July/August 2018 Transportation Bicycles Diversity

LawNow

relating law to life in Canada

Ticket to Ride

About *LawNow*

Publisher Jeff Surtees

Editor/Legal Writer Aaida Peerani

LAWNOW is published six times per year.

More information is available on our website **www.lawnow.org**

Funders and Supporters

Alberta LAW FOUNDATION

Department of Justice Canada

Ministère de la Justice Canada

In This Issue

Canadian laws that impact your travel and transport.

Featured Articles: Ticket to Ride

Special Report: Diversity in the Law and the Legal Profession

By Aaida Peerani

Victory for Students in Gay-Straight Alliances in Alberta

In 2015, the Government of Alberta under Jim Prentice passed *Bill 10: An Act to Amend the Alberta Bill of Rights to Protect our Children*. This Bill amended *The School Act* to allow students to create voluntary student organizations, including gay-straight alliances (GSAs). As stated by the late Premier, it was an unambiguous commitment to equality for the LQBTQ community. In 2017, the Government of Alberta under Premier Rachel Notley passed *Bill 24: An Act to Support Gay-Straight Alliances*, which enhanced protections for LGBTQ+ students including prohibiting schools from exposing students who are part of gay-straight alliances to their parents or peers.

In this case, parents and private schools applied to advocate for parental rights to know that their children are in GSAs. They argued that Bill 24 infringes on their freedoms of conscience, religion, and expression. They also argued that Bill 24 infringed Section 2 of the *Charter of Human Rights and Freedoms* by preventing them from accessing education consistent with their moral and religious values. They requested an interim injunction to this Bill and asked that:

- the new provisions not be incorporated; and
- the Minister of Education be prevented from de-funding or de-crediting schools for not complying with the new provisions.

The Court dismissed their application. Based on the test for an interim injunction, the Court found that:

- There is no serious constitutional issue to be tried because GSAs are voluntary organizations and students are not required to participate in them. Therefore, the rights of parents or schools to teach moral and religious values to their children are not restricted.
- There would be irreparable harm from these changes. In fact, an expert in psychology found that GSAs actually provided many benefits including improved school performance, increase sense of safety and belonging at school, reduced casual sex, reduced drug use and abuse and enhanced psychological well-being.
- The balance of convenience weighs in favour of maintaining the legislation. Based on expert evidence, statistically, there is a greater risk of harm to LGBTQ students without the legislation due to greater homophobia and as a result, a higher risk of suicides.

> Therefore, it is more important (and less harmful) to maintain the injunction and support LGBTQ students, than temporarily limiting a parents right to know and make decisions about their child's involvement in a GSA.

The Court also considered that the Ministry of Education stated that they no plans in the upcoming year to de-fund or de-credit any schools. Furthermore, the Court noted that there was no urgency to the situation, as the provisions for allowing GSAs have been in existence since 2015. Urgency is a consideration in providing an interim injunction.

> *PT v Alberta*, 2018 ABQB 496

Trinity Western University's Law School Goes Unaccredited After Supreme Court of Canada Decision

The Supreme Court of Canada released two landmark cases regarding Trinity Western University's bid for accreditation under the Law Society of British Columbia and the Law Society of Ontario (formerly known as Law Society of Upper Canada).

Trinity Western University (TWU) is a Christian university in British Columbia. TWU students have to sign a Covenant, which forbids students to have sexual intimacy outside of a marriage between a man and a woman. When TWU wanted to create a new law school, it applied for accreditation from the provincial law societies. Both the Law Society of British Columbia and the Law Society of Ontario denied accreditation. Each Law Society found that access and diversity in the legal profession, as well as preventing harm to LGBTQ students, were factors to consider in their decision. These factors were at risk with accreditation and were found to be against the public interest, which is in the Law Societies' mandates.

TWU launched a claim under the *Charter of Rights and Freedoms* arguing that their freedom of religion had been infringed.

Interestingly, in British Columbia, the trial court and Court of Appeal agreed with TWU. In Ontario, the trial court and Court of Appeal disagreed with Ontario.

At the Supreme Court of Canada, a majority of the judges upheld the decisions of the Law Societies to deny accreditation to TWU's law school. Although the Court found that the Law Societies' decision did infringe on TWU's freedom of religion, they found that the Law Societies' had reasonably balanced religious freedom with their mandate to serve the public interest, based on the aforementioned factors.

As a result of the Supreme Court of Canada's rulings, TWU has stated that it will not be starting a law school in the near future.

> *Law Society of British Columbia v. Trinity Western University, 2018 SCC 32*
> http://canlii.ca/t/hsjpr

Trinity Western University v. Law Society of Upper Canada, 2018 SCC 33
http://canlii.ca/t/hsjpt

http://www.millerthomson.com/en/publications/communiques-and-updates/social-impact-newsletter-formerly-the/june-21-2018-social-impact/supreme-court-of-canada-upholds-decision-to-deny-accreditation-to-trinity-western-university-law-school/

A Fickle Fiddler Dashes Boyfriend/Musician's Dreams

Eric Abramovitz is a gifted clarinetist. He has studied the clarinet since he was seven years old and won many awards. In 2013, Abramovitz applied to study for two years at the Coburn Conservatory of Music in Los Angeles, California. If accepted, he would receive a full scholarship including tuition and living costs, and would study closely with world-renowned clarinetist Yehuda Gilad. Only two students are accepted per year to this program.

Abramovitz, after attending an in-person interview and presentation, was accepted into the program by email on March 27, 2014. His girlfriend at the time, Jennifer (Jooyeon) Lee, a fellow music student, secretly accessed his email and declined the offer for Abramovitz without his knowledge. She then deleted the acceptance email. Furthermore, she created a fake email address, using Yehuda Gilad's name, to tell Abramovitz that he was not accepted. In the email, she continued to tell him that he was accepted to study at the University of South California with a scholarship of $5,000 a year. Annual tuition was $51,000 at the University of South California. She knew that Abramovitz would be unable to accept the offer due to his financial circumstances.

Believing that he was rejected for a 2 year full scholarship, Abramovitz stayed in Canada for the remainder of his studies. He only found out the truth years later when he entered in a Graduate Certificate Program at the University of South Carolina to study with Gilad. This opportunity covered few costs and gave Gilad less time with Abramovitz than the initial program he was accepted into.

In tallying up all the costs against Lee, the Court included opportunity costs and cost of attending the school. Abramovitz was awarded $350,000 and costs. Lee did not appear at trial and did not defend the claim.

Abramovitz v. Lee, 2018 ONSC 3684
http://canlii.ca/t/hshs9

Conflicts of Law in the Internet Age

Mitchell Goldhar is a wealthy businessman based in Canada. He also owns one of the most popular professional Israeli soccer teams. On November 29, 2011, Haaretz.com, Israel's oldest daily newspaper, published an unflattering article online about Mr. Goldhar based on his ownership and management of the Israeli soccer team and his Canadian businesses.

The newspaper made comments such as, "[w]ithin the club, however, there are those who believe that Goldhar's managerial culture is based on overconcentration bordering on megalomania, penny-pinching and a lack of long-term planning." Goldhar tried to sue Haartez.com for libel in Ontario stating that the article caused damage to his business and personal life. The newspaper is not distributed in Canada, however, it is available electronically.

The question the courts were asked was whether the case should proceed in Ontario or should it be referred back to a court in Israel.

The Supreme Court of Canada found that Israel was the most appropriate jurisdiction for Goldhar to sue Haartez.com. Holding a trial in Israel would be fairer and more efficient. Moreover, since Haaretz.com has no assets in Ontario, it would be far easier for Goldhar to sue and collect an award in Israel.

> *Haaretz.com v. Goldhar*, 2018 SCC 28
> http://canlii.ca/t/hsd2n

Canadian Human Rights Commission Does Not Have to Consider Discrimination Under the *Indian Act*

This case involved two other cases. In both cases, the complainants argued that the government department formerly known as Indian and Northern Affairs Canada (INAC) acted in discriminatory fashion under *Indian Act* in providing services by preventing individuals from obtaining or keeping their Indian status. In the first case, three siblings argued that sex-based discrimination resulted in their grandmother losing her Indian status when she married a non-status person, which meant that eventually, her children were ineligible for Indian status. In the second case, individuals lost their status through an "enfranchisement order". Their family member gave up Indian status rights to become a fully enfranchised Canadian citizen. As a result, his grandchildren did not have Indian status.

The Canadian Human Rights Tribunal (CHRT) found that these complaints directly attacked the *Indian Act* and that this law, or any legislation, is not a "service". Therefore, the CHRT did not have jurisdiction to hear the case. As a result, the CHRT dismissed their claims. Both the Federal Court and Federal Court of Appeal, in appeals, agreed with the CHRT decision.

At the Supreme Court of Canada (SCC), the Court agreed with all three prior decisions.

> *Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31*, 2018 SCC 31
> http://canlii.ca/t/hshvb
>
> https://www.theglobeandmail.com/politics/article-canadian-human-rights-tribunal-cannot-challenge-discrimination-in/

Three Partners in a Polyamorous Relationship Recognized as Legal Parents

For the first time in Canada, a court in Newfoundland and Labrador has found three unmarried adults to be legal parents of a child. The three adults are part of a "polyamorous" relationship. This is different than bigamy and polygamy, which involve marriage with two or more people. Bigamy and polygamy are illegal in Canada.

The relationship consists of two men and a woman. The family has been together for three years, but the biological father is unknown and is not identified. The Court found that recognizing all three individuals was in the best interests of the child – the child was born into a stable, loving family in a safe and nurturing environment.

https://www.cbc.ca/news/canada/newfoundland-labrador/polyamourous-relationship-three-parents-1.4706560

Bicycle Law in Alberta

By Jeff Surtees and Dave Pettitt

As a cyclist, do you follow the rules of the road?

According to a University of Colorado Survey, about eighty-five percent of cyclists do obey the law when riding. Almost three quarters of the scofflaws who break the rules claim to do so for their personal safety – saying they are simply getting out of the way of automotive traffic as quickly as they can. The most common law-breaking activity of cyclists is going through red lights or stop signs. In Australia, thirty-seven percent of cyclists admit to riding through red lights in the previous month. The UK is slightly lower at thirty-two percent.

Statistics Canada data shows that over forty percent of Canadians cycle and the numbers among adults are growing. Some Canadian municipalities are aggressively improving the cycling infrastructure to encourage bicycle commuting. Edmonton spent $7.5 million on a seven kilometer bike network in 2017. Calgary put $5.75 million into successful trial program in 2015. Both cities have reported an increase in bicycle commuters.

Remember that many cycling rules vary from city to city.

Rules, Rules, Rules…

In this article we are going to talk about some of the written laws that govern cycling. Be aware that the unwritten common law rules of negligence also apply to cycling. Everyone has a duty to take reasonable care to not harm others by their activities. If you fail to do so and you cause harm, you could be sued for damages.

In Canada, written cycling laws come from a variety of federal and provincial statutes and local bylaws. It is the responsibility of every cyclist to understand the rules that apply where they are riding. If you want to learn more about how law-making powers are divided between Canada's levels of government, check out CPLEA's publication "The Canadian Legal System".

Some written laws that affect cyclists are "laws of general application". In other words, they apply to everyone, including cyclists. An example would be the criminal laws passed by Canada's federal government. If you commit a crime with or on your bike, you could be charged and if you are found guilty, you will be convicted and punished. An example would be intentionally running into a pedestrian with your bike. That could fit the definition of assault under section 265 of the *Criminal Code*. That section does not contain the word "bicycle" but it still applies to cyclists.

Other written laws specifically refer to cycling. Those laws generally dictate what kind of safety equipment is required, where cyclists can ride, and some aspects of how they ride, such as speed limits.

In other words, cyclists should assume that almost everything that applies to drivers of cars also applies to them. This includes rules about speed limits, signaling turns, obeying traffic signals, not driving carelessly or without due care and attention and the rules against distracted driving (use of cell phones).

Let's start with what one would think would be the easiest part – defining what a bicycle is. In Alberta a "cycle" is defined in the *Traffic Safety Act* as a "bicycle, power bicycle, motorcycle or moped". To find out what a bicycle is you must look at section 1(c) of the *Use of Highway and Rules Of The Road Regulation* passed under the *Traffic Safety Act*. A bicycle is defined there as including "any cycle propelled by human muscular power on which a person may ride regardless of the number of wheels that the cycle may have". Under the *Traffic Safety Act,* a unicycle (one wheel) is also a bicycle even though "bi" usually means two. For that matter, so is the twenty-five passenger "Big Bike" that gets ridden in the Calgary and Edmonton Corporate Challenge events each year. To make things a little more confusing, the *Vehicle Equipment Regulation*, also passed under the *Traffic Safety Act*, defines a bicycle as "a cycle propelled solely by human power on which a person may ride that has 2 wheels, and includes a bicycle with training wheels".

Under the *Traffic Safety Act*, all bicycles are cycles and all cycles are vehicles. Cyclists must obey all provincial rules that apply explicitly to bicycles, cycles and vehicles. Bicycles are vehicles under the *Traffic Safety Act* but they are not motor vehicles. Drivers of motor vehicles have licencing requirements and duties at the scene of an accident that don't apply to riders of bicycles.

But many of the rules that apply to motor vehicles apply to cycles, and therefore to bicycles. Section 75 of the *Use of Highway and Rules Of The Road Regulation* says that unless the context otherwise requires, a person who is operating a cycle on a highway also has all the rights and is subject to all the duties of a person driving a motor vehicle under the *Traffic Safety Act* and regulations that set out the rules of the road and the rules about the operation of vehicles. In other words, cyclists should assume that almost everything that applies to drivers of cars also applies to them. This includes rules about speed limits, signaling turns, obeying traffic signals, not driving carelessly or without due care and attention and the rules against distracted driving (use of cell phones). If a rule makes no sense to apply to a bicycle (for example the rule that you can't leave a vehicle unattended if it is up on a jack) then it simply doesn't apply.

Some of the rules in the *Traffic Safety Act* and its regulations apply while a bicycle is being operated on a "highway". A highway is defined to include just about everywhere that anyone would ever ride, including any type of street, trail, driveway, alley, bridge or other place that the public is ordinarily entitled or permitted to use for the passage or parking of vehicles, including sidewalks and ditches, regardless of whether the land is public or private.

Some of the province wide rules from the Alberta *Traffic Safety Act* and its regulations that refer to bicycles specifically are:

- Power over the licensing of bicycles is given to local municipalities;
- If a bicycle is in motion on a highway after dark, its lights must be lit;
- Operators of bicycles are not to use their "audible warning device" (horn) except where it is reasonably necessary as a warning;

A bicycle is defined there as including "any cycle propelled by human muscular power on which a person may ride regardless of the number of wheels that the cycle may have."

- Riders and passengers under 18 years of age must wear an approved helmet;
- Parents must not "authorize or knowingly permit" their children under 18 to ride or be a passenger on a bicycle unless the child is wearing a helmet;
- Helmets must have an approval from a designated safety organization, must fit properly and have a chin strap, must have a hard smooth outer shell and be capable of absorbing an impact;
- If you ride at night, your bicycle must have at least one, but not more than two headlamps, a red tail amp and a red reflector on the rear; and
- A rider may not operate a bicycle unless it has a brake.

According to Statistics Canada, forty-two percent of Canadian cyclists wear a helmet every time they get on their bike (here). Minors in Alberta have been required to wear helmets when riding since 2002 and a 2011 University of Alberta study concluded that the law has been effective at reducing head injuries but that youth cycling may have decreased since the law was enacted.

Where Can I Ride?

Sections 13 and 14 of the Alberta *Traffic Safety Act* permits municipalities in Alberta to make rules about a wide variety of matters governing traffic and vehicle operation within their own boundaries. Where you can ride and the rules for doing so are governed by the local municipality and vary from place to place. The best and easiest rule is to simply understand and obey the signs. If you want to dig further, search online for the city name along with "traffic bylaw" and then searching for "bicycle" within the bylaw for rules about cycling.

Highways – Bikes are permitted on highways (remember that "highway" includes any sort of street). Municipalities have the authority to ban bicycles from certain busy highways for safety reasons.

Sidewalks – Both Calgary and Edmonton ban riding on sidewalks and both cities have exceptions for children and sidewalks where signage permits riding. Calgary adds a further exception for anyone delivering newspapers. Red Deer, by contrast, allows bicycles on sidewalks unless they are prohibited by signs.

Crosswalks – Riding a bicycle in a crosswalk (using the crosswalk as a pedestrian would) are not specifically banned by the *Traffic Safety Act* or its regulations and are not banned by city bylaws in Calgary or Edmonton. Although, as noted above, riding on the sidewalk approaching the crosswalk is likely prohibited. Calgary has designated a special kind of crosswalk called a "multiuse crossing" where bicycles are explicitly allowed to cross with pedestrians. As with all things when you are on a small bicycle amongst the big cars, common sense is important. If you appear unexpectedly in a crosswalk, drivers might not see you. Take care for your own safety. Also, when you are on a bicycle in a crosswalk, you are a vehicle, not a pedestrian. You may not have the right of way over other vehicles as a pedestrian would.

Parks and pathways – Municipalities may make further rules governing cycling in parks and on separated pathways. For Calgary, these rules are in the Parks and Pathways Bylaw (here). Pathways often have speed limits. In Calgary its 20 km/h, which would surprise many commuters.

Outside of cities – To ride on private land or leased crown land you must have permission from the owner or lessee. The rules around riding on non-agricultural crown land or in parks are complex and vary with ecological conditions in the area. You should stick to designated trails, obey all signs and if in doubt about whether you should be there, check with a local authority.

How To Learn More

Be aware that the unwritten common law rules of negligence also apply to cycling.

In this article we have just scratched the surface about the laws that apply to cycling. If you want to learn more we highly recommend *Every Cyclists Guide to Canadian Law* by Craig Forcese and Nicole LaViolette. Every serious Canadian cyclist should own this well-written book. It is easy to read and the authors cover just about every conceivable cycling topic. As a bonus you will learn a lot about the Canadian legal system. It is available online, at major bookstores and at some bike shops.

Your city or town may have a webpage about local cycling like this one for Calgary or this one for Edmonton. Remember that many cycling rules vary from city to city. These sites can help you understand your responsibilities in the city you are riding in.

Quality bike shops will always have knowledgeable staff who can help you find out more and give you tips on where to ride.

Finally, we both want to stress that while knowing the rules that apply to you when you are cycling is important, it is even more important to have cycling survival skills. Stay alert. Constantly look ahead and try to anticipate what cars and pedestrians a half a block ahead might do. Make eye contact if you can. Be respectful of others on the road. Remember that in a collision with a vehicle, you lose even if you are legally in the right.

Happy cycling!

Jeff Surtees B. Comm., JD is the Executive Director of the Centre for Public Legal Education Alberta and is a Graduate Student in the University of Calgary's Natural Resources, Environmental and Energy Law program.

Dave Pettitt manages the Centre for Public Legal Education websites, and has specialized in SEO and digital marketing for legal websites for over 20 years.

Travel and Taxation

By Hugh Neilson

In his 1966 song "Taxman", then-Beatle George Harrison sang the line "if you drive a car, I'll tax the street". While that may exaggerate our tax system, taxation of travel takes many forms. One form of travel taxation is via road tolls. Highway 407, Ontario's only Express Toll Route, is not presently delivering revenues to the provincial government (it was transferred to other owners in 1999 by a 99 year lease). However, 40% of it is owned by the Canada Pension Plan Investment Board, so some tolls still reach government coffers. Other provinces have occasionally imposed tolls to pay for certain road and highway construction costs, but this has been relatively rare.

That's not to say that travel costs have escaped the attention of the Taxman.

Fuel Taxes

Both the provincial and federal governments impose fuel taxes. A significant portion of the price of fuel represents various taxes. In recent years, several provinces have implemented carbon taxes. The Federal government will impose a carbon tax on those provinces which have not implemented their own, commencing in 2019. In addition, the GST/HST (5% in non-harmonized provinces) is also included in the price at the pump, which applies to both the sales price paid to the gas station and the other taxes already included.

Many people are surprised to learn that the commute between home and the workplace is personal, not business or employment, travel.

In 2019, a combination of taxes will apply to fuel:

- a Federal excise tax of 10 cents per litre will apply to gasoline (4 cents for diesel) across the country;
- provincial fuel taxes (13 cents per liter in Alberta); and
- carbon taxes (6.73 cents per liter on gasoline and 8.03 cents on diesel in Alberta; a Federal carbon tax of 4.65 cents per liter for gasoline and 5.48 cents per liter on diesel fuel will apply in Saskatchewan, which has refused to follow the Federal plan, and is challenging it before the courts).

A price of $1.25 per liter at the pump would also include 5.95 cents of GST, bringing the total tax cost at that hypothetical retail price to 35.68 cents for gasoline (28.5% of the total) in Alberta, or 30.66 cents for diesel (24.5%). These amounts vary by province, but a significant portion of the price at the pump makes its way to the government.

License and Registration, Please

The provinces also manage the registration of vehicles, and the issuance of driver's licenses, collecting fees for these services. Whether there fees are "taxes" depends on one's perspective, but the funds find their way to provincial revenues. In some provinces, such as British Columbia, vehicle insurance is also managed provincially.

Gimme a Ticket for an Aeroplane

The CRA often challenges claims for business travel, reviewing the income-earning purpose and possible personal benefits.

The Air Travellers Security Charge applies to most commercial airfare. The charge is collected by the air carrier, or its agent, as part of the ticket price. It applies to flights from airports at which the Canadian Air Transport Security Authority is responsible for passenger screening. The charge varies depending on whether the airfare is subject to GST/HST (being 5% higher when GST/HST does not apply) and on the destination, with lower fees applicable to travel within Canada. For flights within Canada, subject to GST/HST, the charge is $7.12, so $14.24 for a typical round trip flight, plus GST/HST.

Of course, fuel taxes (federal and provincial) also apply to aviation fuel.

Uber and the Tax System

The advent of the "sharing economy" has created a variety of new challenges for the tax system. The Canada Revenue Agency (CRA) regularly notes that income from the sharing economy is subject to both income tax and GST/HST, like any other income. Failure to register for, and report, these taxes places the income within the underground economy.

The ride sharing service Uber has received considerable attention, including seizure of records by Revenue Quebec (which administers Quebec sales and income taxes). The Uber website reminds Canadian drivers that they are self-employed, and must report their income. To assist, Uber provides an Annual Tax Summary to its drivers.

The GST/HST system has struggled with ride-sharing services. Most businesses are required to charge and collect GST/HST on their revenues, with an exception for "small suppliers". Generally, a small supplier has less than $30,000 of annual revenues subject to GST/HST and may chose not to register for GST/HST. By not registering, they forego the right to recover GST/HST paid on their business costs.

However, according to the *Excise Tax Act,* taxi services providers "are not eligible for small supplier status – they must collect GST/HST, even if they earn modest revenues. It was unclear whether ride sharing services met the legal definition of a taxi business, historically defined as "a business carried on in Canada of transporting passengers by taxi for fares that are regulated by the laws of Canada or a province".

The Air Travellers Security Charge applies to most commercial airfare.

The Quebec courts, in addressing similar provisions in the Quebec Sales Tax legislation, concluded that Uber drivers were conducting a taxi business. Quebec law required a taxi permit for any business which provides paid transportation of persons by automobile (*Uber Canada Inc v Quebec Revenue Agency*, 2016 QCCS 2158). Uber eventually concluded an agreement with Revenue Quebec to charge and pay GST and QST on their drivers' behalf. However, this left their status in other provinces uncertain.

That uncertainty was removed by the 2017 Federal Budget, which amended the definition of a taxi business to include ride-sharing services. More precisely, a business of transporting passengers for fares by motor vehicle, arranged or coordinated through an electronic platform or system, was added to the definition. Specific exceptions were provided for sightseeing services and for school transportation services for elementary or secondary school services. This brought Uber and similar ride sharing services into the definition of taxi services, requiring they register for GST/HST for even minor amounts of annual revenues, effective July 1, 2017. It remains uncertain whether they would be considered taxi services for revenues earned prior to that date.

Travelling Man

Many people travel for business reasons and the costs of such travel are generally deductible against the related income. However, there are numerous special rules which can apply to travel costs.

First, while the costs of travel for income-earning purposes are generally deductible, travel for personal enjoyment is not. The CRA often challenges claims for business travel, reviewing the

income-earning purpose and possible personal benefits. Retaining documentation showing the business done while travelling can be very helpful in supporting the deductibility of these costs.

Generally, the cost of food or beverages is subject to restricted deductibility, even where the costs are business-related. This extends to the cost of meals while travelling. The general rule is that only half of such costs are deductible, and only half of any related GST/HST is recoverable by registrants. However, a variety of exceptions exist, including the following:

- Most travel to remote locations or special work sites (locations where employment is only temporary, away from the normal place of employment) at least 40 kilometers away from the nearest population centre of 30,000 or more people avoids the restriction for meal costs.
- Under specific circumstances, meal costs incurred in long-distance trucking business operations are 80% deductible, rather than 50% deductible.
- Employers paying per diem subsistence amounts to travelling employees must identify a reasonable portion relating to meal costs, which is subject to this deductibility restriction.
- The 50% rule does not apply to claims for medical expenses or moving expenses, where applicable.

A number of restrictions also apply when computing costs related to automobiles having a cost in excess of $30,000.

The Federal government will impose a carbon tax on those provinces which have not implemented thier own, commencing in 2019.

Baby, You Can Drive My Car

Some employers make a company car available to certain employees. As with any benefit received due to employment, the company car is a taxable benefit. The rules for computing the benefit can be complex, but in general, the availability of an employer-owned vehicle for personal use results in a standby charge and an operating benefit.

The standby charge represents the value of having the vehicle available, it is calculated as 2% of the original cost of the vehicle per month it is available or 2/3 of the lease costs where the employer does not own the vehicle. The operating benefit represents the costs of operating the vehicle and is a fixed amount per personal kilometer driven. The amount is set annually and is 26 cents per personal kilometer for 2018.

Where the vehicle is used primarily (more than 50%) for employment purposes, and personal

use is less than 1,667 kilometers per month (20,004 kilometers per year), it may be possible to reduce the benefit.

As personal kilometers influence the benefit, an accurate record of employment and personal driving is essential. Many people are surprised to learn that the commute between home and the workplace is personal, not business or employment, travel.

As with most tax matters, numerous complexities can arise. The above discussion addresses only the basic rules. Professional advice should be obtained in respect of any specific claims.

Hugh Neilson, FCPA, FCA, TEP, is an independent contractor with Kingston Ross Pasnak LLP, and a member of the Video Tax News editorial board in Edmonton, Alberta.

Impaired Boating is Just Like Impaired Driving

By Cheryl Gallagher

Who Boats

If you have a small open boat, like a canoe, kayak or small motorboat, you cannot drink on board at all and can only transport alcohol from point to point if it is in a sealed container.

Boating is BIG in Canada. The Canadian Safe Boating Council estimates that approximately 40% of Canadians participate in boating and that there are about 5 million boats in Canada. The boating season in Canada, especially for the in-land lakes and rivers, is typically between May and October, or more specifically, the Victoria Day Weekend to Thanksgiving. Even on the West Coast, where people boat year-round, many boaters tend to do most of their boating during the summer season and cut back when the weather gets colder.

This means throughout the summer, boating season is in full swing. With warmer waters and hotter days, many people enjoy fun-in-the-sun adventures on their boat. And although there is a strong *hang over* (pun intended) from years gone by that boating and drinking go together, it just simply is not the case anymore. It has taken a long time to get the message out that the risks of drinking and boating can be as significant as drinking and driving. Studies by the Lifesaving Society of Canada have shown that approximately 40% of boating-related fatalities have alcohol as a contributing factor. And that number does not take into account other impairments like prescription drugs or the use of cannabis, whose pending legalization is likely to drive those numbers of impaired operation up.

The Drinking Facts

Drunk boating is drunk driving. Operating a boat while under the influence is an offence under the *Criminal Code of Canada*. You are considered to be 'impaired' or 'under the influence' if your blood alcohol level exceeds 0.08 (80 mg of alcohol per 100 mg of blood). The fines and penalties for driving a boat while under the influence of alcohol or drugs are the same as those applicable to operating a motor vehicle while under the influence of alcohol or drugs. There is NO difference between drunk driving and drunk boating in the eyes of the Criminal Code of Canada.

In all provinces and territories (except Quebec), to legally drink on board a vessel, it must first be equipped as a residence.

Under Canadian law, if you are convicted of Impaired Operation of a Vessel, your first offence will award you with a minimum fine of $1000. For your second offence, include 30 days of imprisonment and with your third (and any subsequent offences), expect to spend at least 120 days in jail.

In the province of Ontario, (and other provinces are considering similar laws), impaired operation of your boat extends to your privileges to drive your automobile. That means if you are convicted of impaired operation of your boat, the remedies migrate to your driver's licence and are the same as if you were convicted of drinking and driving.

In 2006, Bill 209 of the *Highway Traffic Amendment Act (Drinking and Boating Offences)* was passed in Ontario. The amendment authorizes marine police to suspend your driver's licence for 12 hours if you're caught with up to 50 to 80 milligrams of alcohol per 100 millilitres of blood. If you blow over 80 mgs., your licence will be suspended for 90 days.

There is NO difference between drunk driving and drunk boating in the eyes of the *Criminal Code of Canada*.

And the effect on your automobile driver's licence doesn't stop there. A first conviction for impaired driving of a motorboat will now result in a one-year suspension of your automobile driver's licence along with a series of fines. To get your licence reinstated, you will have to enroll in the Back on Track driver rehabilitation program – which will set you back another $500.

When your licence is reinstated, you'll have to use an ignition interlock device in your car for at least a year (say goodbye to another $1,000). And that does not touch on all the other issues that follow including a criminal record, (prohibiting visits to the USA) and your insurance rates will go 'through the roof'.

While most Canadians are slowly starting to get the message "Don't drink and boat", the statistic that 40% of alcohol use is associated with fatal accidents is not dropping very fast. With the expected legalization of cannabis there is the potential of a whole new level of

impairment on the water, and that doesn't take into account prescription drugs that can add another source of impairment.

What makes the effects of alcohol, marijuana and prescriptions drugs on the water even greater are the 'stressors' which can increase the effects of impairment significantly. Wind, waves, sun, noise, and vibration can intensify the effects of alcohol or drugs, making the impairment while boating even more dangerous than drinking and driving.

Who can drink, when and where?

In all provinces and territories (except Quebec), to legally drink on board a vessel, it must first be equipped as a residence. That means proper sleeping facilities, a head (boat jargon for washroom) and cooking facilities must be present. But even with a floating house, drinking on board is only allowed when the boat is at anchor, docked or hard aground …and never while underway.

In the province of Ontario, (and other provinces and considering similar laws), impared operation of your boat extends to your privileges to drive your automobile.

If you have a small open boat, like a canoe, kayak or small motorboat, you cannot drink on board at all and can only transport alcohol from point to point if it is in a sealed container. If you have open bottles of alcohol or an open case of beer on board could result in a charge.

Like drinking and driving, drinking and boating is no longer socially acceptable. There is heightened enforcement on the water and the remedies are severe. Canadians love boating, but the Canadian Safe Boating Council urges you to "Boat Sober" and leave the drinking until you are safety back on shore.

Cheryll Gallagher is a marketing professional with extensive boating experience. She is currently a project manager for the Canadian Safe Boating Council.

Bringing Clarity to Passenger Compensation Rules

By Ian Jack and Institute for Research on Public Policy (IRPP)

The last time Ottawa decided to make some noise about air passenger rights, in 2000, they brought an ex-NHL referee to a news conference. Bruce Hood, the newly minted air complaints commissioner, pulled out a whistle and blew it. Literally.

If you're looking for the highlight of Ottawa's past work to improve the passenger experience, that would be about it. Hood packed up his whistle and left town within two years, and the initiative fizzled out a few years later.

So, when the Liberal government announced consultations on improving passenger rights in 2016, the history on the file was not encouraging. There had been talk of an airline bill of rights for decades in Ottawa, countless private member's bills that have gone nowhere, and many consultations. But they have always foundered, as a succession of governments decided for a couple of reasons to leave the airlines alone.

Finally, last month, Parliament passed the *Transportation Modernization Act*, which mandates the Canadian Transportation Agency to develop regulations for airlines' obligations to air passengers. Those CTA consultations have just begun, and the process will bear close watching.

Governments have long been leery of slapping excess regulation on a business that frequently seems to be flirting with the line between profit and loss. One just has to recall

the litany of bankruptcies among US, European and Asian carriers. Most countries, Canada included, have also believed in the importance of maintaining at least one flag carrier, an airline to represent the country in other markets.

The resulting policy stance has meant the Canadian mainline carriers – the ones that serve all the less profitable routes that connect the country – are treated a little like the banks. That means either being expected to maintain a strong network, even during adverse economic conditions, or being protected to the point where competition on price and service suffers.

The Canadian Transportation Agency has launched consultations on air passenger rights. The rules around compensating passengers should be clear and firm.

But it must be said that airlines do a good job, most of the time. There are very few businesses that have as many direct dealings with customers – each one a potential opportunity to fumble a reservation, lose a bag, oversell a flight or spill a drink. Given the multiple possibilities of screwing up, it's a miracle — and a tribute to good systems — that most of us get where we're going when we fly, most of the time.

And yet, bad things do happen. And when they do, it's been quite unclear what the average person's rights are or how to claim them. Under the existing rules, airlines have to file tariffs with the government – legal documents that describe their services, with some sections that deal with passenger compensation rules. However, the airlines are under no obligation to make these documents readily available to passengers and no outside body got to sit in judgment of their overall fairness.

> *When we at the CAA went hunting for one airline's tariff last year, we eventually found it, buried many layers down on their website, under an obscure heading. It was a PDF of what looked to be a photocopy of a legal document many, many pages long.*

When we at the CAA went hunting for one airline's tariff, we eventually found it in 2016, buried many layers down on their website, under an obscure heading. It was a PDF of what looked to be a photocopy of a legal document. It was many, many pages long, blurry and in small type. Good luck retrieving that quickly at the airport counter after a cancelled flight. How is a traveller supposed to know if what they're being offered by the agent at the counter is fair, or if there is room to bargain?

The provisions included in the new Act are a good start at addressing this imbalance between passengers and airlines. Bumping, lengthy tarmac waits, flight delays and cancellations will all be covered. The Act, however, leaves it to the Canadian Transportation Agency through its consultations to fill in the all-important details like how much compensation should be disbursed and under exactly what conditions.

Here are some of the things the CAA will be advocating for:

- Pro-active compensation. Passengers have the right today to complain to the Canada Transportation Agency, but the process can be lengthy. The new system should require the airlines to proactively provide compensation when they break the rules, so that passengers have to complain only if the airlines do not offer compensation.
- Concise rules around the categories of compensation. For instance, the legislation sets out different levels of care expected if a flight is disrupted for various business reasons (in other words, it is the airline's responsibility), mechanical problems (it is partly their fault), and weather (stuff happens). Of course, there is a temptation on the part of an airline to lean towards certain reasons over others – a mechanical problem will cost the airlines less. The CTA will need to strengthen its audit capabilities, to ensure the airlines do not have an incentive to cheat.
- In cases where compensation is due, it should be in cash, not vouchers or upgrades, where the value may not be as clear.

The regime, expected to be in place by the beginning of 2019, will at least set out clear standards of treatment, including minimum levels of compensation, in easily accessible language – all mandated in the legislation.

When we at the CAA went hunting for one airline's tariff last year, we eventually found it, buried many layers down on their website, under an obscure heading. It was a PDF of what looked to be a photocopy of a legal document many, many pages long.

It will, in reality, be an airline passenger bill of rights. It has come about as a result of four factors that came together. First, the power of social media, which puts out for all to see the stories of backed-up toilets, passengers being dragged off overbooked flights and guitars being flung around — and these are just some of the worst instances of customers' mistreatment.

The second factor is that there has recently been an upswing in carrier profitability.

Third, the European Union and the United States have in recent years put these regimes in place. This resulted in no discernible hit on earnings, and has left Canada lagging behind. As it stands, it could be cheaper for an airline flying to Canada from Europe, even a Canadian one, to bump someone holding a Canadian passport than to bump someone holding a US or EU passport.

Fourth, we have a government and Transport Minister, Marc Garneau, who is looking to make a mark for the middle class.

Polling by the CAA has suggested that 91 percent of travellers support an airline code of conduct. Some in Ottawa who are frequent fliers and VIPs may look on this file with bemusement, perhaps because they have status with an airline or perhaps an asterisk beside their name. They would therefore be among the last people in Canada who need to worry about being bumped or treated unfairly. But ordinary Canadians who travel once a year to visit family or to go south are unlikely to know how to use the rules or to be afforded special treatment. The protections in C-49 speak to them.

This article is part of the Recalibrating Canada's Consumer Rights Regime special feature.

Reproduced from* Policy Options *June 2018 with permission of the Institute for Research on Public Policy. www.irpp.org

Ian Jack is managing director of communications and government relations for the Canadian Automobile Association (CAA). He was a Parliament Hill journalist and a political and public service staffer.

The Institute for Research on Public Policy is an independent national, bilingual, not-for-profit organization. The IRPP seeks to improve public policy in Canada by generating research, providing insight and informing debate on current and emerging policy issues facing Canadians and their government.

How Long-Term Car Loans are Causing Bankruptcy

By J. Doug Hoyes

The days of buying a vehicle with cash are long behind us. Car loans and leases are now commonplace. It's feasible to have a 3-5 year car loan, pay it off, and then own the car. It's a reasonable timeframe for the average consumer and also ensures that an affordable loan is borrowed. However, problems arise when car loans exceed 5 years.

These days, an increasingly popular method of financing a car is to sign a lengthier term loan, including some that are even 8 years long. In fact, more than half of all car buyers in Canada are taking out loans of 84 months or longer. But while a longer repayment period makes monthly payments smaller for a more expensive car, you may want to reconsider risking your financial health to purchase a depreciating asset.

Provincial laws provide an exemption from seizure for a motor vehicle, under certain conditions, generally if the vehicle has a value below the provincial limit. For example, in Ontario you can keep a vehicle worth up to $6 600.

What are long-term car loans?

Long term car loans are loans that exceed 60-month terms. In other words, loans that are 6 to 8 years in length. The short-term benefit to a longer repayment schedule is it can more easily help you manage the costs of a new car you would otherwise not be able to afford.

When you do this, however, you are taking some big risks:

Overpaying for a car

Smaller monthly payments can be attractive. But, what you may not realize is that by accepting a longer-term loan, you are paying for much more than the value of the car through interest charges.

Let's say for example you buy a car that costs $35,000. The interest rate on your loan is 5%. Your term of the loan is 36 months (3 years). If you borrow for 3 years, you are paying $37,763.33 for the car because you made $2,763.33 in interest payments. Because it's a 3-year loan, your monthly payments on it would be approximately $1,048 a month.

However, if that monthly payment is too high and you opted for a longer repayment period of 72 months instead (6 years) at 5% interest on a loan of $35,000, you would pay more than double in interest charges. Over the 6-year period, the car would cost you $40,584.43 because you made $5,584.43 in interest payments. Your monthly payments on this extended loan, however, would only be $563.67.

Personal bankruptcy law in Canada is governed primarily by the Bankruptcy & Insolvency Act (BIA). In addition to Canadian bankruptcy law, there are provincial laws that create bankruptcy exemption limits. These allow you to keep certain assets like your basic household furniture, clothing, tools necessary to your work, etc.

While this seems more affordable on the surface, it's actually costing you much more to own that car. Instead, you could purchase a vehicle that falls more within your monthly spending limit, without an extended loan.

In addition to high interest charges, the risk of longer-term car loans is ending up with negative equity. Remember that a car is a depreciating asset. It loses some of its value the moment it's driven off the dealership lot. So, why extend your payment period for an asset that loses value with each year?

Having negative equity

Negative equity means owing more on a car than the car is worth. While this is not uncommon, there is a much higher risk of financial trouble on extended loans.

If your car has declined in value to $20,000, but your loan balance is $27,000, by purchasing a new car, you will have to rollover the remaining $7,000 to your new car, which can make the new purchase much more expensive. This can lead to serious debt trouble when you have a car loan that's a lot longer than 3 to 5 years. Unless you have taken very good care of your vehicle and have had no accidents, chances are that in 5 to 7 years, you may need

a new car or just want one that's more efficient.

If in 5 years your car is no longer working as well as it used to; has lost significant value and you still owe over $10,000 on the loan, it can be very expensive to purchase a new car when you rollover the remainder of what you owe. Doing this frequently and not paying off your auto loan in full can lead to serious debt problems.

Car loans and insolvency

From the Hoyes Michalos bankruptcy study we know that the average debtor with a car who files insolvency is likely to owe more than the realizable value of his vehicle, which is an added burden when the time comes to renew the loan. In 2017, over one-third (34%) of all financed vehicles had a negative car equity, up from 33% in 2015 and 31% in 2013.

Car loan rollovers have become an increasing concern, especially for Canadians with poor credit, as they are often forced financially to roll the balance owing on their old car into their new car loan. For vehicles with a shortfall, the average car loan was underwater in 2015-2016 by $9,385, up from $7,045 in 2011-2012.

If you have a significant amount of unsecured debt and are considering your debt relief options, it's important to know that you can keep your car after filing for insolvency. Personal bankruptcy law in Canada is governed primarily by the Bankruptcy & Insolvency Act (BIA). In addition to Canadian bankruptcy law, there are provincial laws that create bankruptcy exemption limits. These allow you to keep certain assets like your basic household furniture, clothing, tools necessary to your work, etc.

Remember that a car is a depreciating asset. It loses some of its value the moment it's driven off the dealership lot. So, why extend your payment period for an asset that loses value with each year?

Provincial laws provide an exemption from seizure for a motor vehicle, under certain conditions, generally if the vehicle has a value below the provincial limit. For example, in Ontario you can keep a vehicle worth up to $6,600.

Vehicles financed either through a lease or bank loan are also treated differently. Secured debt, like a car loan or lease, is not included in a bankruptcy or proposal. In most cases, debtors do not have enough equity in the vehicle to surpass provincial exemption limits. As long as you can keep up with your monthly payments, you can continue to keep your financed vehicle even if you file insolvency.

However, what if your car is only worth $13,000 for a trade-in or resale, does it make sense to pay off the remaining $19,000 that you owe on the loan? It might actually be better for you financially to return your car to the dealership and include the shortfall amount into a bankruptcy or consumer proposal.

How to avoid car loan debt

To avoid risks such as negative equity and overpaying on interest charges, I'd recommend looking beyond just the monthly payments. While longer-term car loans often appear more affordable, they are not in the long-run.

When purchasing a new car:

- Keep your loan period as short as possible, ideally between 3 to 5 years.
- Save as big a down payment as you can for the car
- Purchase the least expensive vehicle that meets your needs.

If you get into financial trouble, consider speaking to a Licensed Insolvency Trustee who will take the time to review your financial situation and provide you with a customized solution to help you achieve debt relief.

J. Douglas Hoyes, B.A., C.A., CPA, CIRP is a Licensed Insolvency Trustee and co-founder of Hoyes, Michalos & Associates Inc. in Ontario, Canada. He is also the host of Debt Free in 30, a weekly podcast about how to handle money and debt.

Law Society of Ontario Targets Systemic Racism in the Legal Profession

By John Cooper

An amended *Rules of Professional Conduct* was just one of 13 recommendations delivered by the Law Society of Ontario in a lengthy report designed to address issues of long-standing systemic discrimination in the legal system.

Entitled *Working Together for Change: Strategies to address issues of systemic racism in the legal professions,* the report was approved at the law society's December 2016 Convocation. It was the result of four years of consultation and research by the Challenges Faced by Racialized Licensees Working Group. The group found that racialized lawyer licensees (those who are outside the dominant white culture) faced a variety of professional barriers to growth.

The report outlined five action areas: accelerating a culture shift; measuring progress; educating for change; implementing supports; and leading by example. As well, additional work was being considered for overhauling the law society's racial discrimination complaints system.

The report's consultative process was seen by the Law Society of Ontario as an opportunity to develop a positive change strategy, given that racialized lawyers had dealt with barriers within the profession for years. The group identified challenges involving entry into the practice of law and advancement within law firms, the challenges racialized lawyers faced that might increase the risk of complaints or discipline, best practices to support racialized lawyers in all areas, and the development of measurable, accountable strategies.

According to working group co-chair Raj Anand, a partner at WeirFoulds LLP, the need to create the report had been a focal point since the mid-1990s.

> *"The change of the legal profession in makeup has taken place in the last 20 years, with a lot of anecdotal evidence of racism, individual and systemic, and individual incidents and individual concerns," said Anand. "We must root out systemic barriers and create lasting change by adopting a tool box for the professions that will promote equal recognition and respect for all of our members."*

The working group engaged with more than 1,000 lawyers, law students, paralegals, articling students and members of the public, both racialized and non-racialized, and received written input from 45 organizations and individuals. Evidence drawn from the group's work included qualitative examples of stereotyping, a lack of mentors, the challenge of negotiating the culture of law firms, and fitting into the workplace. There was extensive evidence that intersectional issues also created complications through overlapping biases involving race, disability, sexual orientation, race, and gender identity.

Arleen Huggins, immediate Past President and Chair of the Advocacy Committee for the Canadian Association of Black Lawyers (CABL), and a partner at Koskie Minsky LLP, said her organization provided the working group with initial guidance as well as submissions and association representatives for interviews. She said the recommendations are a minimum first step in making change happen.

> *"The legal profession in my view suffers from systemic issues which create barriers for many racialized/equity seeking law students and lawyers, and is lagging behind on proactively addressing equity and diversity issues," said Huggins in an email interview. "I believe that the mobilization of the (law society) has come more from our increasingly diverse demographics within Canada and especially within Ontario, and from organizations such as CABL."*

The Roundtable of Diversity Association (of which CABL is a member) had lobbied the law association "for some years now to introduce measures to move the legal profession to become more diverse and more reflective of the diversity of the general population," Huggins said.

Anand, who was chief commissioner of the Ontario Human Rights Commission in the late 1980s, said it was "time to devote time and resources to see if the anecdotal evidence was borne out … and to determine what if anything the law society should do." The resulting report is "about ethics, professionalism, fairness and mutual respect. Our working group came about as a result of longstanding concerns and anecdotal evidence of discrimination in our professions (and) our law society accepted its responsibility and undertook to get to the bottom of this issue."

The report was an unprecedented look at issues regarding Ontario's diverse legal system and "other provinces have not delved into it the way we have," added Anand. "In terms of the final recommendations, nothing we proposed was radical. These were proactive approaches and arbitrators have been looking at these for the last 15 to 20 years. We have a lot of 'inside the beltway' issues to deal with, apart from the broader societal issue of systemic discrimination."

Some cynicism as to whether the recommendations had the necessary 'teeth' to make new guidelines stick was expected, said Anand. "There was concern that it would be a lot of talk and no action."

Not too surprisingly, racialized professionals tended to push harder for action to hold the industry accountable, with more data collected and stronger penalties, while the "non-racialized majority tended to take approach that it should be voluntary," said Anand. "For me, having done human rights work, these were familiar issues. We adopted what were fair best practices, and typical of what you would do in large organizations to attack the issues."

Huggins said resistance to change from lawyers in the mainstream was anticipated. "We have already heard of law firms/lawyers who believe the recommendations go too far in 'mandating' their practices … to effect change, these steps are critical and arguably don't go far enough (CABL and other equity seeking legal organizations lobbied for mandatory aggregate data collection within law firms and legal organizations) to rectify a systemic imbalance in opportunity which has existed in the legal profession for a long time."

Overall, Anand anticipated long-term positive outcomes. "Good human rights is good business. This is a win-win-win proposition, as law firms benefit from diversity in terms of marketing, attracting clients and getting the best work out."

The report will have significant influence in Ontario legal firms, and "I expect it will have influence in the provinces in which diversity is more marked," said Anand. "We need to facilitate culture change, to signal the importance of an even playing field, to infuse equality and inclusion in our work as professionals," and it is likely that as more law students and new lawyers and paralegals become aware of the law society's approach, it will help to better foster a long-term culture of inclusiveness.

Recommendations of *Working Together for Change: Strategies to address issues of systemic racism in the legal professions* (several of these recommendations apply to law firms with more than 25 employees):

- **Reinforcing professional obligations**: review and amend the Rules of Professional Conduct, the Paralegal Rules of Conduct, and Commentaries to reinforce professional obligations to recognize, acknowledge and promote equality, diversity and inclusion consistent with human rights legislation
- **Diversity and inclusion project**: work to develop model policies and resources to address challenges
- **Adoption of equality, diversity and inclusion principles and practices**: ensure compliance by lawyer to adopt and abide by principles acknowledging the obligation to promote equality, diversity and inclusion; establish a workplace human rights/diversity policy; conduct a workplace self-assessment every two years
- **Measure progress through quantitative analysis**: Annual review, through the Law Society, of self-identification data in legal workplaces

- **Measure progress through qualitative analysis**: every four years, provision of answers to law society on the state of the legal workplace
- **Inclusion index**: a record of self-assessment information, demographic information and information drawn from the Law Society's inclusion questions, published every four years
- **Repetition of inclusion survey used in the project**: Law Society will conduct ongoing inclusion surveys, every four years
- **Progressive compliance**: consideration of compliance measures for workplaces that fail to comply with the adoption of inclusion principles and practices
- **Continue professional development**: launch a three-hour accredited program that focuses on advancing inclusion in the legal professions, and provide assistance to workplaces in designing and delivering their own society-accredited programs
- **Licensing process**: include as part of the licensing process the topics of cultural competency, equality and inclusion as necessary competencies
- **Build communities of support**: provision of support to racialized lawyers who require networking and mentoring
- **Address systemic discrimination complaints**: review the Discrimination and Harassment Counsel Program, revise the rules of conduct where appropriate, and create effective ways to address complaints of systemic discrimination
- **Lead by example**: continue monitoring and assessing internal policies and practices to promote diversity, inclusion and equality in the workplace.

John Cooper, EdD is an educator and researcher who has taught journalism and corporate communication at Durham College and Centennial College.

Accommodating Syrian Refugees' Legal and Other Needs

By Hasna Shireen

The Syrian Crisis

The United Nations High Commission for Refugees (UNHCR) has recognized the Syrian refugee crisis as the world's single largest refugee crisis for almost a quarter of a century under its mandate. As of March 2017, the UNHCR reports that 6.3 million Syrians have fled their homes and remain trapped in Syria. 4.9 million Syrians have sought refuge in countries outside of Syria. The vast majority of Syrian refugees who have sought refuge in other countries have fled to surrounding countries and include with corresponding numbers: Lebanon (986,942), Jordan (666,113), Egypt (128,956), Iraq (249,641) and Turkey (3,589,384). In addition to these neighboring countries, Europe has received a large number of Syrian refugees (i.e., between the periods of April 2011 to October 2017, Europe received 996,204 asylum applications from Syrian refugees).

Recent Canadian Measures to Address the Syrian Refugee Crisis

In response to Syria's civil war and the resulting refugee crisis, the Canadian government committed to resettling 25,000 Syrian refugees between November 4, 2015 and February 29, 2016, which was known as the #WelcomeRefugees initiative. Canada's commitment under this initiative was to be completed under strict timelines. Canada successfully delivered upon this commitment on February 29, 2016. Accordingly, between 2015-2016, Canada welcomed its highest number of refugees since the 1980s. As of January 2017, 40,081 Syrian refugees have been resettled into Canada under the #WelcomeRefugees initiative.

According to the Alberta Government, Alberta has historically welcomed 10% of Canada's immigrant population. In the Government of Canada's recent Syrian refugee initiative, according to the Alberta Association of Immigrant Serving Agencies (AAISA), Alberta, Ontario and Quebec lead the country in the number of Syrian refugees resettled provincially. In particular, during the periods of January 2015 to September 2016, Alberta resettled 7,415 Syrian refugees.

Canada's International and National Obligations to Refugees

Canada signed the 1951 United Nations (UN) Convention on the Status of Refugees on 4th June 1969 (Convention). Canada recognized its obligations for refugee protection not merely as a humanitarian gesture but also a legal requirement as a signatory state of the Convention. The country's national obligation to ensure refugee resettlement is protected under the *Immigration and Refugee Protection Act, SC 2001, c 27*.

Refugees are different from immigrants because they are forced to flee their homes and do not choose to immigrate. Unfortunately, until 1976, Canada treated refugee claims in a similar manner to other immigration claims. The *Immigration Act 1976* introduced the new refugee class and distinguished refugee claimants from other immigration applicants and also recognized refugee resettlement as a legal right. Judicial interventions further acknowledged rights of refugees. In its landmark decision of *Singh v Minister of Employment and Immigration*, 1985 SCC 65, the Supreme Court of Canada (SCC) confirmed the availability of the basic rights for the refugee claimants under the *Canadian Charter of Rights and Freedoms*. Recently in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, the Supreme Court extended the scope and definition of "humanitarian and compassionate grounds" to include the best interests of a child directly affected under the *Immigration and Refugee Protection Act, SC 2001, c 27*.

Refugees are different from immigrants because they are forced to flee their home and do not choose to immigrate.

The Legal System in Canada to Support its Obligations to Refugees

Part 2 of the *Immigration and Refugee Protection Act* provides the framework for refugee resettlement. Refugees can be resettled in Canadian soil under either of the following programs:

- Refugee and Humanitarian Resettlement Program (outside of Canada); and
- In-Canad Asylum Program (not generally applicable for Syrian refugees).

Refugee and Humanitarian Resettlement Program

Refugee applicants from outside of Canada can be resettled under this program in the following three ways:

- Government-Assisted Refugees (GAR) Program

Refugees acknowledged by the UNHCR (known as Convention Refugees) are eligible for this program. The Government of Canada is responsible for the initial settlement (for up to one year) of these refugees through the Resettlement Assistance Program. The UNHCR or other organizations can make referrals for resettlement under this program.

- Privately Sponsored Refugees (PSR) Program

A Group of Five (G5) or Community Sponsor (five or more Canadian citizens or permanent residents) can sponsor refugees under this program. Prior to sponsoring, the groups have to sign agreements with the Government of Canada to be eligible as Sponsorship Agreement Holders (SAH). A G5 may only sponsor applicants recognized by the UNHCR or other organizations and will be financially responsible for the resettled refugees for up to one year.

- Blended Visa Office-Referred Refugees (BVOR) Program

The BVOR Program matches refugees identified for resettlement by the UNHCR with private sponsors in Canada. The goal is to engage in a three-way partnership among the Government of Canada, UNHCR, and private sponsors. The Government of Canada will generally provide up to six months of income support through the Resettlement Assistance Program while the private sponsors will be responsible for financial support for the other six months of the initial year.

Alberta Human Rights Act (AHRA): Supporting Syrian Refugees Against Discrimination

Alberta's provincial human rights legislation sets out the standards for human rights in the province of Alberta and shares many similar themes with the international human rights agreements to which Canada is a signatory member. As per section 20(1) of the *AHRA*, the protection of the Act applies to "any person" "…who has reasonable grounds for believing that a person has contravened this Act…" Thus, an individual refugee residing in Alberta is within the jurisdiction of the *AHRA*.

AHRA and Accommodation

In Alberta, the *AHRA* protects Syrian Refugees and all Albertans from discrimination in certain areas based on specified grounds. The *AHRA* recognizes that all people are equal in dignity, rights and responsibilities, regardless of race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, gender expression, gender identity, place of origin, marital status, source of income, family status or sexual orientation.

Accommodation means making changes to certain rules, standards, policies, workplace cultures and physical environments to ensure that they don't have a negative effect on a

person because of the person's protected ground. The goal of accommodation is to allow equitable participation in any of the areas protected by the *AHRA*.

Albertans who need accommodation to overcome a disadvantage caused by the application of a rule or a practice may include employees, prospective employees, union members, tenants, and customers, among others. The reason for the accommodation must be based on a need related to a ground that is protected under the *AHRA*. The duty to accommodate applies to employers, landlords, business owners, public service providers, educational institutions, professional associations, trade unions and others. The employers and service providers have a legal duty to take reasonable steps to accommodate individual needs to the point of undue hardship. To demonstrate a claim of undue hardship, an employer or service provider must show that they would experience more than a minor inconvenience.

The law recognizes that, in certain circumstances, a limitation on individual rights may be reasonable and justifiable. Discrimination or exclusion may be allowed if an employer can show that a discriminatory standard, policy or rule is a necessary requirement of a job. In *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* (BCGSEU) (1999), 35 CHRR D/257 (SCC) [*Meiorin*], the Court provided direction to employers as to how to determine whether a particular occupational requirement is reasonable and justifiable. The Supreme Court outlined a three-part test. The *Meiorin* test outlines an analysis for determining if an occupational requirement is justified. Once the complainant has shown the standard or requirement is *prima facie* discriminatory, the employer must prove that, on a balance of probabilities, the standard:

- was adopted for a purpose that is rationally connected to job performance;
- was adopted in an honest and good faith belief that the standard is necessary for the fulfillment of that legitimate purpose; and
- is reasonably necessary to accomplish that legitimate purpose;
- to show that the standard is reasonably necessary, the employer must demonstrate that it is impossible to accommodate the employee without the employer suffering undue hardship.

Employers and/or service provider should make inclusive policies to accommodate different members of society before adopting a bona fide occupational requirement. These should take into account Syrian Refugees as newcomers in Alberta. Accommodation measures should be considered when they are simple and affordable and do not create undue hardship.

Challenges Faced by Refugees

It is important to recognize that the various challenges faced by refugees' resettlement processes are unique to each individual. In December 2016, the Senate of Canada

requested the Standing Senate Committee on Human Rights to prepare a report on the status of Syrian refugees and their experiences to integrating their life in Canada [Senate Committee Report]. In responding to this request, the Committee met with various key stakeholders in this area, including individual refugees themselves. The Canadian Council for Refugees made a report called "Refugee Integration: Key concern and areas for further research" [Refugee Integration Report]. From these two reports the following common challenges are faced by Syrian refugees:

In particular, many Syrian refugees suffer from Post-Trumatic Stress Disorder as a result of the truma they have endured.

Access to employment

The Refugee Integration Report (at page 10) noted that access to employment is a major priority concern for refugee integration in Canada. This issue further expanded to "access to appropriate employment". The Senate Committee Report stated (at page 35) that some Syrian refugees have education and/or experience in their respective fields, but, like other newcomers to Canada, they may find their qualifications are not recognized. Moreover, language, education and work experience are prerequisites to be considered for a job in Canada.

Health Issues

The Refugee Integration Report (at page 11) noted that health issues are a top priority concern for the integration of refugees in Canada. Several issues that make it difficult for refugees to access appropriate health services were raised. The Senate Committee Report noted (at page 9) that there needs to be greater coordination between the various levels of government and the Minister of Immigration, Refugees and Citizenship in addressing the mental health needs of the Syrian refugee population. In particular, many Syrian refugees suffer from Post -Traumatic Stress Disorder as a result of the trauma they have endured.

Language Difficulties

The Refugee Integration Report (at page 11) noted that refugees often face long waitlists to attend language learning classes. Furthermore, the Senate Committee Report noted (at page 33) that many community service agencies expressed concern with the limited number of English language classes offered in conjunction with child care spaces for attendees. This was found to be particularly troubling for females, who were found to be the primary childcare providers in the home.

Limited Financial Resources

Many Syrian refugees initially traveled to Canada with the assistance of a government loan and have experienced difficulty with beginning the repayment of this loan upon arriving into Canada. The Senate Committee Report stated (at page 32) that refugees are struggling to meet their basic needs with the financial support provided through the refugee settlement

programs, and therefore find the additional expense of repaying government loans to be burdensome. Further, the Senate Committee Report noted (at page 34) that a refugee's financial challenges are further compounded by the various difficulties they face in securing employment.

Limited Access to Social Assistance

The Senate Committee Report noted (at page 8) that Syrian refugees are encountering delays in accessing government benefits, such as Canada Child Benefits. As a result, many refugees struggle with meeting the basic needs of their families.

Youth Issues

Additional funding is needed to meet the unique needs of Syrian refugee youth as they settle and integrate into Canadian society, according to the Senate Committee Report noted (at page 36). Namely, refugees from this age group have demonstrated difficulties with integrating into Canadian society, concurrently with experiencing the unique challenges of adolescence. Further, the Committee heard evidence about the lack of extra-curricular programming available in local communities across Canada, specifically tailored for this demographic.

Gender Issues

The Senate Committee Report (at page 39) stated that gender based issues were highlighted via a recommendation for the Minister of Immigration, Refugees and Citizenship to work more closely with immigrant service agencies in the community to appropriately address domestic and gender-based violence in a culturally sensitive manner. The Committee heard evidence by witnesses indicating that the prevalence of gender based issues increases among a population group when individuals face language barriers, are new arrivals in a country and have pressing family demands, such as finances and child care.

Family reunification

The Senate Committee Report stated (at page 40) that the Committee heard reports that there is a need for a greater emphasis by the Ministry of Immigration, Refugees and Citizenship on reuniting Syrian refugees with family members. Many newly settled Syrian families in Canada remain separated from loved ones and in turn face emotional barriers and burdens to successfully settling into Canadian life knowing that their loved ones remain in harm's way. Family reunification is essential for full integration.

Key recommendations to address these concerns and that will assist in accommodating Syrian Refugees include:

- increase funding for language classes with childcare facilities so that all refugees can learn English or French;
- expedite recognition of foreign education and work experiences to enhance employment opportunities;
- develop workshops and programs to address culturally sensitive youth and gender issues;
- develop a comprehensive plan to deliver mental health services to Syrian refugees. This plan should contain culturally appropriate interventions that address widespread and varied mental illnesses, including those related to ongoing trauma and post-traumatic stress disorder;

As of March 2017, the UNHCR reports that 6.3 million Syrians have fled their homes and remain trapped in Syria. 4.9 million Syrians have sought refuge in countries outside of Syria.

- eliminate or reduce debts that some refugees owe to the Canadian government by converting travel loans into grants or introducing debt forgiveness mechanisms. Create more financial assistance for refugees;
- make social assistance and services more accessible to refugees; and
- accelerate family reunification processing time as members of their family still abroad may face persecution or other serious risks to their safety. Also recognize an inclusive definition of family.

Supporting Canada's Syrian refugees is not only a moral imperative, but also a legal obligation for Canada. The Government has an obligation to ensure that they have the same opportunity as any Canadian to thrive in Canada.

***Some of this information was taken from ACLRC's new publication: Refugees and Discrimination: Teacher and Student Materials (Updated Syrian Refugee Edition) 2018, online: http://www.aclrc.com/resources-for-teachers/**

Hasna Shireen is a Research Associate with the Alberta Civil Liberties Research Centre, at the University of Calgary in Calgary, Alberta.

Indigenous Public Legal Education—PLE from an Interconnected Worldview

By Patti LaBoucane Benson and Alex Choby

What does it mean to practice Public Legal Education (PLE) from an Indigenous, interconnected worldview? This is the goal of BearPaw Legal Education (BPLE) in the development, distribution and evaluation of PLE for Indigenous peoples throughout Alberta. BPLE is a department of Native Counselling Services of Alberta (NCSA). NCSA was established in 1970 with the objective of providing Courtworker assistance to Indigenous people in conflict with the law. NCSA recognizes that Aboriginal people often feel alienated by legal and court procedures, and that they need support navigating the justice system. Since then NCSA has evolved to deliver programs, training, and services, as well as to produce research and films.

Public Legal Education: What are we Restoring?

Many project illuminate areas of common ground between Indigenous Legal Traditions and Canadian Laws, and also highlight the strength of Indigenous legal traditions.

Canadian law, and the way justice is administered, is complicated, difficult to understand, and often shifting. All Canadians must have a basic understanding of different areas of law and how changes to the law affect them. Public Legal Education began in Canada in the 1970s, as part of the Legal Aid Movement. Those leading the movement saw that poor people (who qualified for social welfare programs) were at a disadvantage in Court, because they could not afford counsel. PLE began in this spirit, as organizations created literature on legal issues in plain language for socially marginalized groups living in poverty, with the goal to increase access to justice.

Indigenous people have a complex relationship to Canadian law–which has been used both as an instrument of colonization and more recently, as a way to pursue and clarify pre-existing and constitutional rights. For two decades, NCSA has undertaken research into the effects of colonial legislation and policy on Indigenous communities, life-chances, and experiences of the law in the present moment. Key findings highlight that ***some*** (but not all) Indigenous people live with historic trauma that shapes interactions with the legal system.

What follows is a partial list of changes to Indigenous communities that resulted from colonial legislation and policy, and the consequences for peoples' lives.

- Since 1763, legislation and policy (including those that made the residential school system possible) have caused kinship relationships to fracture. This, is turn, has diminished the sense of interconnectedness for Indigenous people, resulting in debilitating isolation.
- Ceremony and traditional knowledge were demonized and made illegal, resulting in loss of legal traditions and damage to Indigenous infrastructures that teach and maintain good relationships. Indigenous people who resisted these changes were targeted through the justice system, so that many Indigenous people lack a meaningful connection to Canadian law today.
- Legislation often mirrors the assumptions a society makes about groups of people, and Canadian legislation has played a role in creating and perpetuating stereotypes about—and racism towards–Indigenous people. Many Indigenous people have internalized negative stereotypes about Indigenousness, culture and spirituality, resulting in profound shame and discomfort about their identity, and disconnection from Canadian identity and society.

The work of BPLE is grounded in NCSA Indigenous model of building individual and family resilience.

- Political, social and spiritual control over Indigenous people diminished Indigenous individuals', families', and nations' ability to have power or control over their lives.
- Indigenous people have experienced systemic discrimination in multiple systems in Canada and thus have a long-standing distrust of the criminal and family justice, as well as child welfare systems.
- When the above is combined with higher illiteracy and poverty rates, considerable difficulty in navigating systems and feelings of hopeless, helpless and powerless result.

Indigenous people today are also over-represented in the Canadian Legal Justice system and fair less well than their non-Indigenous counterparts at every step of the legal process. They are: more likely to be arrested, more likely to be refused bail, less likely to have adequate council and more likely to have their matter proceed to trial in result, and once convicted, more likely to be given longer sentences. The Stanley Trial and the 2013 Iacobucci Report for the Government of Ontario are reminders that Indigenous people are unlikely to face a jury that includes other Indigenous people, or, for that matter, to see Indigenous people in influential positions within the legal system—as judges, court prosecutors or lawyers. As victims, Indigenous people are less likely to pursue matters in court.

In 2007, NCSA completed a research project regarding the legal education needs of Aboriginal people in Alberta. The findings highlighted Indigenous people's difficulty

navigating the justice system and understanding legal terminology and legislation, and general apprehension of, disconnection from, and apathy towards the system.

These current realities and research findings builds a strong case that PLE for Indigenous people must be grounded in restorative practice – as a tool for reconciliation. To accomplish this goal, PLE must be created by Indigenous people, mobilizes Indigenous worldviews, and delivered in a culturally congruent manner.

Interconnected Worldview

Reconciliation must include reworking laws and systems to remove their colonial foundations, as a starting point to repair damaged relationships, as well as address isolation and despair. In tandem with this, Indigenous worldviews must be taken as legitimate and given substantive space to shape and direct social institutions alongside western/European based perspectives.

The work of BPLE is grounded in the NCSA Indigenous model of building individual and family resilience. The model centers on an interconnected worldview that privileges the building, maintaining and strengthening of good relationships between all living things. From this perspective, there are three principles that guide BPLE's work:

1. reclaiming an interconnected world view;
2. fostering reconciliation; and
3. encouraging self-determination.

Since 1763, legislation and policy (including those that made the residential school system possible) have caused kinship relationships to fracture.

First, our resources must reflect and help Indigenous people reclaim an *interconnected worldview* and connection to a legal tradition. In part, this includes encouraging *connectedness* to community-based resources. We provide workshops that are culturally congruent, delivered by Indigenous facilitators and offered in the communities where Indigenous people live. We strive to create good, reciprocal partnerships with agencies throughout Alberta, to facilitate the distribution of our resources and workshop content. Our PLE publications reflect Indigenous worldview, employ well-known Indigenous actors and comedians, and engage our intended audience through shared cultural referents.

Second, BPLE's resources work towards the *reconciliation* of relationships damaged by colonization. The primary relationship we seek to reconcile is between Indigenous people and Canadian society and law. Many projects illuminate areas of common ground between Indigenous legal traditions and Canadian laws, and also highlight the strength of Indigenous legal traditions. In addition, we take on projects that address issues that are related to historic trauma, for example, reporting sexual assault and every Indigenous person's right to be safe in Alberta. Our resources provide content that promotes healing and reconciliation by

examining the historic and systemic roots of the issue discussed, to raise awareness on how Indigenous individuals can use the law to protect themselves.

Finally, BPLE creates resources that promote *self-determination* – the ability of Indigenous people to be able to understand and navigate legal systems, recognize the areas of law where they can assert their rights, as well as make good decisions for themselves. For example, BPLE workshops are often with small groups and encourage free-flowing discussions around rights and responsibilities, with the goals to increase both individual understanding and agency. Additionally, printed resources illuminate how families can participate in decision making related to legal issues: for example, resources on Alberta's *Child, Youth and Family Enhancement Act* highlight how to access family group conferencing. BPLE's resources assist Indigenous people to understand their responsibilities regarding Canadian law; we strive to increase awareness in an effort to prevent unintended consequences – such as eviction, arrest, fines or incarceration.

These principles—reclaiming an interconnected world view, promoting reconciliation, and fostering self-determination– are the cornerstone of all programs and services at NCSA. Our connectedness with Indigenous communities throughout Alberta, as well as our partners, and our self determination to do the work we are guided to by the Elders remains the foundation of 48 years of service for and by Indigenous people in Alberta.

Alex Choby is a research officer at BearPaw Legal Education Centre and has a Ph.D. in medical anthropology.

Understanding Diversity in the Current Context of the Law and Legal Profession

By Charles Davison

Canada is a country which represents the very meaning of "diversity". From beginnings which involved mainly three generalized groups (aboriginals, French and English) we have evolved to become one of the most diverse societies on the planet. Now, in virtually every community in the country, from the middle of downtown Toronto and Montreal, to the smallest settlements in the far north, one may encounter persons whose roots lie in Africa, Asia, and everywhere else on Earth.

In an overall sense, then, "diversity" is a two-way street.

While most Canadians would agree that our diversity is a positive characteristic of our country and society, some sectors do not completely reflect the many and varied backgrounds of our populace. In some areas, we struggle to become more diverse – in order to better represent and reflect the modern-day makeup of the country – and to take account of the many cultures and backgrounds of individual members of our societies. The court system is one of these; in recent years, we have become more aware of the need for greater diversity if we are to reflect Canadian society as it is today. However, we continue to fall short in at least some areas and struggle to grapple with diversity issues in others.

Perhaps the most obvious way in which the court system is working to reflect more diversity is in its "appearance": literally, the faces of the men and women who work within it. For decades, the legal profession was almost exclusively the domain of white men. In every courtroom in the country, the lawyers and judges (who were appointed from the ranks of the lawyers) were all white men. Even the court staff, and (due to eligibility rules) jurors, were almost all white men.

In the late 1960's, however, things began to change. First women, and then, with time, more non-white students began to go to law schools across the country. Now, as we approach the end of the second decade of the 21st century, lawyers and judges are as likely to be of one gender as the other. Both groups also include members of the gay community (and persons who do not necessarily identify as one gender or the other) as well.

Similarly, in terms of racial, ethnic and religious backgrounds, the legal and judicial professions now include members from almost every group which comprise our communities at large. That said, however, the proportions of lawyers from non-white European backgrounds continue to be somewhat lower than most of those groups in society. When it comes to judges, the representations are even lower.

Whether the decision maker is an individual judge, or member of a jury, each person's unique and individual personal histories provide insights and influences, which usually mean the decisions made are arrived at with a wider perspective in mind, and with greater relevence to larger numbers of citizens.

One of the challenges we face in seeking to ensure the ranks of Canadian judges represent the makeup of society at large is in weighing the competing concerns of obvious diversity, and legal talent and expertise. Of course we want the very best candidates to assume positions as judges, and do not want to sacrifice that priority in favour of appointing a less-qualified person simply to achieve the political goal of increased visible diversity. The answer likely lies in the passage of time: as more members of minority communities attend law school and join the legal profession, more will gain the experience and expertise we seek in our judges, meaning more and more members of those communities will meet the demanding requirements for appointment to the bench. With time, our courts will come to reflect the diversity of Canadian society even more than is presently the case.

When it comes to juries, diversity is an on-going issue and challenge. The laws about who can be a juror have changed so that jury service is no longer the exclusive preserve of white men it once was. However, I am writing this article at a time when the composition of the rural Saskatchewan jury in the Gerald Stanley trial for the murder Colin Bushie is still a subject of controversy, and shortly after the government introduced legislation to change the way we pick juries in Canada. The public outcry is mainly centered around the apparent *lack* of diversity on that jury, and the efforts by the defence to ensure no aboriginal persons were chosen to sit as jurors.

Because of the rules and methods by which juries are chosen, there are no assurances that the pool of persons summoned to court will necessarily represent the community at large. While in most large urban centres that pool will usually include at least some persons who are not apparently Caucasian, there is no way to ensure that particular minority communities will necessarily be represented. In other words, even where there is a sizeable minority racial or religious group in a particular centre, there are no assurances that their numbers will be

represented in the jury pool fairly, or at all. Given that in most places in Canada the majority population remains overwhelmingly "white", most persons who attend for jury selection usually appear to be from that group. More often than not, most, if not all, of the 12 persons chosen to sit as a jury will also be "white". The Supreme Court of Canada has held that no one is entitled to a jury pool – or to a jury – composed only of members of his or her own ethnic or racial or religious group. Furthermore, the pool is not required to be numerically representative of the different groups which make up a particular community. All we are assured of is that the process for summoning persons for jury duty, and the selection process itself, are fair. This means, in practice, that most minorities who end up before a jury will not see many faces in the jury panel similar to their own; sometimes it seems the best that can be hoped is that one or two of the jurors will be of a heritage which seems to be "other than white".

As is the case when considering who is appointed to be a judge, and how best to reflect diversity in that context, so too does the question of how we select jurors come with its own complex challenges. An accused person, and society itself, has various interests and concerns about who will be a juror. Sometimes it is not possible to accommodate racial or ethnic or religious diversity along with those other interests and concerns. As with the selection of judges, the questions become whether we should be seeking diversity at the cost of protecting and achieving those other interests and values, and how best to seek some accommodation between those two concerns and factors.

The discussion has thus far focused upon the rather superficial aspects of diversity [...] [h]owever, the value of diversity, and the reason we seek it now, is deeper, and more meaningful, than that.

The Deeper, More Meaningful Value of Diversity

The discussion has thus far focused upon the rather superficial aspects of diversity – literally, the visible image of the court system, in the faces and appearances of the men and women who are part of it. However, the value of diversity, and the reason we seek it now, is deeper, and more meaningful, than that.

As with the humans who make up the court system discussed above, so too have our legal traditions and rules been based upon the English system. The substance of, and most of the procedures associated with, our criminal laws all have their roots in the laws and court procedures developed over centuries of United Kingdom history. With transfer of Quebec to British control in 1763, British immigrants and colonizers occupied virtually all of what was to become Canada, and they brought with them their laws and legal procedures. For 200 years after 1763, the backgrounds of the people (almost always, men) who populated the legislative and court systems meant those systems were informed by and conducted according to a single world view – that of white, British (or northern European) men. Laws were formulated and decisions were made largely from that single perspective, with little regard for the views and values of other groups in society.

This was felt most acutely by the original inhabitants of Canada – First Nations and Inuit peoples, who had long lived and thrived under their own laws and systems of government and decision-making – who suddenly found themselves subject to, and judged by, foreign rules and procedures imposed by the white, predominantly British-based majority society. In many ways, some more obvious than others, the law and the courts became the active tools of colonization. "Cultural genocide" is a description which has been used, appropriately, to describe the efforts of the Canadian government, using the laws and courts, to assimilate aboriginal persons into mainstream society by criminalizing their traditions, practices and almost everything else essential to their cultures and way of life.

Even after more obvious forms of subjugation (for example, the laws prohibiting traditions and ceremonies) were eliminated, various subtle forms of systemic discrimination continued to be exercised and employed in the criminal courts to the detriment of aboriginal persons appearing before them. For example, in various different ways and contexts, the social standing, including employment and housing, of an accused person may become relevant in criminal court proceedings. An accused who seeks bail is more likely to be released if he is employed and has a fixed address. Similarly, at least in the case of more minor offences, someone who is employed and providing for a family is less likely to be sentenced to imprisonment. However, for various systemic reasons often not under their own control, aboriginal Canadians are more likely than most others to be unemployed and homeless. As a result, when it comes to bail and being sentenced, aboriginal offenders have long been more likely than non-aboriginal offenders to be held in custody.

With time, our court will come to reflect the diversity of Canadian society even more than is presently the case.

These are examples of hidden, systemic discrimination which have not been understood and appreciated until recently. The discrimination is not overt and obvious – persons are not detained specifically *because* they are aboriginal – but when apparently "racially-neutral" factors such as employment and homelessness are considered in such situations, the result is much the same: when a racial or ethnic minority suffers higher-than-average unemployment and homelessness, members of that community are more likely to be denied release where such factors are taken into account.

In the last 20 years or so, our courts – and society at large – have started to become more aware of such issues and situations, and have begun to try to address them in meaningful ways. For example, while having a job and a fixed address remain considerations in deciding on bail, judges will more often take account of the circumstances of aboriginal accused persons and will look at other options and terms of release to address the situations of unemployed or homeless individuals.

The value of having the experiences and input of decision-makers who are not white males of British descent is seen in other settings and situations as well. In various different contexts and circumstances, inter-racial encounters can lead to criminal prosecutions where bias

and discrimination might become issues. For example, in 1994 a Youth Court Judge in Nova Scotia apparently relied upon her own experiences as a black woman in the course of assessing the credibility of witnesses, including the black accused, in proceedings before her. She noted that incidents where police officers "over react" when dealing with "non-white groups" are not unheard of. The case ultimately ended up in the Supreme Court of Canada. That Court confirmed the value of having judges from all racial and ethnic groups in order to bring a variety of world experiences and perspectives to the Bench, but it also urged caution because in any case a judge must make her decision based only upon the evidence offered in court, and the law applicable to the situation. Nonetheless, while a white judge – who, as a member of Canada's majority population – might have been skeptical about the existence of racial bias in that case, this judge viewed the situation through the lens of her own personal history and experiences, and accepted that racism exists in Canada. Other judges, too, have referred to their own experiences as members of visible minorities when faced with suggestions as to, or arguments about, the existence and occurrence of racial or ethnic prejudice and bigotry in Canadian society.

Thus, we now realize that having a variety of backgrounds and personal experiences is useful when it comes to judicial decision-making. In light of the multicultural composition of Canada, we now accept that the perspective and experiences of white males of European descent are not the only, or even the most important, perspectives and histories of Canadians at large. Whether the decision maker is an individual judge, or a member of a jury, each person's unique and individual personal histories provide insights and influences, which usually mean the decisions made are arrived at with a wider perspective in mind, and with greater relevance to larger numbers of citizens. As with any other individual, a judge or juror who is a member of a visible minority will bring his or her personal experiences with them into the courtroom; those experiences will inform the assessment of evidence and decision-making process. Even members of the "majority" (however we might choose to define that concept) benefit by having colleagues from outside that group, who can inform the rest as to theirs personal histories in ways which open eyes to the broader picture.

In an overall sense, then, "diversity" is a two-way street. By seeking greater diversity in the appearances – the faces – of those who work within the court system, we hope and expect that system will be seen to be, and accepted as being, more relevant to all members of Canadian society, including members of minority ethnic, cultural and religious groups. At the same time, when members of those minority groups are fully engaged and playing roles in the court system, the value and integrity of the process and the decisions which result are enhanced because the outcomes are influenced by a broader range of world experiences and personal histories than would be the case if all decision-makers were still from the same social, economic, ethnic or religious groups.

Charles Davison is the Senior Criminal Defence Councel with the Somba K'e office of the Legal Services Board in Yellowknife, NWT.

CRIMINAL LAW

Notorious Toronto Judge Makes his Disdain for Disgraced Officer Known: How the Outspoken Justice Clark Drives Home an Important Message

By Melody Izadi

Disgraced (and now nearly fired) Ontario Police officer, Craig Ruthowsky, has been recently found guilty by a Toronto jury of bribery (for accepting protection money from drug dealers), attempting to obstruct justice, breach of trust, and drug trafficking. Ruthowsky also has similar charges pending in Hamilton for which he has yet to stand trial.

Ruthowsky was caught via wiretap disclosing police tactics to drug dealers amidst a police project investigation, and his bank account mysteriously became more flush during a crucial period of time (because of a pool installation business where he had bad book keeping habits and accepted only cash, he says). In essence, the jury found Ruthowsky guilty of accepting cash payments from drug dealers, in exchange for allowing the drug dealers to roam free and avoid arrest and continue trafficking various narcotics on our city streets.

"It's a scandalous amount of money that this man used his badge to generate. He used his badge as an ATM, a cash machine," His Honour hissed.

The judge in Ruthowsky's case, Justice Robert Clark, has not been a stranger to public scrutiny as an integral member of our justice system himself. In 2017, His Honour granted a mistrial in a case that he was presiding over because during the defence's closing address to the jury, many present in the courtroom heard His Honour mutter the F-word under his breath. In 2010 and 2015, His Honour was accused of displaying obvious signs of bias by shaking his head or making facial expressions during trial or submissions. Needless to say, His Honour has a reputation for being an outspoken member of the Superior Court Bench.

However, Ruthowsky's case seemed to be the perfect fit for Justice Clark's temperament. It resulted in a perfect storm of condemnation for the former officer who not only embarrassed himself and his fellow officers, but made a mockery of his duty to protect the public. Justice Clark was having none of it.

The defence asked His Honour to consider sentencing Ruthowsky to 3-4 years in the penitentiary. The Crown was asking for 10. In a surprising move, Justice Clark made it

apparent that he would be giving Ruthowsky even more time behind bars than the Crown wanted, calling the positions of both counsel too light for the "repugnant" crimes that Ruthowsky was convicted of. "It doesn't look good for you in terms of what you perhaps expected the outcome would be," he bluntly stated.

In an effort to reduce his sentence as much as possible, Ruthowsky said to His Honour: "the only thing I want you to know is that this conviction, the jury decision was shocking, devastating. It's destroyed my life. It's destroyed the life of my kids."

"Well sir, you're the author of that misfortune. You destroyed your own life by taking bribes," His Honour quipped back.

In a surprising move, Justice Clark made it apparent that he would be giving Ruthowsky even more time behind bars than the Crown wanted, calling the positions of both counsel too light for the "repugnant" crimes that Ruthowsky was convicted of.

Justice Clarke ultimately sentenced Ruthowsky to 13 years behind bars, and ordered him to pay a $250,000 fine. If he does not pay that fine within a year, Justice Clark ruled that 3 more years will be added on to his sentence. "It's a scandalous amount of money that this man used his badge to generate. He used his badge as an ATM, a cash machine," His Honour hissed.

In his judgment, Justice Clark called Ruthowsky "a man of profoundly flawed character." He openly read told Ruthowsky that his criminality was "motivated by sheer, unbridled greed," called him "arrogant." He said that Ruthowsky presented as someone who felt "a supreme entitlement to do what he was doing," and who "has absolutely no insight into the profoundly wrongful nature of his actions." Justice Clark was said to have been glaring at Ruthowsky across the courtroom while reading his judgment.

To say that Ruthowsky endured a judicial tongue lashing is putting it mildly. But the importance and utter disdain that His Honour vocalized, as an important face of the justice system himself, is crucial in this time of political tension arising globally. The Rule of Law is a fundamental doctrine of democracy and a properly functioning justice system. However its value, worth, and durability have been brought under scrutiny amongst the political soap opera on display south of the border. His Honour's clear and morally anchored comments served as a promising and comforting indication that at least in our country, no one is above the law.

Melody is a criminal defence lawyer with the firm Caramanna Friedberg LLP, located in Toronto, Ontario.

EMPLOYMENT LAW

Cannabis and Employment

By Peter Bowal

Introduction

While medical scientists are busy deciding the human health impacts of regular recreational cannabis use, and governments are still working out how cannabis will be cultivated, sold and taxed, and law enforcement officials consider how cannabis use will affect driving and how road safety will be maintained, it now falls to every employer in Canada to reckon with how the decriminalization of recreational cannabis will impact the workplace.

A recent Conference Board of Canada report revealed that more than half (52%) of employers are concerned about this when the rules change on October 17, 2018.

Impact is Impossible to Predict

The reigning wisdom seems to be that no one can accurately know at this point how cannabis will change the workplace. The law will change and with it expectations and behaviours, and perhaps risks. But cannabis is not the first problematic legal substance to threaten the worksite. Tobacco smoking, drugs and alcohol have all called for good management and cannabis will be added to that list.

Testing of any kind for cannabis in one's body constitutes an intrusion into an employee's privacy. It will only be legally premitted where a clear case has been established upon grounds of critical safety sensitivity of the work.

Concerns

Unregulated cannabis consumption at work will give rise to, or magnify, several concerns. Principal among these is health and safety at work, for the cannabis user and all others located on the worksite. There may be an increase of mental and physical impairment, of time lost due to impairment and consumption on the job, and the need for more frequent testing of employees. If cannabis is addictive in any way, more treatment and reasonable accommodation might be in order. The interests of non-consuming co-workers must also be taken into account.

Employer Prerogative

Except perhaps in the case of medical cannabis, where restrictions may still apply, no one has a constitutional right to consume cannabis on company property and on company time. It may be soon a legal substance, but that does not render it a legal right for the employee at work or a legal obligation for the employer.

The legal instrument of the employer's regulation is the Employment Policy of Cannabis.

Employers have the right – indeed the duty – to regulate the use of cannabis and cannabis-affected employees in their workplaces. This is no different than what they already do with respect to alcohol, weapons or tobacco. While those are all *things*, cannabis can also be regulated at work much like *behaviours* are regulated. Employers already regulate many behaviours of employees. These include acceptable use of language, social media and employer property, and zero tolerance of harassment and violence.

Some observers have noted that the only real difference – and even it is not that significant – between alcohol and cannabis is the detection and measurement of impairment. Employers must be able to intervene in occasions of impairment and must discern when it exists and how it manifests from each stimulant.

Despite decades of illicit cannabis use and a shorter but still significant period of medical cannabis use, not every effect is well understood. It would be prudent, therefore, for employers – who enjoy a wide prerogative to prescribe rules for the workplace – to chart a conservative course.

Cannabis Policy

Except perphaps in the case of medical cannabis, where restrictions may still apply, no one has a constitutional right to consume cannabis on company property and on company time.

The legal instrument of the employer's regulation is the Employment Policy on Cannabis. One should be carefully drafted and placed before existing employees for their acceptance going forward. Future employees should agree to submit to the policy from the first day. Communication and buy-in of the Policy by all employees and managers is essential. It is a good idea to renew this mutual commitment across the board to this Policy, along with other policies, each year.

The written Policy should contain all the workplace rules on cannabis. For example, in safety-sensitive operations, a 'no consumption' rule could be imposed, backed up with random testing. So as not to cross-contaminate abstainers, if consumption on the property is permitted, the employer might require that all consumption take place in certain designated spaces and times.

The legal instrument of the employer's regulation is the Employment Policy on Cannabis. A threshold question is whether the employer would allow cannabis use in the workplace at all. Or at some functions, but not at while engaged in regular work? Again, one draws the analogy to alcohol. One would not abide workers drinking high balls while working, but moderate consumption during a lunch, late afternoon meeting or social event might still be reasonable.

The medical use of cannabis must be treated separately because this engages a human right and the employer's duty to accommodate. Even then, the employer has considerable discretion and control over how the medical cannabis is administered.

The Policy should emphasize that employee productivity or behaviour should not be impaired at any time on the job by cannabis. The employee should be warned, and must accept, that any violation of the Cannabis Policy is subject to disciplinary action up to, and including, summary dismissal.

Offsite Cannabis Consumption

The same workplace rules that are used for alcohol can be adapted and applied to cannabis. Offsite consumption may have lingering onsite effects and this possibility should be addressed in the Policy. Employers might wish to confer with medical experts and law enforcement officials on how users are affected, if at all, well after cannabis use.

Employers are largely in control over cannabis in the workplace, just as they are in control of other legal but problematic substances and potentially troubling behaviours. However, they must be aware of some employees' rights to medical cannabis and every employee's rights to a measure of privacy in the workplace.

Testing of any kind for cannabis in one's body constitutes an intrusion into an employee's privacy. It will only be legally permitted where a clear case has been established upon grounds of critical safety sensitivity of the work.

Peter Bowal is a Professor of Law at the Haskayne School of Business, University of Calgary in Calgary, Alberta.

FAMILY LAW

Enforcement of Family Law Orders When Parents Live in Different Places: Part 2

By Sarah Dargatz

Generally, Alberta court orders are only enforceable in Alberta. And, generally, Alberta judges can only grant family law orders about people who reside in Alberta. However, families are mobile and many relocate from province to province or even from country to country. Therefore, Alberta has entered into agreements with the other Canadian provinces and territories, and with many other countries, to recognize, enforce, and change each other's family law orders. Agreements or orders that have effect across political boundaries are usually referred to as "interjurisdictional".

In Part 1, the *Interjurisdictional Support Orders Act* (ISOA) will be discussed. In Part 2, we will discuss the *Extra-Provincial Enforcement of Custody Orders Act (*EPECOA) and the Hague Convention.

Extra-Provincial Enforcement of Custody Orders Act (EPECOA)

EPECOA states that the court of a province, state, territory, or country generally has the authority (or "jurisdiction") to make an order about the custody of a child if that child has real and substantial connection to that place. A "real and substantial connection" usually means that the child lives or has lived in that place but other factors may be relevant.

If a court outside of Alberta granted a custody order regarding a child that did have a real and substantial connection to that place, EPECOA states that the Alberta court can enforce that extra-provincial custody order if Alberta has the jurisdiction to grant orders regarding that child. An Alberta judge can make any order to give effect to the extra-provincial custody order as if the order had been made in Alberta. An Alberta judge who now has jurisdiction over a child can also change the extra-provincial custody order just as it would vary an Alberta order.

If an Alberta judge believes that the extra-provincial court did not have a real and substantial connection to the child when the order was granted, they may decline to enforce or vary the extra-provincial order. In this case, the Alberta court would proceed as if there was no custody order for the child. A person applying for custody would have to bring an application under the relevant Alberta legislation such as the *Family Law Act*.

In some cases, more than one place *could* take jurisdiction over a child, for example, if a child had recently relocated with one parent. This could result in different courts hearing competing custody applications. The judge must make a decision about which place *should* take jurisdiction and which court will grant an order or which order will be enforced. This can involve complicated legal arguments and advice from a lawyer should be sought in these cases.

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention)

Several countries have agreed to follow the Hague Convention which is an international treaty regarding the return of a child who is internationally abducted. The Hague Convention does not set out how custody decisions should be made. It is intended to help maintain the status quo until the custody of the child can be properly determined by the court of the place where the child usually lived. For example, if a child usually lives in Alberta and is abducted to the United States, the Hague Convention provides that the child should be returned to Alberta so that an Alberta court can make a decision about who should have custody of the child. The Alberta judge may ultimately decide under the *Family Law Act* that the child should live with the parent in the United States. if that is what is in the child's best interests. The Hague Convention is intended to ensure this decision is made in the appropriate court. Currently, 98 countries have signed onto the Hague Convention.

A child is "wrongfully" removed or retained from their home country if they are removed in breach of a person's rights under the law of the place where their child usually lived. If two (or more) people have joint decision-making powers for a child and that child is removed from their home country without the consent of one of the parties, this is usually considered to be a wrongful removal and the child would be returned.

A court can decline to order that a child be returned to their home country under the Hague Convention in a few circumstances:

- where the person asking for the return of the child wasn't actually exercising their custody rights at the time the child was removed or they had consented to or hasn't protested to the removal of the child;
- where more than a year has passed since the child was removed;
- where the child objects to being returned and is old enough and mature enough that the court should consider their wishes; or
- where returning the child would put that child in grave risk of physical or psychological harm, place them in an intolerable situation, or violate their basic human rights.

Parents who wish to relocate with their child should first seek the consent of the other parent or get a court order allowing the relocation. Where safety is an issue, other steps can be taken to mitigate risk while a custody application is before the court.

Parents who are concerned that the other parent will abduct their child can find some comfort when the other parent has connections to, or proposes travel to, a country that is a signatory to the Hague Convention. If that parent does not return the child, there is an established process to have the child returned. The process may take time and money to implement but it exists. Parents may wish to research a country's history of actually complying the Hague Convention. In cases where parents have connections to, or propose travel to, a country that is not a signatory to the Hague Convention, likelihood that an abducted child will be returned is much lower.

Sarah Dargatz has been practicing family law since 2009.
She is currently a partner at Latitude Family Law LLP.

FAMOUS CASES

Omar Khadr.2

By Peter Bowal

This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

We conclude that Mr. Khadr has established that Canada violated his rights under s 7 of the Charter.

Canada v Khadr, [2010] 1 SCR 44, para 25-26

The *Khadr* cases are exceptions to the customary international law principles that the *Charter* does not have extra-territorial application.

Introduction

The last *Famous Cases* column described the first Supreme Court of Canada decision involving Omar Khadr. In that 2008 case, the Court decided the US operations in Guantanamo Bay violated Canada's international human rights obligations. Khadr could assert rights under the *Charter of Rights and Freedoms* from a foreign country.

While Khadr was born in Canada, he had remarkably minimal connection to the country. His family appeared to have rejected the Canadian way of life and took him to Afghanistan to fight for the Taliban. There the 15 year old child allegedly killed one American soldier and blinded another. His life was saved and he was detained at Guantanamo Bay by the United States in July 2002. The next years, including in 2004 when they knew he had been sleep deprived, Canadian officials interviewed Khadr in custody for intelligence gathering and not criminal investigation. The Court characterized this as "active participation" by Canada in human rights violations.

As was the norm in such situations, the Canadians shared the information with the Americans. A few years later, facing US charges for his actions, Khadr requested the interview records.

Khadr was not in Canadian custody or defending against Canadian charges, and he had been personally present at these interviews. His 2003 and 2004 disclosures to Canadian officials were unlikely to provide any unique and miraculous defence to the US charges, although they may have assisted in the prosecution. None of this gave the Court pause. Distinguishing one of its decisions from a year earlier and condemning American actions, the Court summarily determined that Khadr was entitled to *Charter* protection and his right to liberty was denied because he had not received videos and transcripts of his interrogations by Canadian officials. The Court said the statements taken by the Canadian officials contributed to Khadr's detention. In 2008, the Court ordered disclosure of interview transcripts, and disclosure was made. Successive federal governments sought "[assurances] of good treatment of Mr. Khadr".

Another *Charter* Breach?

Khadr also demanded that the Canadian government seek his repatriation. When the government refused to do so, Khadr returned to court claiming this decision also violated his right to liberty under the *Charter*, s 7.

The Supreme Court of Canada, in an uncharacteristically short and quick decision (similar to *Khadr 2008*) covering a large number of discrete issues, found that the questioning of Khadr years earlier and sharing of statements with the US continued to violate his *Charter* right to liberty and security of the person. Canadian actions did not accord with principles of fundamental justice because Khadr was young, did not have access to a lawyer, had been sleep deprived and Canada shared his statements with the United States.

Both decisions concluded that the Government of Canada had violated section 7 of the *Charter* by virtue of the 2003 and 2004 interviews.

The legal remedy sought by Khadr was a court order to the Canadian government to request his repatriation. The Supreme Court of Canada declared the ongoing *Charter* breach but did not make this order. The Court left it up to the federal government to respond. The government did request Khadr's repatriation. Khadr returned to Canada in 2012.

Analysis

The Supreme Court of Canada reasoning in its 2010 decision is light. It does not appear to add much to its 2008 decision. We cannot know, for example, if there was one right violated (liberty) or more than one (security of the person) by Canada. The 2010 decision only seems to say that the violation was continuing as long as Khadr remained in American custody at Guantanamo Bay. This continuity declaration was the only remedy that derived from *Khadr 2010*.

Indeed, it is arguable that the Government of Canada *won* the 2010 decision because the ordered repatriation request was struck down. The Court admitted Khadr's "claim is based upon the same underlying series of events at Guantanamo Bay (the interviews and evidence-sharing of 2003 and 2004) that we considered in *Khadr 2008*". There was really nothing new. Both 2008 and 2010 cases were decided under the same facts. Both decisions concluded that the Government of Canada had violated section 7 of the *Charter* by virtue of the 2003 and 2004 interviews. Nevertheless, the Court framed it as an exclusive win for Khadr and awarded him the court costs of victory.

The *Khadr* cases are exceptions to the customary international law principle that the *Charter* does not have extra-territorial application. Canadians are bound by the laws of the countries to which they travel. If they commit crimes in other countries, they cannot demand that Canadian laws and rights protect them.

The Canadian officials' interviews in February and September 2003, and again in March 2004 were the springboard to what have been characterized by the Court as serious *Charter* breaches. At the 2004 interview, Khadr refused to answer questions and the Canadian officials withdrew.

Canadian actions did not accord with principles of fundamental justice because Khadr was young, did not have access to a lawyer, had been sleep deprived and Canada shared his statements with the United States.

It is important to remember that Khadr was not in custody in Canada, had admitted to killing an American, was early designated an "enemy combatant", was charged by the United States with war crimes and held for trial before a military commission of a country he chose to engage in combat. Despite the Supreme Court's casting this as "active participation" by Canada, the woe visited upon Khadr was overwhelmingly due to his own actions and the actions of the United States.

All of this was done far away from Canada, outside of Canadian power and jeopardy, beyond Canadian law and under international norms applicable to unconventional warfare conducted by non-state enemy combatants. Yet, the Court said Canada actively participated in the illegal American regime. If Canada had ignored Khadr, as it does tens of thousands of Canadians overseas at any time, it would have copped less legal liability.

Conclusion

The Supreme Court said "the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*" (para 39). The Court made no further order in 2010 and, after declaring the breach, left the matter in the hands of the government:

> *The prudent course at this point … is for this Court … to grant [Khadr] a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the* Charter. *(para 47)*

After eight years in US custody, Khadr pleaded guilty to murder in 2010 under a plea agreement, which he later repudiated. He was repatriated to Canada in 2012 and released in May 2015.

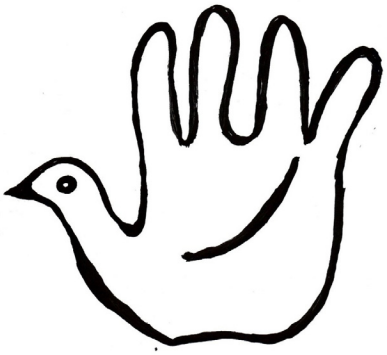
Khadr 2010 merely confirmed *Khadr 2008*'s declaration of the *Charter* breach by Canada. In tandem with another Supreme Court of Canada decision coincidentally just seven months later, the door to a claim for monetary compensation by Khadr was left open. In 2013, Khadr sued the Government of Canada for $20 million.

In July 2017, a new Canadian government agreed to grant him a formal apology and $10.5 million compensation for violating his *Charter* rights, although precisely what right(s) were violated was not clarified. In defence of this controversial payment at the time, the Prime Minister inexplicably confirmed the government settled as it might otherwise have been liable for up to $40 million. To date, no Canadian court has ordered compensation for *Charter* violations at anything close to $10.5 million. Overall, one expects that the entire Khadr matter – unleashed by a Canadian kid throwing grenades for the Taliban at our allies in a faraway land – has cost Canadian and American taxpayers several factors of the settlement amount.

Meanwhile, the families of Khadr's two American victims obtained a US$134 million default judgment against Khadr in 2015. It remains unpaid in full.

Peter Bowal is a Professor of Law at the Haskayne School of Business, University of Calgary in Calgary, Alberta.

HUMAN RIGHTS LAW



Ameliorative Programs Gaining Recognition in Human Rights Legislation

By Linda McKay-Panos

The *Canadian Charter of Rights and Freedoms (Charter)* provides protection from discrimination in s 15(1). Section 15(2) allows governments to establish programs to ameliorate historical disadvantage of particular minority groups. These programs are sometimes referred to as "affirmative action programs".

While s 15(2) has been in force since 1985, it has only recently achieved a fairly prominent place in case law. Originally, s 15(2) was seen as a descriptive section, meant to support the interpretation of s 15(1). See for example: *Lovelace v Ontario* (1997), 33 OR (3d) 735 (CA), affirmed 2000 SCC 37.

The role of s 15(2) gained prominence in *R v Kapp*, 2008 SCC 41 (*Kapp*). A group of non-indigenous fishers challenged a program designed by the federal government, which had granted exclusive fishing licenses for the Fraser River to three First Nations groups in the region. Because commercial fishers were excluded from the program, they argued that their rights under *Charter* s 15(1) had been violated—they were discriminated against because they were not a part of the First Nations groups benefiting from the program. The Supreme Court of Canada (SCC) held that if the government could prove that the program targeted a disadvantaged group, and that it was designed to improve the conditions of the group, it would not violate anyone's equality rights under s 15(1). This legal test was further developed in the case of Alberta (*Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 [*Cunningham*]. The SCC applied the *Kapp* test for considering whether a government can rely on s 15(2) to "defend" its ameliorative program (at paras 43-44).

Like the *Charter*, which allows governments to provide that a rights violation is reasonable and demonstrably justified in a free and democratic society (*Charter s.1*), human rights law have always had some defences available to a claim of discrimination.

In *Cunningham*, the SCC held that the Alberta *Métis Settlement Act,* RSA 2000, c M-14, was an ameliorative program protected by *Charter* s 15(2), because the

exclusion of status Indians from formal membership in Métis settlements helped to respect the Métis' right to culture and the role of the Métis in defining themselves as a people. The SCC stated that the ameliorative program: "corresponds to the historic and social distinction between the Métis and Indians, furthers realization of the object of enhancing Métis identity, culture and governance, and respects the role of the Métis in defining themselves as a people" (para 89). The SCC held that it was open to the government to target ameliorative programs at some disadvantaged groups, while excluding others if the program "serves and advances" the ameliorative program in question (*Cunningham* at para 45). This aspect of the decision has been criticized for failing to recognize the equality principle that once the government decides to implement a program that confers a benefit, it must do so without discrimination (*Eldridge v British Columbia (Attorney* General), [1997] 3 SCR 624). See: Jennifer Koshan, "Age Discrimination and Ameliorative Protections to be Broadened under *Alberta Human Rights Act*" (November 8, 2017) online [Koshan].

The SCC held that it was open to the government to target ameliorative programs at some disadvantaged groups, while excluding others if the program "serves and advances" the ameliorative program in question (*Cunningham* at para 45).

A number of human rights laws across Canada have added provisions that appear to have a similar goal of supporting ameliorative programs. Like the *Charter,* which allows governments to prove that a rights violation is reasonable and demonstrably justified in a free and democratic society (*Charter* s 1), human rights laws have always had some defences available to a claim of discrimination. For employment, there is the *bona fide* occupational requirement (e.g., it is not discrimination to advertise for a male to attend to the toileting needs of a male patient in a nursing home), and for all areas, there is the defence of reasonable and justifiable discrimination. More recently, human rights laws have officially recognized that ameliorative programs are not a form of "reverse discrimination". "Reverse discrimination", may be defined as "discrimination against members of a dominant or majority group in favour of a historically disadvantaged group."

The way that ameliorative programs in human rights laws are instituted varies across Canada.

1. Focus Broadly on Purpose or Object (applicable to various areas):

In some jurisdictions, the human rights code focuses on the *purposes* (or objects) of the ameliorative program rather than its effects (this aligns with the *Charter* s 15(2) interpretation in the caselaw). For example, the *Nova Scotia Human Rights Act* (RSNS 1989 c 214) special program provision states:

Exceptions

6 Subsection (1) of Section 5 does not apply……

(i)to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

Other jurisdictions with similar legislation include: the *Canadian Human Rights Act*, RSC 1985, c H-6, section 16; Ontario *Human Rights Code*, RSO 1990, c H.19, section 14.

2. Focus on Effect (applicable generally to various areas):

In some jurisdictions, the human rights code focuses on the *effects* of the ameliorative program; this differentiates the analysis from that in *Charter* 15(2) as the respondent (individual or government) will have to demonstrate that the program has achieved or is reasonably likely to achieve the ameliorative object. Alberta is the latest jurisdiction to add a provision that deals with ameliorative programs and activities and which requires that the respondent demonstrate that the program has achieved or is reasonably likely to achieve its objective.

The *Saskatchewan Human Rights Code*, SS 1979 c S-24.1, section 48, and Manitoba's *The Human Rights Code*, CCSM c H175, section 11, also require that the program or activity achieves or is reasonably likely to achieve its ameliorative objective.

Section 15(2) allows the government to establish programs to ameliorate historical disadvantaged of particular minority groups. These programs are sometimes referred to as "affirmative action programs."

3. Focus on Effect (applicable to only some specific areas).

Some jurisdictions have more specific defences that focus on the reasonable likelihood of achieving the ameliorative objective, yet the defence is only available in the employment context (see, for example *British Columbia's Human Rights Code*, RSBC 1996, c 210, section 42).

4. Requirement that approval be sought by the human rights commission for the ameliorative program.

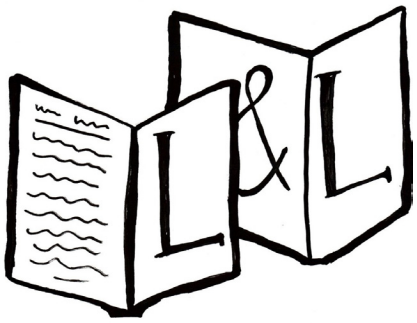
In British Columbia, for ameliorative programs outside of the employment context, the approval of the human rights commission must be sought (section 42, BC *Human Rights Code*). In New Brunswick, the *Human Rights Act*, RSNB 2011, s 14, provides an application for

the commission's approval of a program "designed to promote the welfare of any person or class of persons."

One fear is that the requirement for proving that the ameliorative program is "reasonably likely to achieve its objective" (rather than focusing on the genuine ameliorative *purpose* of the program) is that some might argue that it permits those who have claims of discrimination based on conflicting grounds, or those who have claims of "reverse discrimination" to defeat genuine ameliorative programs (Koshan). This might occur when the program has a genuine ameliorative purpose but it is difficult to prove that it is reasonably likely to achieve its purpose. This is most concerning.

Linda McKay-Panos, BEd. JD, LLM is the Executive Director of the Alberta Civil Liberties Research Centre in Calgary, Alberta.

LAW AND LITERATURE



Sisyphus Ascending: The Remarkable Career of Raja Shehadeh

By Rob Normey

I have just read a wonderful narrative by the Palestinian human rights lawyer, activist, and now writer of the first rank, Raja Shehadeh. The author lives in Ramallah, in the West Bank, which has been under occupation by Israeli forces for 51 years and counting. The book, A Rift in Time: Travels With My Ottoman Uncle, is a moving excursion through lands that should by now belong to the Palestinian people but are instead under a harsh military occupation. Shehadeh is too gifted a writer to have offered up his tale in a strident and inflexible manner. Rather, he digs deep within himself to provide a double narrative, as he retraces the steps of his rather alluring yet enigmatic uncle, Najib Nassar. This is much harder than the casual reader might imagine, given the ridiculous, persistent constraints to which stateless Palestinians are subjected. Shehadeh intertwines his historical tale with observations from today's perspective on the drastically altered landscape he uncertainly advances across. While the mood is often melancholy, we are treated to a vivid and admiring descriptions of what remains of the open landscape that so enchants our author.

In reading the account of Najib Nassar, a journalist, novelist ("bad novelist" according to his great-nephew but revelatory nonetheless), and romantic dreamer of a future Palestine filled with equal, rights-bearing citizens, I was reminded of the tale of Sisyphus in contemplating the exertions of the author. You may remember that in Greek myth he was the wily and unflappable King of Corinth who got in Very Serious Trouble with the Gods over his failure to follow their rules. This led to a drastic punishment indeed. He was left to toil ceaselessly in rolling a boulder up a hill in Tartarus. Once Sisyphus had struggled to the summit, the God of Hades decreed that it would immediately begin a trajectory back down the hill. Shehadeh' s work as lawyer and founder of the pioneering, nonpartisan human rights organization Al-Haq, an affiliate of the International Commission of Jurists, appears to have been every bit as frustrating as the labour's of poor Sisyphus. Shehadeh's efforts to challenge the illegal expropriations and takings of Palestinian lands, the demolitions of Palestinian homes and other abuses were met with failure time and again. The Israeli military courts were not interested in this indefatigable lawyer's conceptions of justice.

> **Shehadeh is a Christian and I was taken by his description of his forlorn feelings upon coming upon Jericho-Tiberias Road, one that in the past he had often traversed.**

Having penned several legal texts on law in the Palestinian Territories and on human rights, Shehadeh has clearly recognized that his talents as a writer might thereafter be better put to testifying to the reality of the Palestinian nation and the Palestinian people in the twentieth and twenty first century. The world had famously heard from a former Israeli Prime Minister, Golda Meir, that there "are no Palestinian people." Shehadeh has employed his gifts as historian, memoirist and travel writer to refute that statement. He has done this with poise. Most impressively, he continually seeks out equitable approaches to the problems he describes.

Indeed, the book starts with the startling news that our narrator is himself under arrest. It is none other than the Palestinian Authority (PA) that wants to haul him in for questioning.

A Rift in Time recounts his efforts to come to terms with what had been family lore – the stories of his great-uncle Najib's daring escape from the Ottoman authorities whose empire encompassed the district of Palestine until the Empire's breakup in the aftermath of World War I. For some years, Najib lived a life on the run, disguised and living in hiding in the homes of friends or acquaintances. Shehadeh is able to draw on a novel penned by his great-uncle, Mufleh Ghassani, at the very time that the British Mandate came into being in 1922. Readers are able to join in a voyage of discovery with our deeply knowledgeable guide. We learn much about the multicultural aspects of the Ottoman world in which Najib had earlier operated. Although he is said to be too much the stoic and therefore lacking in the ability to investigate and reflect upon his inner self as he recounts the various episodes of his life in the largely autobiographical novel, Shehadeh teases out any number of fascinating connections to the momentous times. For instance, he searches for an accurate map of the largely vanished Palestinian landscape that Najib travelled through in his flight from authorities. To do so, he must hunt down a 1933 map from the National Library of Scotland in Edinburgh. He communicates the grim reality that his great-uncle, albeit an alleged criminal, had greater freedom of movement than any Palestinian in the Occupied Territories does today, given the many borders and border within borders, including innumerable checkpoints manned by stern, sometimes surly soldiers that Israel has created. A mound of directives and laws has been imposed on the subject population, without regard to Israel's obligations under international law.

Our London-trained lawyer offers a number of forceful insights into his attempts at rebellion against an alien authority through legal channels are thwarted every bit as much as were his great-uncles attempts at offering principled alternatives to autocratic rule through his journalism, nearly a century before. The way Israel has used its military orders to give a veneer of legality and respectability to its actions to fragment the

The book, A Rift in Time: Travels With My Ottoman Uncle, is a moving excursion through lands that should by now belong to the Palestinian people but are instead under a harsh military occupation.

landscape and isolate the long-time inhabitants is captured in graceful prose. Shehadeh took on a number of cases involving challenges to the settlement project, losing again and again but refusing to acquiesce to the new "facts on the ground." In A Rift in Time, he cites a government report that 40 % of the Jewish settlements were established on land proven to be owned by Palestinians and yet nothing would be done to remove them. In his considered view, law and legality did not prove to be decisive weapons in his people's battle against what he, together with many others, describes as colonialism. His faith in the power and righteousness of international law and the foundational concepts of fairness and equality dashed, he describes his shift to engaging in the act of writing as a form of resistance by a "noncombatant."

The book also offers descriptions of the fate of others Shehadeh meets. These include a poignant lament by his driver, Abu Ahmad. The events that occurred after the Palestinian Nakba ("catastrophe" of 1948) have severed close family bonds. He was forced to emigrate to seek work as a driver in Jordan. His brother in Nablus in the West Bank is not allowed to leave his enclosed territory by virtue of Israeli military rule. Abu Ahmad's nephews, he laments, have become strangers to him, against his will. Another brother lives a remote existence in exile, in Venezuela. And so it goes.

In A Rift in Time, he cites a government report that 40% of the Jewish settlements were established on land proven to be owned by Palestinians and yet nothing would be done to remove them. In his considered view, law and legality did not prove to be decisive weapons in his people's battle against what he, together with many others, describes as colonialism.

It is important to note that in my view Shehadeh endeavours to provide a fair and complete account of the situation in the Palestinian Territories. For instance, he is certainly willing to criticize the Palestinian leadership. Indeed, the book starts with the startling news that our narrator is himself under arrest. It is none other than the Palestinian Authority (PA) that wants to haul him in for questioning. Fortunately Shehadeh is not charged with anything but he give us details of the alienation he has experienced in his recent dealings with the strange quasi- government that is the PA. The scene also serves to establish kinship between himself and his great-uncle. We will eventually get to hear of the interesting trial that Najib is put through in Damascus, having been arrested in Nazareth in 1917. The alert reader will be able to make various connections between this trial and the many trials Palestinians continue to face in the West Bank.

Shehadeh is a Christian and I was taken by his description of his forlorn feelings upon coming upon the Jericho- Tiberias Road, one that in the past he had often traversed. Now, all he can do is stare at the different world preserved for Israeli settlers and visitors. "A land that from here appeared truly like a paradise had been usurped and could not even be visited." As a Christian myself, I think of the stories in the New Testament of Jesus and his disciples

travelling the Jericho Road, one that presented grave dangers to many travelers. Jesus tells the parable of the Good Samaritan in relation to that danger zone. One can only ponder in futile despair the fact that there are few Good Samaritans willing to help Shehadeh' s people today.

On a personal note, I thought often of my sole trip through the West Bank in the 1980s, after spending time in Israel. I will never forget my time in Nablus, and the great generosity of Hassan, and the other Palestinians who welcomed me there and offered me their kind hospitality. I have tried to imagine what life has had in store for them in the years since.

It may be that every effort that Raja Shehadeh makes, whether through the military courts or, now, through his memorable accounts of the Palestinian century, will be no more successful than Sisyphus's efforts in rolling his boulder up the hill. Still, I recall that Albert Camus made Sisyphus the ultimate hero of the absurd universe that we now live in. There must be a reason that Camus ends "The Myth of Sisyphus" with the words: "One must imagine Sisyphus happy." Perhaps Camus knew something that the original tale omitted. Perhaps Sisyphus had conceived a way to smuggle a message out to the free world, or perhaps to the Goddess of Liberty, Eleutheria, and, sooner or later, would be relieved of his massive burden. Perhaps, too, Shehadeh's message will penetrate the Iron Wall of indifference and inspire a meaningful and compassionate response from the community of nations.

I note that Shehadeh has a new book out, Where the Line is Drawn: A Tale of Crossings, Friendships, and Fifty Years of Occupation in Israel-Palestine. One of the significant relationships he explores is with Henry, an idealist Jewish Canadian who emigrated to Israel many years ago and who has been a tireless advocate for peace. Speaking of this friendship, Shehadeh states: "In our small way, our friendship exposed the lie peddled by Netanyahu and his followers to Israeli people and the world – that the Arab is the fundamental and eternal enemy of the Jew, that the conflict between Palestinian Arabs and Israeli Jews cannot be resolved diplomatically and that the Israeli people have to live forever by the sword." I look forward to reading this latest installment from our modern Sisyphus.

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

NOT-FOR-PROFIT

'A charity is a charity is a charity' – The Common Law and *Income Tax Act* Charity Regulation

By Peter Broder

As I write this column, a major government report on a Canadian social innovation and social finance strategy is pending. Earlier this year, the federal Budget contemplated exploration of preferential tax treatment for certain types of journalism. In each of these fields, it has been suggested that means be found to give groups access to charitable foundation resources, if not to full charity status.

In the early decades of the last century, Parliament extended charity tax preferences under the *Income Tax Act* (*ITA*), which had earlier been available to a limited number of organizations. In doing so, it used the common law meaning of charity, rather than creating a statutory equivalent. This decision to use the common law methodology to determine what qualifies as a charity, rather than listing types of organizations or named organizations as eligible, has shaped the federal regulatory regime since its inception. Whether Parliament's choice was purposeful or more a consequence of convenience than forethought can be debated, but it has unquestionably complicated the work of both the federal charity regulator – the Canada Revenue Agency (CRA) – and the country's registered charities.

Canadian law to some extent distinguishes between charities that do thier own (charitable organizations) and those that fund the work of other charities (public and private charitable foundations), but does not typically draw a distinction between funding from individual donors and funding from foundations.

The common law tradition generally views any charity as a charity with the same privileges as any other charity and as subject to the same constraints as any other charity (i.e. 'a charity is a charity is a charity'). This view is held regardless of whether its objects mandate it, in the famous formulation set out in *Commissioners for Special Purposes of the Income Tax v. Pemsel* (*Pemsel*), to relieve poverty, advance education, advance religion or undertake other purposes beneficial to the community in a way that the law regards as charitable.

Among other tenets of charity common law is the requirement that a charity pursue exclusively

charitable objects. This is an obligation that has been somewhat eased by case law allowing pursuit of ancillary and incidental endeavours (essentially work that on its face doesn't appear charitable, but is a means to achieving charitable ends) without offending the exclusively charitable requirement.

Yet another principle, also found in *Pemsel*, is that charity is not limited by political jurisdiction. So Canadian charities can carry on or fund work abroad, and foreign charities can fund or do work in Canada. The key common law limitation on this is that endeavours, whether foreign or domestic, cannot be illegal or contrary to public policy, as these characteristics disqualify conduct from being treated as charity.

In Canada, the federal regulatory regime over charities has grappled with this common law legacy in a number of ways. Certain types of entities not fitting within the meaning of charity as defined through case law have been afforded treatment akin to charities under the *ITA*. These entities are called qualified donees. As well many *ITA* charity provisions reflect or are structured as proxies for common law strictures with respect to charity. In their particulars, such *ITA* measures may ease or restrict common law requirements.

This hodgepodge is apt to cause confusion, partly because sometimes regulatory provisions adopted for tax policy reasons are quite out-of-step with the requirements established by the common law. Measures requiring registered charities to be resident in Canada, and mandating tracking of the flow of foreign monies into Canadian charities, for example, are clearly rooted in tax policy not common law. The common law doesn't generally fetter either of these aspects of charity.

Earlier this year, the federal Budget contemplated exploration of preferential tax treatments for certain types of journalism.

If, as is sometimes suggested, the common law is opened up to accommodate social innovation/social finance, the delicate balance that limits private benefit relative to public benefit under charity common law would need to be accounted for. And, if through legislation you provide for certain non-profit journalism as qualifying as charity, it is not clear how you reconcile that with the common law prohibiting partisan involvement and limiting non-partisan political engagement by charities. (Or for that matter, with *ITA* provisions regulating the political activities of registered charities.)

Canadian law to some extent distinguishes between charities that do their own work (charitable organizations) and those that fund the work of other charities (public and private charitable foundations), but does not typically draw a distinction between funding from individual donors and funding from foundations. Doing so for social innovation/social finance and/or journalism groups, would effectively create different classes of charities.

Moreover, moving away from the 'a charity is a charity' principle would introduce even greater complexity into a system that is already widely seen as overly complicated.

One solution to this dilemma might be to treat certain social innovation/social finance and/or certain journalism groups as qualified donees. However, as well as necessitating carving out detailed special rules for such groups in legislation to address how they could depart from general principles that apply to others, doing so would be at odds with recent trends to have qualified donees increasingly subject to the registration and regulation that applies to other registered charities.

As well, essentially, the *ITA* regulatory regime is a closed system that contemplates restriction of the use of tax-supported donations for a limited range of public benefit ends. That said, except for certain measures to prevent tax avoidance, inter-organizational transfers of resources are not closely tracked or constrained, and any effort to do so because certain groups are given different privileges from others would put more stress on already strained regulatory resources.

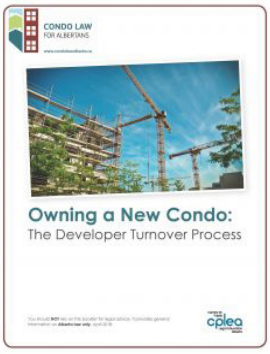
As possible reforms of the federal charity regulatory regime are explored, flawed understanding of the interaction between the common law and tax policy could undermine reform efforts and thwart any simplification of the system. Whether considering who's in and who's out or how legislative or administrative measures could be improved, knowing what considerations are in play – and why – will be essential to bettering the system.

Peter Broder is Policy Analyst and General Counsel at the Muttart Foundation in Edmonton, Alberta. The views expressed do not necessarily reflect those of the foundation.

NEW RESOURCES AT CPLEA

LawNow has created a Department called New Resources at CPLEA, which is now a permanent addition to each issue. Each post will highlight what's new, updated/revised or popular at CPLEA. All resources are free and available for download. We hope that this will raise awareness of the many resources that CPLEA produces to further our commitment to public legal education in Alberta. **For a listing of all CPLEA resources go to: www.cplea.ca/publications**

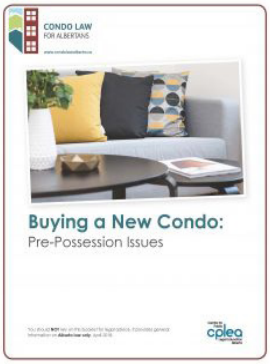
Owning a New Condo: The Developer Turnover Process (NEW)



This booklet will provide an overview of the turnover process and a checklist of documents that the developer must provide to the first elected board.

https://www.cplea.ca/wp-content/uploads/DeveloperTurnover.pdf

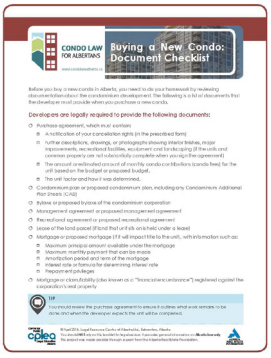
Buying a New Condo: Pre-Possession Issues (NEW)



This booklet applies to the purchase of new and conversion condominium developments only. This booklet will provide you with an overview of
deposits, occupancy fees and other potential issues that may arise (for example, purchase agreement cancellations, changes in construction and move in delays).

https://www.cplea.ca/wp-content/uploads/PrePossessionIssues.pdf

Buying a New Condo: Document Checklist (Updated April 2018)



Before you buy a new condo in Alberta, you need to do your homework by reviewing documentation about the condominium development. This tipsheet is a checklist of documents that the developer must provide when you purchase a new condo.

https://www.cplea.ca/wp-content/uploads/BuyingNewDocumentChecklist.pdf

See: https://www.cplea.ca/publications/condominium-law/ for all CPLEA's condo law publications.