, a very stringent standard requiring a high level of social equity concurrent with excellent environmental performance.

Many Canadian municipalities, including Edmonton and Calgary, have a requirement for new city-owned buildings to meet the standards for some level of LEED certification under the CaGBC – which is an effective approach to improving building performance in cases where the municipality is acting as the client. This position allows them to hold design consultants and contractors responsible for the achievement of a given standard under the terms of their contracts. But what is being done to raise the expectation for green building more broadly? Arguably, the challenge is to extend a higher performance and efficiency standard to as wide a scope as possible, which would inevitably include raising the calibre of private development as well.

One aspect of sustainable building strategy, green – or vegetated – roofs, has been embraced wholeheartedly by the City of Toronto, as it strives to position itself as a global leader in this area. The first in North America to do so, the City enacted a bylaw in 2009 requiring the construction of green roofs on all new developments. There are many arguments in favour of a move like this: according to a City of Toronto Policy and Finance Committee report (Report 1, Clause 20, January 31, February 1 and 2, 2006), "8 percent green roof coverage can result in an estimated $34 million in direct and urban heat island related annual energy savings and a onetime energy cost savings of over $148 million", recommending that the City "recognize that green roofs hold the potential to mitigate impacts on stormwater quality and quantity, improve buildings' energy efficiency, reduce the urban heat island effect, improve air quality and additionally, beautify the City." Depending on the size of a project, most new commercial, institutional, and residential developments in the City are now required to incorporate between 20 and 60 percent vegetated roof coverage. Although the *Building Code Act* generally prohibits municipal bylaws from exceeding the requirements of the provincial building code, the specific authority to require green roofs on new private development was granted under the *City of Toronto Act* (2006).

Similarly, the *City of Vancouver Charter* (passed in 1953) grants different powers to the City than those typical under the *British Columbia Municipalities Act* – allowing Vancouver to enact its own Building Bylaw as an alternative to the *National* and *Provincial Building Codes*. This bylaw holds single family residences and multi-family/commercial developments to a higher standard of sustainability performance than would otherwise be required by the *British Columbia Building Code* or the related *National Energy Code for Buildings*. Commercial-scale developments (those requiring professional involvement in the design and engineering) are additionally required to submit energy performance calculations demonstrating the project's adherence to specific ASHRAE[1] standards in order to receive a building permit, and must also

Justice Building, Sechelt, BC, Sharp & Diamond Landscape Architecture

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demonstrate that the construction has been in accordance with the proposed design in order to pass final inspection for occupancy permits. The ability to adopt this Building Bylaw has also allowed the city to be progressive in other areas, including requirements for barrier-free accessibility, sprinklering for fire protection, and higher standards for building envelope performance, the latter at least partially in response to the 'Leaky Condo' crisis in the 1990s. Clearly, in the cases of Toronto and Vancouver, legislation granting these municipalities rights to enact standards above and beyond the provincial building codes has resulted in more vigorous adoption of green building and other progressive initiatives.

But what about cities that are not empowered by such extended rights through legislation such as city charters? With limited authority to require additional standards over and above the requirements set out in the provincial building code, many municipalities are understandably hesitant to make any green building standards mandatory for third-party builders. But there are several options available to them within the bounds of their authority.

Some municipalities, including Strathcona County, just east of Edmonton, are experimenting with including green building criteria in the zoning requirements for certain sites. This strategy may include a requirement for a specific level of environmental performance being embedded in the permitted land uses for the property, either drawing on a third-party certification system such as LEED or Built Green, or using a checklist the municipality has developed internally for the purpose. In Strathcona County's case, these initiatives are focused around a number of specific development areas, or "villages," which demand special attention to environmental sustainability, rather than as an across-the-board measure applying to the entire municipality.

Another strategy being employed is to request that developers set their own targets for sustainable performance as part of expanded design consultation processes taking place at the development permit stage. This can include consultation requirements through organizations such as the Edmonton Design Committee or Strathcona County's SUN (Sustainable Urban Neighbourhoods) Committee, where advance approval of the

Clearly, in the cases of Toronto and Vancouver, legislation granting these municipalities rights to enact standards above and beyond the provincial building codes has resulted in more vigorous adoption of green building and other progressive initiatives.

design is an additional requirement applying to certain sites or areas of the city. In this approach, it seems that while the targets set are often based on existing rating systems such as LEED or Built Green, performance tends to be self-reported by the design and construction team. This is known as a "shadowing" approach to these certification systems, which appears, at least in the Alberta capital region, to have a higher level of uptake than a voluntary pursuit of third-party certification.

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Some cities are trading extra density successfully as a benefit to developers who choose to meet a higher standard than that required by the governing standard. In the development of new high-density neighbourhoods in Vancouver, the City has offered extra building height (and therefore additional lucrative saleable area) at the development permit stage to developers who commit to exceeding the energy performance requirements of the Vancouver Building Bylaw. This strategy can result not only in better-performing individual buildings, but also in additional urban density in largely walkable neighbourhoods, which contributes to sustainability through infrastructural efficiency and reduces energy devoted to transportation by residents.

Other strategies that are available to municipalities, and are being explored across North America, include:

- expedited approval processes;
- fee rebates for development and building permit fees;
- development cost charge reductions; and
- property tax rebates for high-performing developments.[2]

It appears that requirements for performance on new developments are more robust and enforceable when tied to the Building Permit stage of approval, rather than the Development Permit, simply because they fall within an existing inspection structure that happens throughout the construction process and occupancy permit approval stages – not only in the planning phases. This only seems possible, however, when the municipalities are granted power to enforce requirements over and above the provincial building codes, as in the case of Canada's few charter cities.

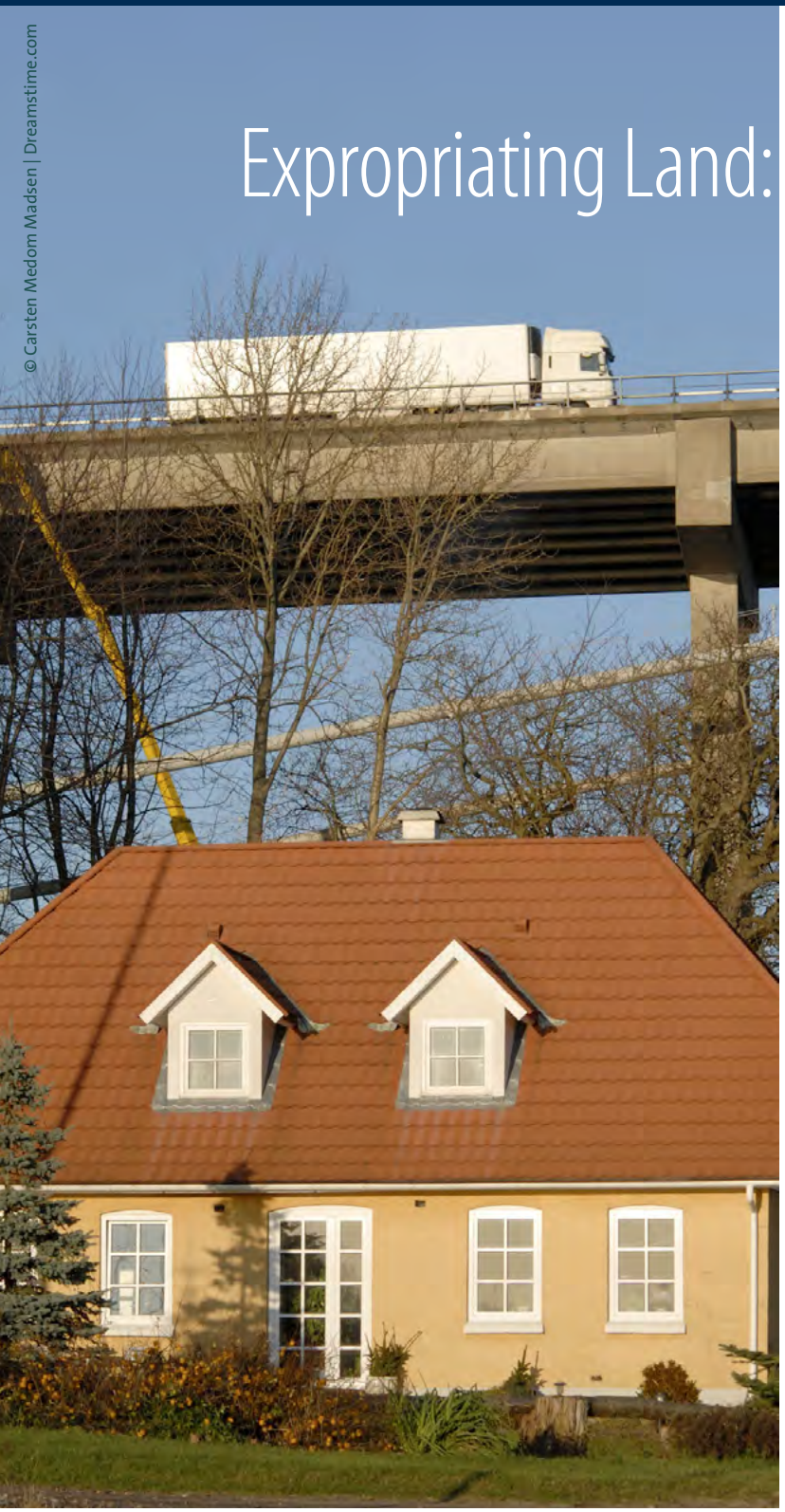
More generally, hope for a higher performance standard being broadly adopted in the future seems to lie either in better association between the national and provincial building codes and the standards within the *National Energy Code for Buildings*, or in a significant increase in market demand for a higher level of performance from the buildings that house us.

Tai Ziola is an architect and principal of newstudio architecture, an Edmonton firm specializing in community projects, sustainable design, and design innovation. She has been a LEED® Accredited Professional since 2004.

Notes

1. American Society of Heating, Refrigerating, and Air-Conditioning Engineers; their standards are commonly referred to by engineers across North America.
2. From the City of Edmonton Green Building Plan, June 20, 2012.

Thanks to Sharp & Diamond Landscape Architecture for permission to use these photographs



Expropriating Land: A Balancing Act

Peter Bowal and Rohan Somers

Introduction

The somewhat foreboding term "expropriation" in Canada describes the right of the government (the Crown or one of its agencies) to legally take real property (land), that is in private hands and apply it for a greater public use or benefit. This concept is called "compulsory purchase" in the United Kingdom, and "taking" or "condemnation" under the power of "eminent domain" in the United States.

All land in Canada started off belonging to the Crown. The government did not need all the land and could not possibly have managed all of it. Large tracts were surveyed and then sold to private parties to live on, building structures on and otherwise turn into productive uses. Sometimes, after this transfer to private ownership,

the government discovers that some of the land it earlier sold to private parties it now needs to get back for the public good. These important public uses that come up (and require access to privately owned land) include the construction or expansion of highways, water and other public utility systems, schools, transportation systems such as rail tracks, airports and light rail in cities, pipelines, parks or even to expand municipal boundaries. At all levels, governments require the power to expropriate private land. Expropriation laws mediate the inevitable conflicts between private real property rights and the public need for that same land, following clear step-by-step processes.

Sometimes, after this transfer to private ownership, the government discovers that some of the land it earlier sold to private parties it now needs to get back for the public good.

Statutory, But Not Constitutional, Protection

This government acquisition of land without the owner's consent is not subject to the *Canadian Charter of Rights and Freedoms* simply because there is no constitutional right for Canadians to own property. This is not to say that there are no rights to due process or administrative fairness when the government asks to take land. It merely means that the landowner's rights are found in the expropriation legislation and not in the *Charter*. The government must follow the law as to what land may be expropriated and must observe the procedures set out in the legislation that generally serve to protect the private landowner.

While the federal government can expropriate land, (*Expropriation Act*, RSC 1985) most expropriations come under provincial legislation. Each province has applicable legislation.

In Canada, there was once a common law basis for expropriation without legislative oversight. The procedure for government to take land and to determine the compensation payable evolved with economic and social conditions. But many would say that it did not evolve fast enough in favour of the landowner. The 1959 case of *Grayson v. R.* ([1956-60] Ex. C.R. 331) defined Canada as one of the most arbitrary jurisdictions of land expropriation in the developed world.

This changed with the introduction of the *Ontario Expropriations Act* (S.O. 1968-69 c.36) in 1968, which would later serve as the model for new federal legislation and other provincial legislation. The Ontario legislation added clarity by removing subjectivity and arbitrariness. It provided a complete expropriation code. Today, the law of expropriation is found in legislation and the judicial decisions that interpret those statutes. The right of government to expropriate, and how it can do so, must be found in legislation as it will no longer be implied.

Procedural Fairness

Given the obvious imbalance in power between landowner and government, the legislation provides numerous procedural safeguards that favour the owner in the expropriation process. These include the rights:

Today the law of expropriation is found in legislation and the judicial decisions that interpret those statutes.

- to be notified of the expropriation;
- to be notified of all steps being taken by the government in the process;
- to challenge the expropriation; and
- to representation by a lawyer in that process. Reasonable legal fees are usually reimbursed to the landowner.

If landowners are not content with the expropriator's initial proposals, they have the right to:

- a formal offer of compensation;
- a record of appraisal;
- negotiate the compensation; and ultimately
- a public hearing or inquiry procedure before an independent administrative tribunal.

If an expropriating authority does not fulfil the procedural requirements set out in the expropriation legislation, it will be found to have acted without authority. The expropriation can be invalidated and the property owner will be able to bring an action for damages or an injunction against the authority.

If there is any uncertainty or confusion in the legislation about what the expropriating government can do, that ambiguity will be construed and settled in favour of the landowner (*Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, 1997 CanLII 400 (SCC), [1997] 1 SCR 32). The burden of proof in the expropriation process is usually on the expropriating authority.

If there is any uncertainty or confusion in the legislation about what the expropriating government can do, that ambiguity will be construed and settled in favour of the land owner.

Public Purpose and Fair Compensation

While the power of expropriation is generally held by the government, the power may be delegated to ministries, government agencies, railway or pipeline companies and public utility-type corporations. Expropriation legislation sets qualifying conditions for expropriations and the procedures that must be followed.

The government cannot take land as a punishment to the owner or on other political, unreasonable or capricious grounds. The land must be needed for a clear public purpose. Once that threshold has been met, much of the process turns to the determination of fair compensation for the landowner. The method to assess compensation varies across provinces but generally a "value to the owner" approach is applied in Prince Edward Island, Quebec and Saskatchewan. The "market value" approach is used in some form in the other provinces and territories. However, the two approaches will yield similar results, as the objective is to restore the owners to the same position as they were in before the expropriation.

Most expropriation legislation now includes a "home for home" provision to allow forfeited land to be swapped for equivalent replacement property. Other factors which may be considered in arriving at compensation include:

The government cannot take land as a punishment to the owner or on other political, unreasonable or capricious grounds. The land must be needed for a clear public purpose.

- injurious affection (loss to adjoining property as a result of the expropriation);
- disturbance damages;
- loss of business or the capacity to use the property for such purposes; and
- special circumstances such as difficulty relocating or special value of the property based on the purposes for which it is currently being put to use.

. . . in the vast majority of cases, there are quiet, collaborative and generous negotiations and offers on the part of the public authority behind the scenes in an expropriation.

Comparison with American Expropriation Law

Under the Fifth Amendment of the American Constitution, no private property may be taken for public use without just compensation and without the due process of law. As it turns out, these operate in similar fashion to Canadian procedures. Canadian landowners enjoy an array of procedural safeguards to challenge an expropriation and ultimately receive fair compensation under ordinary expropriation legislation. There are no parallel constitutional protections because fair, modern and comprehensive legislation in Canada renders *Charter* protections unnecessary.

Conclusion

Today the expropriation of private land continues to have major political challenges. Governments want to limit expropriations, and approach them carefully and sensitively so as not to be perceived as being unfair or abusive in any way. That is why, in the vast majority of cases, there are quiet, collaborative and generous negotiations and offers on the part of the public authority behind the scenes in an expropriation. Accordingly, the strict formal steps in the process, including a public hearing, are rarely needed. By far, most expropriations have happy, or at least satisfactory, resolutions on both sides when they are negotiated in good faith in the shadow of the legislative framework.

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No **Trespassers** Allowed

Samina Thind

The act of "trespassing" is often conceptualized as one person setting foot on another person's land without their consent. "Get off my property, you're TRESPASSING!" is a common phrase landowners employ when faced with uninvited guests.

At law, the term "trespass" encompasses much more than individuals creeping onto their neighbour's property without permission. In fact, a landowner's right to be free from intrusions (be it people or objects) extends to both the air above and the ground below their land. This legal principle stems from the latin maxim, *cuius est solum eius est usque ad coelum et ad inferos*, which roughly translated means: for whoever owns the soil, it is theirs up to heaven and down to hell. What is the concept of trespass beneath land, and a landowner's recourse when faced with such an event?

Generally speaking, trespass to land occurs when there is an unjustifiable intrusion by one person upon another person's land. Trespass also occurs when something is placed on (or in) land that is owned by another. The law's rationale is that a landowner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his/her land. Should such a scenario occur, the law provides that a landowner has a right of action in trespass.

. . . a landowner's right to be free from intrusions (be it people or objects) extends to both the air above and the ground below their land.

A landowner's right to be free from intrusions extends to the ground beneath an owner's land. In *Philips v. California Standard Co.*, 31 W.W.R. 331, the Alberta Court of Queen's Bench confirmed that:

> In general, he who owns or possesses the surface of land owns or possesses all the underlying strata also. Any entry beneath the surface, therefore, at whatever depth, is an actionable trespass.

Unless the trespasser can satisfy a court that he/she meets one of the defences outlined above, his/her chances of escaping an injunction or damages award are slim.

This principle is best explained by way of example. In *Vetro v. Strata Plan VR2546*, 2008 BCPC 275, the plaintiff landowner sued the defendant condominium developer because rods, rebars and concrete boulders were found protruding into his land from the neighbouring condominium complex. Upon discovery, the plaintiff promptly had the rods, rebars and concrete boulders removed. He brought an action in trespass and sought damages for the costs of removing the items and for pain and suffering.

The Court found that the continued presence of the rods, rebars and concrete boulders on the plaintiff's land constituted a trespass as they remained underneath the land until their discovery. The plaintiff was awarded damages for the costs of having the items removed. The Court did not account for the fact that the rods etc. were inserted into the plaintiff's land by mistake. A trespass is deemed to occur whether or not the trespasser has knowledge of his or her actions.

Should you discover that the ground beneath your land has been trespassed against, you may seek either an injunction or damages. A court will order that the objects beneath your land be removed or will alternatively order the defendant to pay damages to compensate for the harm done to your property.

There is a very limited set of defences available for trespass generally, which also apply to trespass beneath land. The defences are:

- consent (implicit or implied);
- self-defence;
- defence of others or property;
- legal authority; and
- necessity.

Unless the trespasser can satisfy a court that he/she meets one of the defences outlined above, his/her chances of escaping an injunction or damages award are slim.

Should you discover that there has been a trespass beneath your land, seek legal advice as soon as possible. You will want to avoid the perception that you are consenting (even implicitly) to the actions of trespassers. In the eyes of the law, your right to protect the land beneath the surface of your property is just as sacred as your right to protect the land on the surface of your property.

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Cyberbullying or Criminal Conduct?

Melissa L. Luhtanen, J.D.

Facebook, Instagram, Twitter, texting or similar means of communicating over the Internet have given new challenges to teachers, parents and most of all, youth. We tell youth to be cautious, to use their common sense, to not talk to strangers and to keep their personal information private. And yet these precautions, even when followed, do not always protect youth from cyberbullying. Cyberbullying is a serious issue in schools and in the after-school life of children as young as six years old.

However, part of the problem in preventing, punishing and educating on cyberbullying is the difficulty in finding a common definition of "cyberbullying", and the very real problem of downplaying *Criminal Code* offences as bullying.

In the past year the media has reported on at least two high profile cases that were labeled "cyberbullying", and that received mainstream media attention across Canada. One was the case of Amanda Todd, from Port Coquitlam, British Columbia, who killed herself after being "cyber-

bullied". Amanda Todd posted an eight-minute video where she explained, through flash cards how she and her friends were talking on a web-cam with another person. She was 12 years old and she playfully flashed her chest. The person on the other side of the web-cam turned out to be a grown man and not a young boy. He posted the image of her bare chest online. Then he stalked Amanda Todd every time she moved to a new school and sent out the video to her classmates. Bullies at school taunted Amanda Todd, with names such as "porn star". She hung herself in 2012, at age 15.

part of the problem in preventing, punishing and educating on cyberbullying is the difficulty in finding a common definition of "cyberbullying", and the very real problem of downplaying *Criminal Code* offences as bullying.

Rehtaeh Parsons was a Halifax teenager who also killed herself after events that were named "cyberbullying". Rehtaeh Parsons was allegedly gang raped. It has been reported that one of the boys took a photo of her being raped and distributed it to her classmates. The RCMP did not lay charges at the time. After the photo was distributed online, boys started texting and Facebooking Rehtaeh Parson asking her to have sex with them. She was bullied because of the pictures that were distributed online. Rehtaeh Parsons hung herself in April 2013.

The Nova Scotia Task Force reviewed many definitions of "bullying" and "cyberbullying" and recommended that the following definition be used for education and legislation in the province:[1]

> Bullying is typically a repeated behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property.
>
> Bullying can be direct or indirect, and can take place by written, verbal, physical or electronic means, or any other form of expression.
>
> Cyberbullying (also referred to as electronic bullying) is a form of bullying, and occurs through the use of technology. This can include the use of a computer or other electronic devices, using social networks, text messaging, instant messaging, websites, e-mail or other electronic means.
>
> A person participates in bullying if he or she directly carries out the behaviour or assists or encourages the behaviour in any way.

The cases of Amanda Todd and Rehtaeh Parsons both have elements described in this definition: repeated behaviour, intended to cause fear and distress, harm to the "person's body, feelings, self-esteem, reputation". The harassment in Amanda Todd's case took place electronically. In Rehtaeh Parsons' case there was the use of technology to distribute pictures of an alleged rape. In both cases other people encouraged the behaviour. On its face, the actions were akin to cyberbullying and were treated as such in the media, and by those who commented on the horrible actions that led to these two girls taking their own lives.

1 *Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (2012) at p. 42.

However, on closer examination these cases are much more complicated than cyberbullying. Amanda Todd was being stalked and harassed by a man who lived somewhere in the United States. He lured her into flashing her naked chest and then took a video, which he posted online. These are all criminal offences under the *Criminal Code*: stalking (Criminal harassment s.264), Internet luring (s.172.1), and distribution of child pornography (s.163.1(3)). Rehtaeh Parsons said that she was raped which is a sexual assault (s.265). Afterwards, pictures of the events were distributed online, arguably also a criminal offence, which would possibly be dealt with under the *Youth Criminal Justice Act* if those distributing were under the age of 18 years.

Having the courage to make a cyberbullying claim is just one aspect of addressing this issue in a thoughtful manner that will encourage youth to report bullying and also support peers who are being bullied.

We should not be appalled at cyberbullying only when it results in such heinous acts that they must be described as *Criminal Code* offences. Cyberbullying deeply affects the child who is texted mean messages about her appearance, who is told by text that she is uninvited to a social gathering, or whose picture is posted online and laughed at. Cyberbullying is something that affects a youth's ability to learn, grow and enjoy school, not something that results in criminal actions against her body or fear of being stalked.

Youth must be encouraged to report cyberbullying. If we continue to conflate cyberbullying with Internet luring, sexual assault and child pornography, youth will not report bullying that takes place online. Reporting cyberbullying is a key component to combating this issue.

In 2010, a 15-year-old girl (A.B.) did report a case of cyberbullying. A.B. discovered that someone had signed up a Facebook account using A.B.'s picture and a slightly different name. A.B.'s picture was posted on the Facebook account with unflattering sexual comments about her appearance. A.B. wanted to find out the identity of the user who had started the Facebook account and posted her picture. However, A.B. wanted to proceed with the case anonymously and also asked for a publication ban. The case went to the Supreme Court of Canada (*A.B. v. Bragg Communications Inc.* 2012 SCC 46) to consider whether A.B. had demonstrated that there was a "real and substantial harm to her which justified restricting access to the media" (para 7). The SCC said:

> If we value the right of children to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing A.B.'s anonymous legal pursuit of the identity of her cyberbully. [para 27]

We should not be appalled at cyberbullying only when it results in such heinous acts that they must be described as *Criminal Code* offences.

A.B. was allowed to proceed anonymously, but the publication ban on non-identifying information was not granted since A.B.'s identity would be protected by being anonymous.

Having the courage to make a cyberbullying claim is just one aspect of addressing this issue in a thoughtful manner that will encourage youth to report bullying and also support peers who are being bullied. Conflating the issue of cyberbullying with sexual assault, child pornography and other *Criminal Code* offences undermines the efforts to address problems that are, at the core, cyberbullying. Distributing naked pictures of girls online is not cyberbullying just because it uses technology. It is a criminal offence that warrants a response by Police and RCMP.

Distributing naked pictures of girls online is not cyberbullying just because it uses technology. It is a criminal offence that warrants a response by Police and RCMP.

Both issues are important and highlight grave challenges for parents and youth. Lawmakers must ensure that the *Criminal Code* has measures to address the horrible actions of stalkers and pedophiles who use the Internet to lure children. Schools, school boards, communities and governments have a responsibility to address and educate children and youth about cyberbullying, by children against children, in legislation, policies and procedures.

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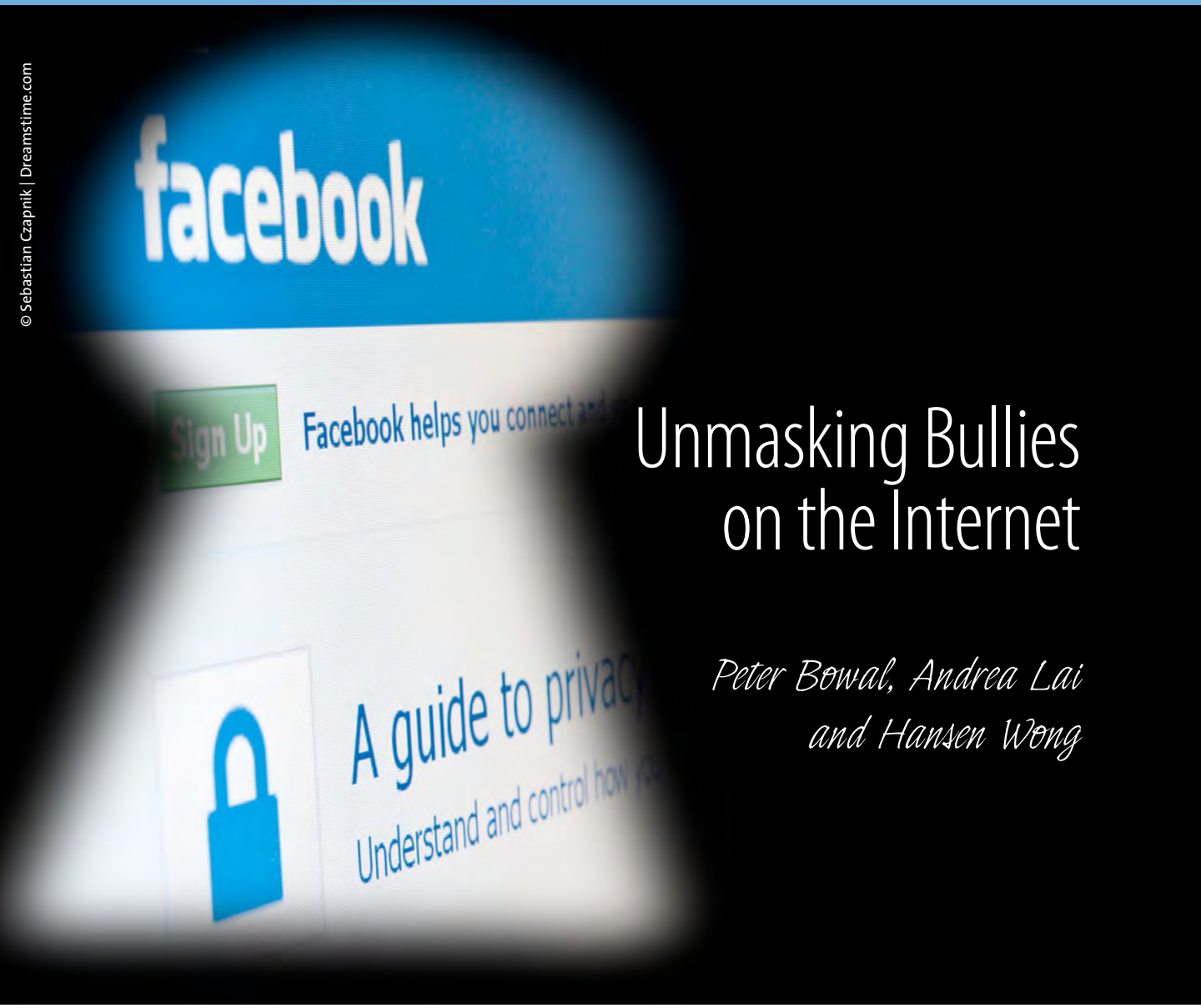

Unmasking Bullies on the Internet

Peter Bowal, Andrea Lai and Hansen Wong

Introduction

Most of us have heard of cyberbullying and the dreadful impact it has had on young people, even driving some of them to suicide. The incidence of bullying online is likely far greater than the average Canadian might expect. As a university professor, I (Bowal) receive menacing and profane emails from anonymous former students presumably unhappy about a course or grade, or perhaps one lecture.

It is easy to set up a free, bogus web-based alias email account and spew forth. A recent study showed that teachers as well as children are the victims of online bullying, with parents responsible for a quarter of the abuse. Forums, emails, blogs, social media, YouTube, complaint websites (such

as ComplaintsBoard.com and PissedConsumer.com) and ratings websites (such as TripAdvisor) all provide channels for anonymous expression, and therefore for harassment and bullying of others with apparent impunity.

Brian Burke, the former general manager and president of the Toronto Maple Leafs, recently sued 18 anonymous online commentators, including online aliases such Ncognito, Slobberface and Sir Psycho Sexy. He is alleging defamation after they accused him of an extramarital affair with a named woman.

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Most online commentary outlets require registration with a user name and password and agreement to their standards. In 2010, a Halifax weekly newspaper published an article about racism in the Halifax Regional Fire Service. This was followed by dozens of comments posted on the newspaper's website. The Fire Chief and Deputy Chief were publicly accused of racism, cronyism and incompetence by seven anonymous commentators who hid behind names such as "The truth" and "in the know." The two firemen said they could only defend themselves once they knew who the commentators were. In the 2010 case of *Mosher v. Coast Publishing Ltd*, the Nova Scotia Supreme Court ordered the newspaper and two Internet service providers to release the IP addresses and login information that could identify them. The seven commentators were unmasked and became defendants in a defamation suit.

Similarly, a New Brunswick judge ordered a Moncton newspaper to identify an anonymous commentator who allegedly defamed Daryl Doucette, another firefighter. Doucette had written a short Letter to the Editor favouring occasional high speeds for emergency vehicles. The commentator, under the name "Anonymous Anonymous," made two posts on the newspaper's online comment section that offended Doucette, calling him a "cowboy" of "goon mentality" who should lose his job. The identity of the poster was ordered disclosed.

Not all are firefighter cases. The President of York University in 2009 was accused of academic fraud in the appointment of a new dean, by an anonymous group of individual(s) identified as "York Faculty Concerned about the Future of York University" ("YFCFYU") in several e-mails. The University obtained a court order against Google, since the email originated from a @gmail.com account, and Bell and Rogers to identify the individual(s) behind the email account.

What motivates cyberbullies to cruelty and harassment online may be their misguided sense of security in tormenting others from an anonymous, lawless realm sitting alone in front of their computers. They mistakenly believe that they cannot be traced and identified but, once they are identified, they are subject to the criminal and civil law that applies to that nasty, cowardly behaviour. This article describes the legal procedure to unmask the cyberbully for a civil remedy such as a restraining or no-contact order, or compensation on the basis of an intentional tort such as the intentional infliction of mental and emotional suffering or defamation.

The Norwich Order

In the early 1970s, Norwich Pharmacal believed a company was illegally manufacturing its product by infringing its patent abroad and then importing the counterfeit product into Britain. All Norwich could do was demand that the government Customs and Excise Commissioners identify the importers so Norwich could stop the illegal production and importation. Ultimately, the House of Lords ruled that where a person becomes involved in the wrongful acts of others, even innocently, that person has a legal duty to fully disclose the identity of the wrongdoer. *Norwich Pharmacal Co. v. Commissioners of Customs & Excise*, [1974] A.C. 133 (H.L.)

What motivates cyberbullies to cruelty and harassment online may be their misguided sense of security in tormenting others from an anonymous, lawless realm sitting alone in front of their computers.

This eponymous *Norwich order* affirms a legal right to discover and identify wrongdoers and defendants before a lawsuit has been commenced. It is an order allowing one to discover some fact by compelling a third party (such as a newspaper or ISP) to reveal precise information prior to litigation. The Rules of Court in each province authorize the making of such an application. The application to the Queen's Bench of Alberta is covered by Rule 5.2(1), which states that information may be ordered disclosed when the answer "could be reasonably expected to significantly help or determine one or more of the issues raised in the pleadings." Other provinces' rules are more specific, such as New Brunswick's 32.12 where discovery is granted where "the applicant, having made reasonable inquiries, has been unable to identify the intended defendant."

Norwich orders may be powerful tools to unmask the identity of anonymous abusive online bullies. It has been used in earlier cases such as *Isofoton S.A. v. Toronto Dominion Bank,* 2007 CANLII 14626 to prosecute bank fraud, or discover innocent individuals who may have unwittingly aided in bank fraud. The *Insofoton* case outlined five elements that should be considered by any court before granting a Norwich order:

1. there should be evidence of a valid, *bona fide* claim or reasonable claim that is not frivolous or vexatious;
2. the applicant must establish that the third party from whom the information is sought is involved in the wrongful act, even innocently. For example, a bank in receipt of fraudulent funds is an innocently involved third party;
3. the third party must be the only practicable source of information. The victim is not required to approach the alleged wrongdoer for the information. Often, media outlets and ISPs are the only source of information on who is the person behind online statements. In that way, the Norwich order will be granted only as a last resort, consistent with its status as an equitable remedy;
4. in appropriate cases, the applicant should indemnify the third party for any costs associated with complying with the order; and

5. the court will consider the interests of justice through the competing interests and weigh the benefits of revealing the information against the interest in maintaining confidentiality. There may be serious prejudice to the wrongdoer to release his financial records without his knowledge or consent. On the other hand, "outing" an obnoxious Internet bully likely favours disclosure over his privacy rights.

The applicant for a Norwich order should demonstrate to the judge that the disclosure sought is necessary in order for a prospective action to proceed, although one does not have to guarantee a lawsuit will follow from the disclosure.

The Norwich order is only a form of a subpoena. It does not itself prove any wrongdoing has occurred. It is a procedural device to allow someone with a *prima facie* claim to obtain more information about wrongdoing from a third party. It can be made *ex parte*, which is to say, without notice to and without submissions from the other side. Several such orders may be required – one from the online source upon which the communication and a second from the service provider.

The primary objective of the federal *Personal Information Protection and Electronic Documents Act (PIPEDA)* (SC 2000.c 5), enacted in 2000, is individual data privacy protection. Any organization with access to personal information may not disclose that personal information without the individual's consent, an exception being a court subpoena. A Norwich order will override an individual's *PIPEDA* right to privacy.

We see that privacy is not an absolute right and court orders can, and frequent do, trump privacy rights to confidential information, even for personal financial records, and the unveiling of who did or said what, through third-party intermediaries. Norwich orders are often granted in conjunction with other similar litigation-affiliated equitable remedies: Mareva injunctions (to identify and locate assets), Anton Pillar orders (to identify and locate evidence for preservation) and Bankers' Trust orders (to trace and preserve assets in which the wronged party has a proprietary interest).

The underlying principle is one of equity. Victims applying for the order have an equitable right to information. Third parties who even innocently, unknowingly assist in the carrying out of a wrong, such as a financial institution involved in the processing of an allegedly fraudulent transaction, or an ISP whose network publishes threats, harassment or defamation, has an equitable duty to assist the victim to pursuing his or her legal rights. Often these third parties will not voluntarily disclose the confidential information but neither will they oppose the Norwich order.

It is a discretionary and unusual remedy. The applicant for a Norwich order should demonstrate to the judge that the disclosure sought is necessary in order for a prospective action to proceed, although one does not have to guarantee a lawsuit will follow from the disclosure. There are several cases where the identifying information is obtained and the victim settles with, imposes other forms of discipline (such as at work) or merely warns the perpetrator, without launching a formal lawsuit.

Conclusion

The Internet, and now Web 2.0, allows for unlimited instantaneous and free online interaction between users, but it is also a new platform and pulpit for the bully in anonymity. We know, for example, posters to online forums usually post under a pseudonym which may decrease their sense of accountability. The online realm is an immediately and dangerously public place. Anonymous email or Facebook accounts, for example, are easily created within minutes. They can be used to threaten the security of others or destroy reputations with posted pictures and videos. Reputations and lives can be injured by bullies faster on the Internet and social media than through any other medium. Malicious Internet behaviour should be penalized and deterred before it leads to tragic consequences.

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Legal Responses to Cyberbullying:

The 'Unsupervised Public Playground'

Teresa Haykowski

Should a student be suspended or expelled for posting a video on the Internet that mercilessly humiliates another student? Should a school principal be able to search a student's cellphone much like a school locker? What should happen to those students who intentionally post information about a fellow student that causes them to contemplate suicide?

Such questions arise following the tragic recent death of Rahtaeh Parsons, a 17-year-old Nova Scotia girl who died in April 2013, after hanging herself. The suicide was in response to a picture, shared around Rahtaeh Parsons's school, of an alleged sexual assault involving her.

This deeply sad incident occurred on the heels of the suicide of 15-year-old B.C. teenager Amanda Todd, who experienced months of cyberbullying which started after pictures were posted of her on the Internet. Shortly before Amanda took her young life, she posted a YouTube video documenting her suffering.

What is Cyberbullying?

Cyberbullying is generally known as electronic communication intended to, or that could reasonably be expected to, cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation. It often manifests itself by students, the effects of which are experienced at school. Cyberbullying can include:

- creating a web page or a blog in which a student assumes the identity of another student;
- impersonating another student as the author of content or messages posted on the Internet; and
- communicating material electronically to more than one student or posting material on a website that may be accessed by one or more students.

Cyberbullying is generally known as electronic communication intended to, or that could reasonably be expected to, cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation.

It goes without saying that children can suffer harm through cyberbullying, including loss of self-esteem, anxiety, fear and school drop-outs. Moreover, victims of cyberbullying are almost twice as likely to report that they attempted suicide compared to young people who have not been bullied. For more information about this, we recommend Nova Scotia's Task Force Report on Bullying called *Respectful and Responsible Relationships: There's No App for That*.

As this Report notes, the anonymity available to cyberbullies makes it easier to bully because it removes the traditional power imbalance between the bully and victim, and makes it difficult to prove the identity of the perpetrator. Anonymity allows young people, who might not otherwise engage in bullying, the opportunity to do so with less chance of repercussion. It is easier to be anonymously bold electronically than to be bold directly to someone's face. (Please see YouTube's Talent Show, Cyberbullying Prevention Commercial.)

Legislative Responses to Cyberbullying

The Todd and Parsons incidents thrust the issue of cyberbullying into the legislative spotlight. British Columbia, Alberta, Ontario and Nova Scotia, among other provinces, provided legislative responses to cyberbullying to assist victims and their families, and to ensure that school administrators have the tools they need to deal with cyberbullying on and off school property.

Nova Scotia

In April 2013, Nova Scotia introduced the *Cyberbullying Safety Act* which will create Canada's first cyber-investigative unit and allow families and victims to get protection orders from the court to ban a person from contacting the victim, talking about them online, or using any form of electronic communication. The Act provides for significant search-and-seizure powers permitting an investigative squad (without notice to the alleged cyberbully) to

. . . victims of cyberbullying are almost twice as likely to report that they attempted suicide compared to young people who have not been bullied.

enter homes, remove computers and cellphones, and obtain records of everything an individual has done on the Internet including obtaining all texts that the purported cyberbully sent and received. The Act also provides that victims can sue cyberbullies and, if the cyberbully is a minor, their parents could be responsible for the damages. School principals in Nova Scotia will also have clear authority to act against bullying and cyberbullying on or off school grounds.

British Columbia, Alberta, Ontario and Nova Scotia, among other provinces, provided legislative responses to cyberbullying to assist victims and their families, and to ensure that school administrators have the tools they need to deal with cyberbullying on and off school property.

Ontario

Ontario's *Accepting Schools Act* requires school boards and schools to prevent bullying, mete out tougher punishment for bullying and support students who want to promote understanding and respect for all, including requiring school boards to:

- work with the school community to develop a bullying prevention and intervention plan and make the plan public;
- investigate reported incidents of bullying;
- support students who have been bullied, who have witnessed bullying and who have bullied;
- inform parents about bullying incidents involving their children and discuss the available supports; and
- issue tougher consequences for bullying and hate-motivated actions up to, and including, expulsion.

British Columbia

British Columbia introduced its *Erase Bullying* strategy in June 2012 and dedicated $2 million to train educators and others to recognize and address threats. In November 2012, at B.C.'s request, a national working group discussed the issue of cyberbullying and considered whether the *Criminal Code* should be amended to address implications associated with cyberbullying.

Alberta

As part of its major revision to the current *School Act*, Alberta added a definition of 'bullying' in the new *Education Act*, which is expected to become law in 2015. Some have suggested that the new 'bullying' provisions in the *Education Act* are some of the strongest in the country.

The proposed *Education Act* defines "bullying" as repeated and hostile or demeaning behaviour by an individual in a school community which is intended to cause harm, fear or distress to one or more other individuals in the school community, including psychological harm or harm to an individual's reputation.

The Act describes what is expected of Alberta students when it comes to bullying: they are to *refrain from*, *report* and *not tolerate* bullying or bullying behaviour directed toward others in the school, *whether or not* it occurs within the school building, during the school day or by electronic means. Worthy of note is that the Act creates a *positive obligation* on students to *report* bullying.

It also makes it an obligation on Alberta school boards to offer a "welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour."

Under Alberta's proposed *Education Act*, cyberbullying extends beyond the school walls and gives authority to school administrators to address cyberbullying that occurs off school property.

The Proposed Legislative Responses are not a Full Answer to Cyberbullying

While the proposed legislative reforms are not expected to stop student cyberbullying, the reforms are intended to provide tools to courts, the justice system, school administrators, victims and their families to deal with cyberbullying and its effect in schools. It is a step in the right direction. The legislation sends a strong message about cyberbullying – this type of behaviour is not acceptable in our society.

Lessons can also be learned from the American legislative experience. In June 2010 the *New York Times* ran a opinion article about New York's legislative requirement that schools implement an anti-bullying curriculum, investigate incidents of bullying and report certain cases to the police. As noted in Education Law Blog, the New York article explores how cyberbullying is being treated in the U.S. by judges and lawyers, schools, victims and their families. One issue considered is that cyberbullying raises the common question for schools about the limits of their jurisdiction and whether (and to what extent) schools are responsible for off-campus student conduct. Under Alberta's proposed *Education Act*, cyberbullying extends beyond the school walls and gives authority to school administrators to address cyberbullying that occurs off school property.

While laws alone may not create kinder communities or teach children how to get along, the current legislative reforms empower school boards to appropriately address cyberbullying and send a strong message to students and their parents – cyberbullying is unacceptable, it will be addressed and will not be tolerated.

If cyberbullying is an issue your child is experiencing, we recommend you talk to your school principal and police (depending on the circumstances). You may also wish to consult Need Help Now, which is a website designed to instruct teens and their parents on how to deal with cyberbullying and how to remove pictures from the Internet.

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New Developments in the Area of Discrimination on the Basis of Family Status

Linda McKay-Panos

Note: a portion of this article is reproduced with permission from Ablawg.ca "Accommodation for Family Status Required by Federal Human Rights Tribunal for Three Alberta Women"

– Ablawg December 22, 2010

All provinces and territories, and the federal government, have human rights legislation to address discrimination. The ground of family status is relatively new.

It was thought that "family status" was fairly straightforward – a person is discriminated against on the basis that they are related to another person. However, recent case law indicates that there are issues surrounding what discrimination on the basis of "family status" actually entails. The issues also illustrate a tension that has developed in the law of discrimination about whether it is a law or entity that is discriminating or whether it is "just the way our society operates and the choices people make" that have the effect of discriminating against a person. The Seeley case *(Canadian National Railway v.Denise Seeley and Canadian Human Rights Commission, 2013 FC 117* (Seeley, Fed Ct)) demonstrates these developments.

Denise Seeley, Cindy Richards and Kasha Whyte all lived near their home terminal in Jasper, Alberta. Kasha Whyte was a single parent with sole custody of her (then) five-year-old son; Cindy

Richards was the divorced parent of two children, then aged 12 and 11; and Denise Seeley was married with two children, then aged six and twenty-one months.

In February 2005, CNR experienced a severe shortage of employees in its Vancouver terminal. The complainants were asked to work in Vancouver pursuant to their Collective Agreement, which provided that "non-protected employees" could be required to work at another terminal in the Western region upon 30 days' notice, unless there was a satisfactory reason for them to fail to do so. The Complainants were required to move to Vancouver for the duration of the shortage, which was to be of unknown length.

In the *Seeley* case, Michel Doucet concluded that the complainants faced a "serious interference with [their] parental duties and obligations" if they were forced to work in Vancouver, and that childcare issues constitute a parental responsibility that falls within the ground of "family status".

Each Complainant received a recall notice, which provided that they had 15 days to report to Vancouver, contacted CNR communicating her inability to cover the Vancouver shortage due to parental responsibilities; and asked to be excused from the transfer on a compassionate basis. CNR ordered them to report to the Vancouver terminal by July 2, 2005 or they would forfeit their seniority rights and their employment with CNR would be terminated. All three Complainants failed to report to Vancouver and were fired on July 4, 2005.

The Complainants filed complaints with the Canadian Human Rights Commission, arguing that the CNR had discriminated against them under sections 7 and 10 of the CHRA. Michel Doucet, a member of the Canadian Human Rights Tribunal (CHRT), upheld the complaints. He concluded that the complainants faced a "serious interference with [their] parental duties and obligations" if they were forced to work in Vancouver, and that childcare issues constitute a parental responsibility that falls within the ground of "family status". In each case, the remedy included reinstatement without loss of seniority, payment of lost wages, $15,000 for hurt feelings, $20,000 for willful discrimination and implementation of non-discriminatory policies.

Once a Complainant has established a *prima facie* case of discrimination, the onus shifts to the employer to demonstrate that the discriminatory standard or action is a bona fide occupational requirement (BFOR). The Supreme Court of Canada adopted a three-part test for the BFOR in *British Columbia (Public Service Commission) v. BCGEU*, [1999] 3 SCR 3 ("Meiorin").

Seeley, *Whyte* and *Richards* focused on the third aspect of the *Meiorin* test – whether the impugned standard was reasonably necessary for the employer to accomplish its purpose. At this stage the employer must establish that it cannot accommodate the complainants (and others affected by the discriminatory standard) without experiencing undue hardship.

CNR argued that it had accommodated the Complainants by providing a four-month extension to the time that they had to report to Vancouver in order to permit them to make the necessary childcare arrangements. The CHRT noted that this accommodation was "not in any way a meaningful response to the Complainant's request" or to her personal family situation, and that the witnesses provided by CNR did not consider family status matters that involve parental

responsibilities as a ground of discrimination that required any form of accommodation. Further, CNR did not apply its own comprehensive Accommodation Policy, which specified that accommodation "means making every possible effort to meet the reasonable needs of employees".

Parents are obligated to care for their children and if Parliament had intended to exclude childcare obligations from "family status" it would have done so clearly.

CNR also argued that it would have encountered undue hardship if it had accommodated the Complainants. Since the vast majority of their employees are parents, accommodating the Complainants would grant them "super seniority" based upon their status as parents. However, there was no evidence that CNR had multiple requests for accommodation. To argue that accommodating a complainant in one instance will open the floodgates to claims by other employees is "unacceptable".

The CNR also failed to provide evidence that accommodating the Complainants would cause undue hardship in the form of costs. In fact, CNR's Accommodation Policy said: "The costs incurred must be extremely high before the refusal to accommodate can be justified". Thus, CNR was not able to rely on the BFOR defence and the CHRT found that the Complainants had been discriminated against on the basis of family status.

The CNR appealed the *Seeley* case to the Federal Court of Canada. CNR argued that this case really dealt with the question of whether balancing family life and employment duties will be transferred from the home to the workplace. It argued that the CHRT had been mistaken when it equated family status with a parent's choice as to how to define and meet his or her childcare obligations.

Justice Mandamin of the Federal Court dismissed CNR's appeal. He noted that the Canadian *Human Rights Act* does not define "family status" and also suggested that the legal cases to date illustrated two distinct lines.

In determining whether there was a *prima facie* case of discrimination based on family status, and in attempting to reconcile the two lines of cases, Justice Mandamin said that the following questions needed to be answered:

- does the employee have a substantial obligation to provide childcare for the child or children; in this regard, is the parent the sole or primary care giver, is the obligation substantial and one that goes beyond personal choice;
- are there realistic alternatives available for the employee to provide for childcare: has the employee had the opportunity to explore and has explored available options; and is there a workplace arrangement, process, or collective agreement available to the employee that may accommodate an employee's childcare obligations and workplace obligations;
- does the employer conduct, practice or rule put the employee in the difficult position of choosing between her (or his) childcare duties or the workplace obligations?

The following factors were considered by Justice Mandamin to be relevant to a finding that there was discrimination on the basis of family status:

- Ms. Seeley is the primary caregiver for two children of tender age;
- her husband works full time and is the breadwinner;
- she had considered whether childcare was available in nearby Hinton, AB;
- CNR never provided necessary information for exploring whether childcare options were available or feasible in Vancouver; and
- a realistic assessment of her circumstances discloses she would have significant difficulty in fulfilling her childcare obligations in responding to an indefinite recall assignment for the Vancouver shortage.

Thus, Ms. Seeley's specific parental childcare obligations and CNR's response to her request for an extension to address possible options all resulted in *prima facie* discrimination on the basis of family status.

In addition, Justice Mandamin found that CNR never considered the question of accommodation under the collective agreement before firing Ms. Seeley; the CHRT's finding that CNR had not adequately responded to Seeley's request for accommodation was reasonable; and the CHRT's award of damages was also reasonable.

It appears, then, that childcare responsibilities are clearly part of "family status" and that this ground of discrimination should be given equal footing with the other grounds. Tribunals will consider the steps that the employee took to minimize the obligations that were imposed on his or her family responsibilities; the individual circumstances of the complainant; the nature of the conflicting responsibilities; and the barriers that are in place. The employer's duty to accommodate will be tempered by the three factors that a tribunal will consider, which seek to balance the responsibility for childcare issues between the employer and the employee.

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The Blackmailer's Charter: Victims in British Film and Theatre

Rob Normey

I recently saw the 1961 British film Victim, starring one of my favorite actors, Dirk Bogarde. Dirk plays the highly successful barrister, Melville Farr, expected by his staff to take silk very soon (that is, become an eminent Queen's Counsel, with a judgeship in his bright future as well). We see Farr in his chambers and outside the Old Bailey courtroom at various points and can readily see that he is a smooth barrister who can be expected to robustly defend his client's interests, as we barristers like to say. Pity the poor witness, we are made to feel, who keeps important information from Farr – he will persevere until the truth topples out.

In this social message film, director Basil Dearden drops several hints early on, however, that the days of effortlessly climbing the legal ladder may soon be tested for this man for all seasons. Scenes from legal chambers are crosscut with the very different world of a young man in serious trouble with some most unsavoury individuals. Further, the young man, Boy Barrett, is alarmed upon hearing that the police want him for questioning and makes increasingly desperate efforts to decamp from London in order that he might lay low. *Victim* goes on to reveal the deepening tragedy brought about by a brief relationship that Farr and

> Beneath the surface lay untold dangers for those who didn't fit the sexual norms of the intolerant, blinkered majority of 1950s England.

Barrett had. That most taboo subject for Englishmen is then carefully but unflinchingly introduced – homosexuality. We learn that Barrett is a homosexual and that Farr, despite being married, had apparently yielded to the homosexual impulses. Barrett has been mercilessly hounded by blackmailers who have developed a most lucrative business – spying on gay men and then taking advantage of the fact that all homosexual behaviour constitutes a crime – to blackmail and threaten ruin to all those whose sexual orientation they have uncovered. Beneath the surface lay untold dangers for those who didn't fit the sexual norms of the intolerant, blinkered majority of 1950s England.

A "social message" film like this one has its built-in limitations and lacks the qualities of personal meditation and voice that the greatest films possess. Nonetheless within the confines of the genre, this film stands out as a genuine *cri de coeur* by individuals concerned about the glaring discrimination and injustice faced by homosexuals. Dirk Bogarde was himself a gay man, although not one who was "out of the closet" at the time the film was released. He obviously took on this project on the basis that the story and the wider theme really needed to be confronted in film. He turns in a dignified and quietly intense performance as a lawyer willing to put his own career on the line in his quest to ensure that Boy Barrett's death was not entirely in vain. The stakes are captured neatly in a scene when Farr and his wife Laura return home in their car and see graffiti emblazoned across their garage door – "Farr is Queer."

> Implicitly, *Victim* operates as a plea for a more humane and rational legal system, one that does not imprison all homosexuals who act on their feelings inside a lawless subculture where they can be victimized again and again.

Melvin Farr emerges as a genuine hero, tackling a serious problem that corroded British society and its justice system. In doing so, he must move beyond the world of the courts that he is familiar with and the thriller plot sends him on a journey to an underworld where the rules operate rather differently. The moral code of those close to Farr get severely tested as the search for the blackmailers raises the stakes. Interesting dilemmas get debated. For instance, Laura is confronted with a series of arguments by her brother, a barrister. He states that he has both defended and prosecuted homosexuals and to be caught up with them in any way leads to trouble and social disgrace. He asks her how Melvin, on track to become a High Court Judge, could possibly sit in judgment on individuals who will be coming before him for the "crime" of homosexuality.

In his excellent book *Victim* (BFI Film Classics), John Coldstream takes us through each stage of the production of this landmark film and includes a section on the initial reaction to the film around the globe. I was quite taken by the report from Italy, as follows:

> [Viewers were] surprised because few Continentals can credit the British law with being so hypocritical, and a number of Italian critics failed to understand that homosexuals in Britain are punished for no other reason than that they exercise a free choice in sex, just as anyone would in picking the drink they fancy, or the food they would prefer to eat or … At least the Italians have a sense of humour about it.

The film was daringly explicit for its time in its frank exploration of the deficiencies in the law. Implicitly, *Victim* operates as a plea for a more humane and rational legal system, one that does not imprison all homosexuals who act on their feelings inside a lawless subculture where they can be victimized again and again. Crisp and telling dialogue is employed to confidently convey this untenable situation. The police chief explains to Farr, for example, that 90 percent of incidences of blackmail were thought to involve homosexuality and that the law criminalizing this behavior was said to be the "blackmailer's charter." "Is that how you feel about it?" asks the crusading barrister. "I am a policeman sir, I don't have feelings" comes the terse response.

Victim was truly a landmark film and, together with the famous Wolfenden Report on Homosexuality and Prostitution, played a critical role in the 1967 reform which decriminalized homosexual acts, in private, between consenting adults.

Editor's Note: Rob Normey will continue his discussion of this theme with a review of the British play *A Taste of Honey*, to be posted on August 7, 2013.

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

An Overview of Anti-bullying Legislation and Alternatives in Canada

Lindsey Panjvani

Very few days seem to go by, of late, without Canadians hearing about the alarming consequence of bullying in some form or another. This is particularly true in relation to children and youth. A number of high profile cases have garnered much discussion over the past few years, the latest of which is the tragic death of Rehtaeh Parsons. Studies and reports, campaigns and projects, and even the occasional uplifting triumphs, too, all do their part to keep this topic in the public eye.

According to Public Safety Canada, bullying is "characterized by acts of intentional harm, repeated over-time, in a relationship where an imbalance of power exists. It includes physical actions (punching, kicking, biting), verbal actions (threats, name calling, insults, racial or sexual comments), and social exclusion (spreading rumours, ignoring, gossiping, excluding)." Notably, a 2010 report for the Public Health Agency of Canada, on the Health of Canada's Young People, found approximately 40% of adolescents to be both bullies and victims of bullying. And for all concerned, whether victim, bully, or both, the consequences can be many and long-lasting.

For those engaged in bullying, there may also be legal repercussions. While there is no offense termed bullying under the Canadian Criminal Code per se, many behaviours or incidents characterized as bullying fit the definition of criminal offenses. These include, for example, Criminal Harassment (CCC 264), Uttering Threats (CCC 264.1), Assault (CCC 265 & 266), and Sexual Assault (CCC 271), with perpetrators risking youth or adult sentencing depending on the circumstances of the

crime(s). For more on this topic, see the John Howard Society for an accessible look at bullying and the law.

On a provincial level, a number of different approaches have been taken. At present, only some of the provinces have anti-bullying legislation in place, with mixed opinions as to their efficacy, while the other provinces and territories have opted to address bullying in different ways. What follows are recent legislative changes specific to bullying, as well as a quick look at the approaches taken by the others.

In Manitoba, *Bill 18*, which came into effect on April 15, 2012, amended The *Public Schools Act* specific to bullying and respect for human diversity. The term 'bullying' is defined, and school boards of publicly-funded non-religious and religious schools must both expand their policies about the appropriate use of the Internet and establish a respect for human diversity policy.

In Nova Scotia, *Bill 30, the Promotion of Respectful and Responsible Relationships Act* was introduced in April and received assent on May 17, 2012 shortly after the release of a task force report on bullying. The new Act resulted in bullying and cyberbullying being specifically addressed in the Education Act and the creation of a provincial school code of conduct. Bullying was further addressed on April 25, 2013 with the introduction of *Bill 61, Cyber-safety Act* to further address cyberbullying in particular.

New Brunswick's *Education Act* was amended to address bullying and cyberbullying via *Bill 45* on June 13, 2012. With an emphasis on "prevention, reporting, investigating and taking action," bullying and cyberbullying were highlighted; the roles and responsibilities of principals, educators, parents, students and parent school support committees were clarified, along with protocols for discipline and intervention; and increased reporting at various levels was mandated.

On June 15, 2012, *Bill 56* received assented in Quebec, amending the *Education Act* and the *Act Respecting Private Education* in relation to bullying and violence. Through these amendments, terms and responsibilities were defined, including the obligation of all public and private educational institutions to adopt and implement an anti-bullying and anti-violence plan.

Shortly thereafter, Ontario's *Education Act* was amended on June 19, 2012 by *Bill 13* with respect to bullying and other matters. New legal obligations exist for school boards and schools to prevent bullying; tougher consequences will be meted out for bullying; and students wanting to promote understanding and respect for all will be more so supported.

In Alberta, bullying is taken up in the *Education Act*, which received Royal Assent on December 10, 2012, and is specifically addressed by *Bill 3*. The term 'bullying' is defined; school boards will be required to establish a student code of conduct; and the National Bullying Awareness Week will be formalized as Bullying Awareness and Prevention Week.

Of the remaining provinces and territories, most have strategies in place to address bullying, and some have even tabled motions to consider anti-bullying legislation, too. In January 2008, Yukon passed the Safe and Caring Schools Policy, in which bullying in defined and clarification is provided

around roles and responsibilities, standards and policies. British Columbia introduced ERASE Bullying (Expect Respect and a Safe Education) – a prevention and intervention strategy building on the province's Safe, Caring and Orderly Schools Strategy – in June 2012. Saskatchewan announced an anti-bullying strategy in February 2005, which ties into the province's Caring and Respectful Schools initiative. A year later, in May 2006, Newfoundland and Labrador established a provincial Safe and Caring Schools Policy. Nunavut, though, has neither legislation nor a broad strategy in place specific to bullying.

Nunavut, though, has neither legislation nor a broad strategy in place specific to bullying.

Finally, Prince Edward Island is presently considering legislation, just over a year after a motion was passed in April 2012 to encourage government in the adoption of anti-bullying legislation. Shortly thereafter, the Northwest Territories also passed a motion, in June 2012, recommending the establishment of a territory-wide anti-bullying campaign and the review of anti-bullying legislation across Canada.

Lindsey Panjvani will shortly complete a master's degree in Library and Information Studies at the University of Alberta. She was inspired to pursue this degree by her past work at Legal Aid Alberta.

Tax problems

Peter Broder

As I write this a controversy is playing out in the United States over apparent targeting of Tea Party and other conservative groups by local offices of the Internal Revenue Service (IRS) to determine if they met American statutory requirements for exemption from tax. Under U.S. law such groups must be constituted primarily for social welfare purposes, rather than political purposes, to be eligible for status as exempt organizations. The controversy stems from the fact that groups were said to have been identified for scrutiny based on their political leanings, rather than on more neutral criteria.

In Canada, as in the U.S., there is ever present tension between the right of individuals and groups to organize their affairs in such a way as to minimize their tax liability and the powers given to tax authorities to protect the fiscal integrity of the tax base and ensure that everyone pays their fair share. There is wide consensus that the U.S. authorities overstepped their bounds. It is, however, also true that public outrage can be triggered when the groups are perceived as not having paid what they ought to have. This lack of appetite for tax dodgers can be seen in the furor over General Electric not paying tax in the U.S. in 2010 and the protests over Starbucks paying only minimal taxes in the U.K. over a 15-year period.

Non-profit groups are no different and there is likely not much public sympathy for dealings involving voluntary sector

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groups that potentially undermine the integrity of the tax system. One suspects that American taxpayers would not be upset if the IRS had ferretted out groups abusing the system without going about it in such a ham-fisted way.

Three recent developments in Canada touch on where the balance is between the powers of tax authorities to deal with suspected misconduct involving registered charities or their donors and the right of groups and individuals to arrange their affairs as they choose.

Three recent developments in Canada touch on where the balance is between the powers of tax authorities to deal with suspected misconduct involving registered charities or their donors and the right of groups and individuals to arrange their affairs as they choose.

Budget 2013 introduced a measure designed to discourage participation in questionable charitable donation tax shelters and reduce the risk of amounts owing related to such schemes becoming uncollectible. The provision allows the Canada Revenue Agency (CRA) to collect 50% of disputed tax, interest or penalties pertaining to these transactions even where the taxpayer has legally objected to the assessment and the matter is still pending.

While this change widens the powers of the CRA, the courts have recently weighed in in the opposite direction and taken the tax authority to task over aggressive enforcement approaches in tax shelter cases and, more broadly, in a case where it took issue with a tax planning arrangement.

In *Ficek v. Canada (Attorney General)*, 2013 FC 502, the Federal Court dealt with the CRA's obligation to examine the individual's tax return "with all due dispatch" where delay in examination stemmed from a policy of the local Tax Services Office to discourage certain types of tax shelter donations.

The Court found that the CRA had not met its statutory obligation for due dispatch in assessing the return because, rather than being necessitated by considerations related to examining the return and ascertaining tax liability, the delay resulted from trying to discourage participation in a donation tax shelter under a local policy.

It noted the discrepancies in treatment of taxpayers subject to the local policy and those in other parts of the country, and remarked that there was no rationale to justify this different treatment. It granted the taxpayer a declaration that the Minister failed to comply with the duty to assess with all due dispatch.

The Federal Court of Appeal case of *Prescient Foundation v. Minister of National Revenue*, 2013 FCA 120 did not concern a donation tax shelter, but it did deal with what the CRA characterized as a "tax planning arrangement". The revocation was founded on four independent grounds asserted against Prescient:

- it participated in a tax planning arrangement for the private benefit of others;
- it transferred an amount of $574,000 for a share purchase that was in fact a non-charitable gift to a non-qualified donee arising from the tax planning arrangement;

- it made a gift to a non-qualified donee in the form of a $500,000 transfer to a non-profit organization in the United States; and
- it failed to maintain adequate books and records.

The Court upheld the revocation, but in doing so, it made several comments about the CRA and how it exercised its powers. It held, notwithstanding the CRA's assertion otherwise, that on "extricable questions of law, including Interpretation of the [*Income Tax*] *Act*", the Minister is to be held to a standard of correctness, and it is only on questions of fact or mixed law and fact that the Minister only has to meet a standard of reasonableness.

. . . no authority was offered for the Minister's proposition that, to qualify as charitable, a public foundation must not only operate exclusively for charitable purposes, but must also only disburse funds to qualified donees.

It further criticized the CRA's reliance on legislative provisions prohibiting gifts to non-qualified donees that had been announced but not enacted. It stated that no authority was offered for the Minister's proposition that, to qualify as charitable, a public foundation must not only operate exclusively for charitable purposes, but must also only disburse funds to qualified donees. It found that there was no enforceable statutory requirement providing for such a restriction, and that therefore this ground for revocation was unfounded.

Additionally, the Court, in its analysis of the Inadequate Books and Records revocation ground, took issue with the lack of particulars. It held:

> For the revocation of a registration to be reasonable under this ground, the Minister must (a) clearly identify the information which the registered charity has failed to keep, and (b) explain why this breach justifies the revocation of the charity's registration.

The Court did ultimately uphold the revocation, finding certain tax planning transactions were not undertaken for charitable purposes and that Prescient's conduct with respect to Books and Records was also grounds for revocation. Meanwhile, with some incremental contributions having been made in the Canadian context, the debate over the balancing of the responsibilities of tax authorities with the rights of those who would, could or should be taxed continues apace.

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Mother May I? Schools and Parenting Disputes

Rosemarie Boll

I had the pleasure of attending a lecture by Jim Davies, the general counsel for the Edmonton Public School Board. He gave a group of family law lawyers the educator's perspective on parenting disputes.[1] Today's dynamic family configurations can be complicated – divorced biological parents, foster parents, relatives, same-sex partners, step-parents, and even mature minors. Just who holds the educational rights and responsibilities and what do they mean?

The *School Act's* guiding principle is stated in its preamble: "… the *best educational interests* of the student are the paramount considerations in the exercise of any authority under this Act." The principal is charged with maintaining order and discipline in the school and on its grounds during all activities approved by the school board (s.20 (f). Principals must promote co-operation between the school and the community that it serves. Their main point of contact is, of course, parents. The *School Act* says that a "parent" is the child's guardian as defined in section 20 of the *Family Law Act*.[2] Each guardian has equal rights to be informed, consulted, and to make significant decisions affecting the child unless those rights have been limited by a parenting order.

Thankfully, most parents, separated or not, put their children first. The fact that there is a court order signals that there might be some stress in the family, and the principal and staff will be sensitive to this. The school will accommodate reasonable requests for special arrangements (for example, separate parent-teacher interviews) provided it is in the child's best educational interests. However, school administrators are *not* bound by court orders.

In severe situations, principals do not worry about a guardian's rights. They worry about safety, especially the child's.

This took me by surprise. I had assumed that schools must obey parenting orders. Not so. This is because of the principle of "legislative supremacy". Court orders cannot override legislation. The principal must run her school the way the *School Act,* not a judge, tells her to. For example, if parents are fighting and mom gets a judge to order that the school must give copies of report cards directly to her, the principal can ask herself – *what is in the best educational interests of this student?* If she decides it is not in the student's best educational interests, she can refuse.[3]

The biggest challenge is handling hostile parents who make opposing demands, or dealing with a parent who is alienating and controlling a child. In severe situations, principals do not worry about a guardian's rights. They worry about safety, especially the child's. The principal can choose to withhold information that someone might be 'entitled' to. An angry parent may want to transfer their child to a different school, but the move can be refused (s.45.6). A school is a publicly-funded building but not a public building, and school administrators have the power to ban a parent from school property (s.27). An aggrieved parent cannot sue a school administrator for making a decision they disagree with or for doing something that is contrary to a court order. The *School Act* protects school staff from liability for loss or damages if the action was done in good faith in accordance with the Act (s.144.1(1).

Parental authority can end before a student finishes school. If a student is over age 18, or over age 16 and living independently, all the rights and obligations are transferred from the parents to the student (s.1(3). Even well-intentioned parents are not entitled to any information about their child.

It is not the principal's job to interpret court orders. Principals are not referees, judges, or enforcers, and will resist anyone's attempt to put them in that position. Principals see trouble brewing when one parent:

1. says the other parent is not allowed to visit the child for lunch or recess, even though that parent cannot be there.
2. tries to block the other parent from participating in classroom or school events.
3. insists that report cards and other documents be given only to them and not the other parent.
4. withholds copies of school announcements.
5. says personal things to make the other parent look bad.
6. insists that the child says she/he does not want to see the other parent.
7. isolates the other parent from teachers and school officials.

8. hides a good relationship between the child and the other parent, or tries to stifle communication so that the teachers do not hear the truth.
9. makes a scene at school functions – if the other parent is there, they will look disturbed or go out of their way to avoid the other parent.
10. does not want to use the school as an exchange point, and insists on a location of their choice. Generally, this is a place where they can have more control, such as their home.

Parent hostility is a big factor in the daily lives of school administrators and staff. A parent who hates the school hurts their child. When parents cannot agree, the principal will tell them they need to figure out a way to agree or to get a court order that solves their problem. In the meantime, the principal will do what she thinks is in the child's best educational interests, and create the best learning environment possible for all the children.

Notes

1 The comments in this column are specific to the EPSB and may not apply elsewhere. If you have questions, search for information where you live. For example, you can find the Saskatchewan School Board Association's instructions for educators here.

2 *Family Law Act* s 20(2). Not all parents are guardians. A parent is a guardian only if the parent has acknowledged that he or she is a parent of the child and has demonstrated an intention to assume the responsibility of a guardian. The legislation outlines the factors which determine if the section 20(2) requirements have been met.

3 Court orders are not legally binding on a party who has not had the opportunity to speak to the matter. The American Council of School Attorneys says that principals should not even read court orders. Canadian school administrators do not go this far.

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Living with your Landlord

Rochelle Johannson

Each province has one law that applies to most renting situations, and then other laws that you may need to know about depending on the kind of property that you are renting. For example, if you are renting a condominium unit in Alberta, you'd want to know about the *Residential Tenancies Act* and the *Condominium Property Act*, because both laws apply to the landlord and the tenant in that situation.

But what happens when the main renting law in your province excludes the kind of property that you are renting? For example, in most provinces, if you rent a room in your landlord's home, then the relationship between you and your landlord is probably not covered by renting law. In other words, if you share living space with your landlord, then chances are the law will not apply to you or to your landlord. So let's take a look at an example.

Betty owns a house that has a basement suite. She decides that she's going to rent out the basement suite, which has its own kitchen, bathroom, bedroom and entrance. She rents the suite to Tim, and Tim pays his rent on the first of every month. Betty and Tim hardly ever see each other, other than to say the occasional 'hello' as they leave for work in the morning. The renting law in their province applies to them, because they don't share living space (they don't share a kitchen, bathroom or living room).

Now let's say that Betty decides that she's going to get a roommate too. She rents out a room to Jane, and they share the kitchen, bathroom, and living room. Jane pays her rent on the first of every

month. The renting law in their province probably doesn't apply to them, because Jane shares living space with her landlord.

Let's say that at the beginning of the month, neither of Betty's tenants paid their rent. What can Betty do? Well, renting law applies between Tim and Betty, so Betty has to follow the eviction procedure that is set out in the law. For example, if this situation were happening in Alberta, then Betty could follow the eviction procedure set out in the *Residential Tenancies Act* and give Tim a 14 day termination notice. Tim would have 14 days to pay the rent, or else he'd have to move out.

How can you find out if the law in your province will apply to you? Well, you could go directly to the law and look at the definition and application sections. You could also take a look at the CMHC provincial fact sheets.

But what about Jane? Does Betty have to give her 14 day notice? No, because the *Residential Tenancies Act* does not apply to their relationship. Betty could tell Jane that she has to pay the rent with 24 hours, or 48 hours, or 7 days, or immediately, whatever period of time Betty thinks is reasonable. Betty can do this because there is no law, and no eviction procedure, that applies between them.

Now, if Jane thought that Betty was being unreasonable, then Jane could take Betty to small claims court to cover Jane's damages. Let's say Betty gave Jane three days to pay the rent, or else Jane would have to move. Jane didn't get the rent money to Betty, so then Betty changed the locks. Jane had to stay in a hotel for a few days before she found somewhere else to live. Jane could sue Betty for the costs of the hotel stay, and it would be up to the judge to decide if Betty has to pay that money to Jane.

How can you find out if the law in your province will apply to you? Well, you could go directly to the law and look at the definition and application sections. You could also take a look at the CMHC provincial fact sheets. Those fact sheets set out what property the law does and does not apply to, and has contact information for organizations that can help you understand the law if you have any questions.

If the law doesn't apply to you, how can you best protect yourself? You should make sure that you have a written agreement that sets out what will happen if there is a breach, and how the agreement will be terminated. The agreement should also include any other terms and agreements that you and your landlord want to be included (security or damage deposits, inspection reports, rent increases, etc.). By having a written agreement, both the landlord and the tenant know what is expected of them, and what the consequences are should the agreement not be followed. You can take a look at a sample living with your landlord agreement.

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Changing Terms of Employment

Peter Bowal and Colleen Hoy

Introduction

Darrell Wronko started work at Western Inventory Service Limited (WIS) in 1987, right after graduating from university. He worked at the company for 17 years, including four years as Vice President of National Accounts and Marketing. In 2000, he signed an amended employment contract, which included a significant improvement to his termination clause. The new provision would give him two years of salary and bonus on termination.

In 2002 under a new corporate President, Wronko received a new contract that reduced the termination provision to 30 weeks of salary. Wronko refused to sign the new contract and continued working. WIS gave two years written notice to Wronko that the termination clause in his contract would change to a maximum of 30 weeks' salary.

Over the next two-year period Wronko remained employed by WIS, and continued to oppose the amended contract. In 2004 Wronko was told the new termination provision of 30 weeks was in effect, and if he did not accept the new terms of employment, he no longer had a job at WIS. Wronko walked off and asked for his severance package of two years. The case went to court.

Constructive Dismissal

Employers may make life very difficult for employees without expressly dismissing them. They may humiliate them in public, ask for their resignations, lock them out of their workplace or suddenly

Employers may make life very difficult for employees without expressly dismissing them.

demote them or transfer them to a location to which the worker does not want to move. The employer's sudden, unilateral change of the job may be more subtle, such as significantly changing one's job responsibilities, title, working conditions, benefit packages or restrictive covenants. If the average person would view this as an act that renders continued employment intolerable, the employee may consider himself to have been dismissed, even though dismissal language was never used. The law views this as a termination without cause and the employee is entitled to compensation for a reasonable notice period. Wronko argued that WIS constructively dismissed him in 2004 when it unilaterally varied the termination clause in his contract. He sought damages of two years' salary.

The *Wronko* case was not a constructive dismissal because the unilateral change did not have an immediate change on Wronko. Rather, the 2002 notice was an anticipatory breach of contract.

Ontario Court of Appeal Ruling

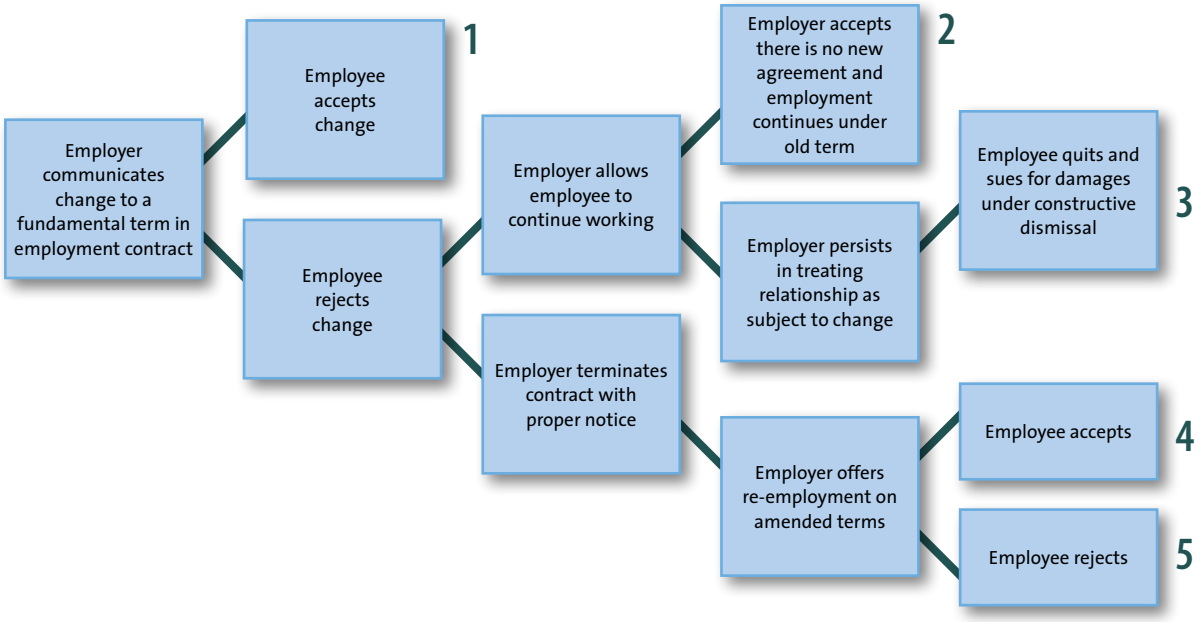
In 2008, Wronko's case reached the Ontario Court of Appeal (*Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327). Did the 2004 letter (reducing the notice period) from WIS constitute a termination, and if so, what consequences flowed from the termination? The Court said a reasonable person would have regarded the concluding statement in the 2004 letter, "… then we do not have a job for you" as a WIS termination. The *Wronko* case was not a constructive dismissal because the unilateral change did not have an immediate change on Wronko. Rather, the 2002 notice was an anticipatory breach of contract. WIS knew Wronko was opposed to the change in severance terms and, by continuing the employment, WIS must be taken to have agreed to Wronko's position. Therefore WIS's unilateral change of a fundamental term of the employment contract, the termination clause in 2004 was wrongful and Wronko was entitled to two years of salary based on the existing contract. The Supreme Court of Canada refused leave to hear an appeal brought by WIS in October 2008.

Options

The Appendix chart summarizes the possible options when an employer proposes a unilateral change to a fundamental term in an employment contract:

Option 1: Employer announces change; employee accepts change.

Option 2: Employer announces change and employee rejects change. Employer allows employee to continue working. Employer accepts there is no new agreement and the employee can assume employment continues under old terms. This is the conclusion in the *Wronko* case and the reason why the judge awarded damages. The lesson here for employers is if they want to avoid wrongful dismissal claims, when the employee rejects the contract change, the employer must provide proper notice of termination (and award any severance) rather than continuing the employment relationship.



Option 3: Employer announces changes and employee rejects change. Employer allows employee to continue working. If the employer persists in treating the contract as changed, the employee can quit and sue the employer for damages on the basis of constructive dismissal.

Options 4 and 5: Employer announces changes and employee rejects change. The employer should respond by terminating the employee with proper notice and offering re-employment on the new terms. The employee will either accept or reject the new offer.

Conclusion

When employers want to introduce new terms that are less favourable to the employee, the lessons from *Wronko* are clear. The employer must:

- obtain the employee's consent and provide fresh consideration; or
- provide reasonable notice of termination, and offer re-employment under the new contract terms at the end of the period.

A final lesson is for the employee to immediately and clearly oppose the change, if the employee objects to the changes in the revised contract. Doing otherwise might be considered as an acceptance of the new terms, and the employee will have no subsequent claim to constructive dismissal or damages for breach of contract.

Peter Bowal is a Professor of Law and Colleen Hoy recently earned her MBA from the Haskayne School of Business at the University of Calgary in Calgary, Alberta.