Volume 43-2 Nov/Dec 2018

LawNow

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Legal Weed!

Going To Pot

Millennials

Notwithstanding Clause

We would like to thank the **Alberta Law Foundation** and the **Department of Justice Canada** for providing operational funding, which makes publications like this possible.

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LawNow is published six times per year.

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LEGAL WEED

How Pot Smoking Became Illegal in Canada

Catherine Carstairs

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In 1923, when it became illegal to possess cannabis in Canada, very few Canadians would have heard of the drug, let alone tried it.

So why did legislators target weed?

Cannabis advocates have long blamed women's rights activist Emily Murphy. Her 1922 book on the drug trade in Canada, The Black Candle, claimed that marijuana users "become raving maniacs" and "are liable to kill or indulge in any sort of violence."

But even though Murphy's drug activism played an important role in strengthening Canada's drug laws in the early 1920s, the real reason cannabis was criminalized has much more to do with Canada's attendance at international meetings.

In the early 1920s, the panic over drug use had much to do with the drive to ban Chinese immigrants from entering Canada. Drug crusaders like Murphy blamed Chinese opium sellers for leading Canadian youth to ruin. In a series of articles in Maclean's in 1920, Murphy warned that drug-addled young women would give in to the sexual demands of Chinese men, leading to the birth of "mixed-race" babies.

In Vancouver, her articles helped give rise to an anti-drug campaign that went on for months. As a result, the federal government passed legislation increasing the minimum penalties for the possession of drugs to six months.

At roughly the same time, the government stopped virtually all Chinese immigration to Canada. But this drug panic had little to do with marijuana: It was squarely aimed at Chinese traffickers and users of opium. Even so, in the middle of this

drug panic, Parliament added cannabis, not opium, to the schedule of restricted drugs. The exact reason remains a mystery. There was no debate in the House of Commons about the addition of cannabis. There are few records pertaining to the issue in Library and Archives Canada, and no mention of the decision in the media.

Cannabis banned in 1923

But controlling cannabis had been under international discussion for more than a decade, although it did not become part of an international convention until 1925, when the Geneva Convention limited Indian hemp to "medical and scientific" consumption.

In 1929, the assistant chief of Canada's so-called Narcotic Division, K.C. Hossick, wrote that Canada had to include cannabis on the schedule of restricted drugs because Canada had ratified the *Hague Convention*. This was not true, as it was not until 1925 that cannabis came under international control, and Canada banned cannabis two years earlier. Even so, Hossick's reference to the international treaties suggest the idea for adding the drug came from international discussions.

Much later, in 1974, Alexander B. Morrison, the assistant deputy minister of the health protection branch at Health and Welfare Canada, wrote: "It appears that Col. Sharman (chief of the narcotic division) returned from meetings of the League of Nations convinced that cannabis would soon fall under international control. In anticipation….he moved to have it added to the list of drugs controlled under Canadian law."

This explanation seems far more likely than Murphy's book chapter.

Not a bestseller

While Murphy's articles in Maclean's created panic, the book attracted little attention. By this point, officials at the now called Department of Health had little respect for Murphy and likely weren't taking her views seriously. What's more, the marijuana chapter was a minor inclusion in a long book devoted to the problems of opium and cocaine.

There were no convictions for the possession of marijuana in Canada for 15 years and even then, they were unusual. The drug was rarely mentioned in the media until the mid-1930s, when the anti-marijuana, "reefer madness" campaign in the United States exploded, associating marijuana use with criminality, murder and insanity.

Even then, the drug attracted little attention in Canada.

In the 1930s, the RCMP requested landowners who were growing hemp as a windbreaker to destroy the plant. Almost none of them were aware of the potentially psychoactive properties of the weed.

In his autobiography, Clifford Harvison, a former RCMP commissioner, reported that one of the few protests came from an older woman who grew the plant to feed her canaries, who sang feverishly after their meal. When the RCMP tried to destroy the plants, she shooed them away with a broom. The police wisely retreated.

As late as the mid-1950s, a study of convicted drug criminals in British Columbia found that very few of them had ever tried the drug. It was not until the Baby Boomers came of age in the swinging 1960s that cannabis became a drug of choice.

Middle-class youth were outraged by the long sentences given out for marijuana possession, as were some of their parents. In 1969, amendments to the drug act made it possible for prosecutors to proceed by summary conviction.

This made it far more likely that possession of marijuana would be punished by a fine rather than a jail term and set us on the path towards legalization.

And so after this long and fascinating history, cannabis has become legal in Canada. ◆

The Legalization and Regulation of Cannabis in Canada

Senator Tony Dean

Tony Dean was appointed to the Senate in 2016 to represent Ontario. He was the sponsor of the *Cannabis Act* as it made its way through the Senate.

First, the challenge: Cannabis use is widespread in our society. Canadians, and particularly young Canadians, are using cannabis at some of the highest rates in the world. According to the 2015 Canadian Tobacco, Alcohol and Drugs Survey, the prevalence of past-year cannabis use was 21 per cent among youth aged 15 to 19; just under 30 per cent among young adults aged 20 to 24; and 10 per cent among adults over the age of 25. The evidence is clear that young Canadians are currently consuming cannabis at alarming rates.

There are well known risks associated with cannabis use. This is particularly so for younger Canadians when the drug is consumed frequently and intensively. There is evidence that frequent and heavy use of cannabis can affect brain development in children and adolescents.

Beyond the health risks associated with

cannabis, the criminalization of this drug results in tens of thousands of criminal records each year, which can have long-term consequences for Canadians, including stigmatization, marginalization and restricted employment opportunities.

Criminalization of cannabis has also contributed significantly to high costs and backlogs in the criminal justice system. More than half of all reported drug offences were cannabis related. In 2016, this amounted to nearly 55,000 offences reported to police. The majority of these offences —81 per cent — were possession offences.

Prior to legalization, 100% of non-medical cannabis was provided by an illegal market worth between $6 billion and $7 billion. These drugs were, and remain, untested for potency or contaminants.

> *"While possession of up to 30 grams of cannabis is legal, there are still penalties for possessing significant amounts of cannabis, as well as for trafficking and distributing illegally."*

It was for all of these reasons that Bill C-45, an *Act respecting Cannabis and to amend the Controlled Drug and Substances Act*, was introduced. The Bill was passed by the House of Commons and Senate and became law on October 17, 2018. It is now known as the *Cannabis Act*.

> *"Producers of legal, regulated cannabis must obtain a license from Health Canada and are held to rigorous standards to ensure that all legal cannabis is of the highest quality and safe to consume."*

The *Cannabis Act* creates a legal framework where adults can access legal cannabis through an appropriate retail framework sourced from a well-regulated industry or grown in limited amounts at home. The Act is divided into four main themes: consumption, production, distribution and penalties.

In addition, there is a division of powers between the federal government and the provinces and territories. Provinces and territories are generally responsible for the distribution and sale components of the legalization framework and can create further provincial restrictions as they see fit, including:

- increasing the minimum age in their jurisdiction;
- lowering the possession limit for cannabis;
- creating additional rules for growing cannabis at home, including the possibility of lowering the number of plants allowed per residence; and
- restricting where cannabis can be consumed, such as in public or in vehicles.

First, consumption. Anyone who is 18 years or older is permitted to legally possess 30 grams of legal dried cannabis or its equivalent for different classes of cannabis while in public. They can also legally share up to 30 grams of legal dried cannabis or its equivalent with other adults. Provinces have the ability to raise the minimum age of access, but cannot lower it. All forms of cannabis are legal with the exception of edibles, which will become legal within one year.

There is a strict prohibition on cannabis being sold or given to a young person. The Act creates a new criminal offence for adults who give cannabis to a young person. There is also a new criminal offence for those who use or involve a young person in the commission of a cannabis offence.

However, under the *Cannabis Act*, young people between the ages of 12 and 18 are exempted from criminal prosecution if they are caught with fewer than five grams in their possession. If they are caught with more than five grams, they are dealt with under the provisions of the *Youth Criminal Justice Act*, which emphasizes community-based responses, rehabilitation and reintegration as opposed to criminalization.

> *"The Act creates a new criminal offence for adults who give cannabis to a young person."*

While the five gram allowance is in place at the federal level, the provinces and territories are allowed to prohibit possession of any amount of cannabis by young people and can impose penalties such as fines, seizure of cannabis, or rehabilitative measures instead of harsher sentences. All of them have done this.

This approach provides police with the authority to seize cannabis from young people, while at the same time not rendering them liable to criminal sanctions that could negatively impact their future.

Second, production. Under the legislation, the federal, provincial and territorial governments all share in the responsibility for overseeing the new system. Federal responsibilities include overseeing

> *"The Act is divided into four main themes: consumption, production, distribution and penalties."*

the production and manufacturing components of the cannabis framework and setting industry-wide rules and standards.

Producers of legal, regulated cannabis must obtain a license from Health Canada and are held to rigorous standards to ensure that all legal cannabis is of the highest quality and safe to consume.

Anyone who has not been granted a license from the federal government is not permitted to grow cannabis for the purpose of distributing it. However, in all provinces but two – Manitoba and Quebec – individuals are allowed to grow up to four plants per household for their own consumption.

Third, distribution. It is the responsibility of the provinces and territories to set up a distribution model. To date, all provinces except for Ontario and Nunavut have operating stores. Each distribution model differs according to province. Ontario will issue licenses to private retailers, while Quebec is only allowing government-approved stores to sell cannabis. Alberta has a hybrid system that allows both private retailers and government-issued stores to operate. Regardless of the model, all retailers are only permitted to sell cannabis if they have a license.

In addition, there are strict labelling and advertising rules that prohibit retailers from creating brands that could be misleading about the risks of cannabis or appealing to young people. Provinces and territories are also key partners in the federal government's efforts to raise public awareness about the risks associated with cannabis use. They recognize that illegal cannabis is widely available and frequently used by young Canadians, and that they must do a better job of providing relevant information about risks and disrupting the illegal market. In doing so, the government is taking an approach of harm reduction.

This approach is complemented by the other protections in the *Cannabis Act* which serve to protect young people by:

- restricting youth access to cannabis;
- protecting young people from promotional enticements to use cannabis;
- prohibiting products that are appealing to young people;
- prohibiting the packaging and labelling of cannabis in a way that makes it appealing to youth;

- prohibiting the sale of cannabis through self-service displays or vending machines; and
- creating new offences with significant penalties for adults who either sell or distribute cannabis to young people or who use a young person to commit a cannabis-related offence.

Possession, production, distribution, import, export and sale outside of the legal framework remain illegal and are subject to criminal penalties proportionate to the seriousness of the offence.

> *"... the criminalization of this drug results in tens of thousands of criminal records each year, which can have long-term consequences for Canadians, including stigmatization, marginalization and restricted employment opportunities."*

Fourth, penalties. While possession of up to 30 grams of cannabis is legal, there are still penalties for possessing significant amounts of cannabis, as well as for trafficking and distributing illegally.

Importantly, the penalties in the *Cannabis Act* are significantly different from the current *Controlled Drugs and Substances Act*. First, the offences proposed in the Act are hybrid, as opposed to strictly indictable, without any mandatory minimum penalties, meaning that someone could receive a ticket or could be mandated for rehabilitation. Second, the Act provides a range of penalties, from ticketing for adults who commit minor possession or personal production offences, to a maximum of 14 years of imprisonment for more serious offences. This removes the possession penalty for cannabis while implementing a strictly regulated framework to protect young people from criminalization and allow adults to consume legal, regulated cannabis.◆

Going to Pot: An update on employers and marijuana issues in the workplace

Hugh McPhail

October 17th was the date chosen by the federal government to make a profound change for Canadian society. Possession of cannabis became legal. In this article, we offer some answers to questions that many employers are probably thinking about.

1. Are all cannabis products a concern for employers?

No. Cannabis includes many chemicals. THC is the troubling one because it has an impairing effect and that effect continues even after a period of abstinence. CBD is another chemical in cannabis and there are some products which contain high concentrations of CBD and virtually no THC. There is some evidence to support medical benefits from the use of CBD products. It seems to be accepted by medical authorities that CBD is not impairing. Many physician authorizations have been for the use of CBD products with negligible amounts of THC.

> *"... it is clear that individual border agents could easily choose to refuse entry to the U.S. to anyone who is a user of Cannabis products or who refuses to answer questions about thier cannabis use."*

2. Will legalization spell the end of the "medical marijuana" authorization scheme?

Not yet. The Canadian Medical Association is in favour of bringing it to an end but some physicians want to preserve the authorization scheme. There are no plans to end it just yet.

3. Come October 17th, will I be unable to ask employees about their cannabis use?

It may be an invasion of privacy to compel employees to answer questions about their cannabis use unless there is a reason to know. There is probably a reason to know if they are employed in a safety sensitive position but employees in other positions are probably entitled to refuse to answer.

4. Will legalization mean that I cannot refuse to hire someone because they admit using cannabis products containing significant amounts of THC or if they test positive for THC?

In general, an employer can hire whom they want to unless it will mean breaking a specific law. The most relevant law here is the *Alberta Human Rights Act* which prohibits discrimination on the basis of disability. Addiction to cannabis products would be a disability. Casual use is not. Some individuals might also have a specific physical or mental disability of some kind where their physician recommends and authorizes a cannabis product for treatment purposes. If the individual fits one of these two categories, then the law might prevent you from refusing to hire them. You would have to show that it would be undue hardship for you to take the risk. There is a human rights duty to accommodate any disability to the point of undue hardship.

> *"Employers must still prove a significant problem with drugs in the workplace before implementing random drug testing on a worksite."*

5. But what if they are working in a safety sensitive position?

That may not matter. It is not true in all cases that use of cannabis products is incompatible with working in a safety sensitive position. It depends first on whether the cannabis product contains THC which is the impairing ingredient. Secondly, although there are many experts who will say that regular use is incompatible with working in a safety sensitive position, some casual use may not be. It all depends.

6. The government permits blood testing to prove impaired driving and the legislation sets specific limits on the amount of THC in the blood that proves impairment for the purposes of *Criminal Code* offences. Is there anything similar for employers?

No. Governments have been urged to help with worksite safety instead of only focusing on road safety but nothing has been done yet to legislatively permit testing, require disclosure, or to set *per se* limits that will be of any use to employers.

7. Are there specific concentrations of THC as shown by oral swab testing or urine samples that prove impairment?

No.

8. Will legalization mean that objections to random testing will ease?

No, there is no sign of that yet. Employers must still prove a significant problem with drugs in the workplace before implementing random drug testing on a worksite.

9. Will employers be able to automatically fire workers who repeatedly continue to use cannabis products while working in safety sensitive positions? Will recurrent positive tests justify termination?

It depends. An expert will have to evaluate whether the use is compatible with safety sensitive work or not.

> *"It is not true in all cases that use of cannabis products is incompatible with working in a safety sensitive position."*

10. Who is going to have to pay for all of these expert opinions?

Employers.

11. What if your employee tells you some time after October 17th that they are a casual user of cannabis and you are concerned about them working in a safety sensitive job? Can you hold them off work to evaluate their fitness to work?

Yes, you have a responsibility, in those circumstances, under the *Occupational Health and Safety Act* to avoid the danger to themselves and others that their cannabis use may pose. If you have a legitimate and reasonable concern you are entitled to hold someone off work to evaluate their fitness to work.

12. If the worker is held off work for an evaluation, are they owed pay for time missed?

Unless a collective agreement or other employment contract says that someone is entitled to pay, workers are usually not entitled to be paid when they are not working.

13. What if the employee says they only smoke pot or ingest cannabis products many hours before the start of any work shift? Are they safe to work in a safety sensitive position?

It is doubtful that an employer could avoid occupational health and safety liability in all cases where they simply trusted that the worker would only smoke or ingest when they said so. In some cases, some unscheduled testing would probably be expected to test the veracity of the employee's promised ingestion schedule. Experts would be able to determine what schedule would be safe, if any.

It is doubtful that an employer could avoid occupational health and safety liability in all cases where they simply trusted that the worker would only smoke or ingest when they said so.

"It is doubtful that an employer could avoid occupational health and safety liability in all cases where they simply trusted that the worker would only smoke or ingest when they said so."

14. If I am using cannabis after legalization, is there any risk in telling a United States border agent about it?

Yes, there is. One United States border official was widely quoted in the media as saying that he expects that at least some users and even people working for cannabis businesses could receive lifetime bans from entry to the U.S. It is clear that individual border agents could easily choose to refuse entry to the U.S. to anyone who is a user of cannabis products or who refuses to answer questions about their cannabis use. Cannabis may be legal under the state laws in some states but it continues to be illegal under federal law in the United States and federal law governs the border. That puts Canadian pot users in a tough spot because lying to a border agent is also a serious offence.

15. Are employees entitled to smoke or otherwise ingest pot while at work?

Legalization does not mean that citizens can ingest or smoke everywhere. This is regulated by provincial law and by municipality bylaws and, on private property, it is controlled by the entity with legal control over the property. Municipal bylaws vary from place to place but, in general, smoking and vaping are often restricted like smoking tobacco. Private landowners can generally control what is allowed on their property although some human rights issues might sometimes arise.

16. Does the legalization of pot mean that employers no longer have a valid interest in prohibiting the use and possession of substances at work which impair fitness for duty?

No.

17. Does legalization require a review of your drug policies?

This is such a significant change that it will often require changes to your policies and it also probably requires a clear communication of expectations so employees understand what they can and cannot do. For example, will you be allowing any cannabis products in the workplace? Will you be allowing vaping or smoking on the premises and environs? Are you going to require employees in safety sensitive position to disclose if they are using cannabis products? It is better to be clear in advance of legalization.◆

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Alberta's Recreational Cannabis Landscape: An overview of restrictions in housing and public spaces

Judy Feng

Introduction

On October 17, 2018, recreational use of cannabis became legal in Canada. Canadians are now able to purchase recreational cannabis, publicly possess up to 30 grams of dried cannabis and grow up to 4 plants for personal use. Does this mean that Canadians can obtain and use cannabis anywhere they want then? Nope, think again.

With the new recreational cannabis regime, provinces can implement additional rules for possession, use and cultivation of recreational cannabis. For example, in Alberta, individuals must be 18 years old or older to purchase or consume cannabis. Municipalities can also impose additional bylaws and land use and zoning laws to restrict where cannabis is sold and where it can be used.

Restrictions in housing

While there is no legislation in Alberta that prohibits cannabis use or cultivation in homes, landlords, property owners and rental companies may restrict cannabis use, cultivation and/or smoke in tenancy agreements. Likewise, condominium boards are also free to enact bylaws and rules restricting cannabis use, cultivation and/or smoke on their properties and common areas.

In other words, home owners can use recreational cannabis within their own

> *"Cannabis use among tenants and condominium residents and the difficulty in enforcing "no smoking" rules or bylaws are already common complaints among landlords and condominium boards."*

homes or backyard and grow up to four plants on their properties as long as their municipality allows it. Tenant or condominium residents, you may likely encounter some form of restrictions through your landlord, rental company or condominium board on cannabis use and cultivation. For example, some landlords in Alberta have already banned cannabis smoking and cultivation in rental units, whereas some landlords allow cultivation and consumption of edibles in units despite a smoking and vaping ban. Tenants should review their leases and condominium residents should review their condominium's bylaws and rules for further information on any restrictions.

Restrictions in public spaces

When it comes to restrictions in public spaces, the province's Bill 26 (An *Act to Control and Regulate Cannabis*) prohibits smoking and vaping cannabis in certain places frequented by children such as:

- any area or place where that person is prohibited from smoking under the *Tobacco and Smoking Reduction Act* or any other Act or municipal bylaws
- on an hospital property, school property or child care facility property
- in or within a prescribed distance from:
- a playground;
- a sports or playing field;
- a skateboard or bicycle park;
- a zoo;
- an outdoor theatre;
- an outdoor pool or splash pad; or
- any other area/place that is prescribed or otherwise described in the regulations.

"Tenants or condominium residents, you may likely encounter some form of restrictions through your landlord, rental company or condominium board on cannabis use and cultivation."

Municipalities in Alberta also have additional bylaws and/or land use and zoning laws restricting where cannabis can be sold and used. For example, cannabis stores in Edmonton must be at least 200 meters away from another cannabis store, 200 meters away from schools and public libraries and 100 meters away from provincial health care facilities, public parks and public recreation facilities. In Edmonton, there are additional places where smoking of cannabis is not allowed, for example, in city owned golf courses, on patios or within 10 metres of a bus stop, doorway, window or air intake of a building. However, there are some public places where smoking of cannabis is allowed in Edmonton, for example, at designated areas at festivals and public events and in some parks and trails (as long as they do not contain children's amenities).

In comparison, cannabis stores in Red Deer must be at least 300 meters away from another cannabis store, 300 meters away from a hospital and 300 meters away from K-12 schools. Public consumption of cannabis by smoking or vaping is prohibited in Red Deer as per the city's smoke free

bylaw. A summary comparing some of the municipal cannabis restrictions in Alberta's four largest cities is provided in the table below:

	Edmonton	Calgary	Lethbridge	Red Deer
Distance between cannabis stores	200 m	300 m in most land use districts, but relaxation guided by the city's Cannabis Store Guidelines.	n/a	300 m
Distance between cannabis stores and schools	200 m	150 m	100 m	300 m (K-12 schools) 100 m (post-secondary)
Distance between cannabis stores and provincial health facilities	100 m	100 m	100 m	300 m *from an approved hospital
Is public use of cannabis prohibited?	Yes	Yes	Yes	Yes
Are there exceptions to the public use of cannabis?	Smoking cannabis in public is allowed in some situations, for example: -In some parks and trails (as long as they do not contain children's amenities). -On some sidewalks (as long as they are 10 metres away from a bus stop, doorway, window or air intake or patios). -Some festivals and public events in designated areas.	Smoking cannabis in public is allowed in limited situations, for example: -In a designated area at a public place where an event has obtained a permit. -Designated cannabis areas in city-owned public places.	n/a	n/a

> *"Municipalities in Alberta also have additional bylaws and/or land use and zoning laws restricting where cannabis can be sold and used."*

Conclusion

Cannabis use among tenants and condominium residents and the difficulty in enforcing "no smoking" rules or bylaws are already common complaints among landlords and condominium boards. Some lawyers have suggested that an overall ban on recreational cannabis would be an effective solution, while others have raised issues about the enforceability of such bans and how they will hold up to existing tobacco smoking restrictions. There is also the issue of medicinal cannabis users and how they would be accommodated by landlords and condominium boards. Furthermore, it has been pointed out that cannabis cultivation in a property may affect insurance policies and premiums.

With regard to public spaces, there have been mixed reactions to the different municipal restrictions. Some say the restrictions are too strict, leaving limited space for people to legally use cannabis. Some say that municipal restrictions are not enough and that public consumption sites should not be allowed at all. Some say the restrictions are just a starting point for possible future changes. Furthermore, the enforceability of restrictions in public spaces raises its own set of challenges. As some commentators have pointed out, it will be difficult to enforce smoking restrictions in public spaces. There is also the issue of whether there are enough resources in municipalities or law enforcement agencies to enforce restrictions in public spaces.

With the restrictions in place for recreational cannabis in housing and public spaces, it will be interesting to see how the range of issues arising out of the new recreational cannabis landscape will unfold. ◆

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Taxing Weed

Mitch LaBuick

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On October 17, 2018, the federal government of Canada legalized the sale and recreational use of cannabis. Here is a brief summary of how sales and excise taxes are being applied to the various cannabis products sold in Canada.

The federal government along with the provincial and territorial governments have agreed to a tax structure to equitably share in the taxing of cannabis. This has been achieved through the Coordinated *Cannabis Taxation Agreement* ("CCTA"). The duty on cannabis will be shared 25/75 between the jurisdictions. The federal government will be responsible for the collection and enforcement of the taxes under the Act. The province of Manitoba at the time of this article has not signed on to this agreement.

All cannabis products in Canada will be subject to an excise duty (referred to as the "Cannabis Duty"), the Goods and Services Tax/Harmonized Sales Tax ("GST/HST") as well as any additional provincial retail sales taxes and other fees, duties and/or mark-ups. The legislative authority for the Cannabis Duty is found in the *Excise Act, 2001* ("Act") which is also the same legislation that applies duty rates to alcohol and tobacco products.

> *"The calculation of the Cannabis Duty by the Licensed Producers is a rather tricky and somewhat complicated process that the CRA has summarized in 5 steps."*

To better understand the taxation of cannabis, cannabis is defined as a cannabis plant and any of the following:

- any part of the plant (stem, trim), including phytocannabinoids sourced from the plant whether processed or unprocessed;
- any substance or mixture of substances that contain any part of the plant; and
- any substance that is identical to a phytocannabinoid produced or found in a plant regardless of how it is obtained.

Excluded from this general definition excludes items such as non-viable seed(s) of a cannabis plant, the mature stalk, without leaf, flower, seed or branches, fiber from the mature stalk and the root of the plant. You can find further information in Schedule 1 and Schedule 2 of the Act.

In addition to certain portions of the cannabis plant not being subject to the duty, there are also exemptions from the duty that are detailed in the Act. A summary of these exemptions are plants that are:

- taken for analysis or destroyed by the Minister of National Revenue, or the Minister for the purposes of the Act;
- transferred to another person for analysis or destruction in a manner approved by the Minister;
- a low-THC cannabis product;
- a prescription cannabis drug;
- a prescribed cannabis product or a cannabis product of a prescribed class;
- non-duty paid cannabis products removed from the premises of a cannabis licensee for export in accordance with the Act; or
- a prescribed cannabis product, or a cannabis product of a prescribed class, that is delivered by a cannabis licensee to a prescribed person in prescribed circumstances or for a prescribed purpose.

The Cannabis Duty under the Act that is split 25/75between the federal and provincial governments is similar to the handling of GST/HST. The Cannabis Duty is made up of a federal component referred to as "Duty" and the provincial component is referred to as the "Additional Duty". These terms and references are important when Licensed Producers are calculating their obligations under the legislation.

The Cannabis Duty is calculated as either a flat tax amount based on the quantity or volume of cannabis product sold or on an *ad valorem* (value) amount based on the selling price. The amount of Cannabis Duty to be applied is the **greater** of these two amounts.

In addition to the 25/75 split of the Cannabis Duty there are certain provinces that have a Sales Tax Adjustment rate applied depending on whether the flat rate or value rate applies to the transaction.

The following chart provides a quick summary of these amounts:

Cannabis Plant Product	Cannabis Duty (Federal Portion)		Additional Duty (Provincial Portion)	
	Flat-rate	Ad valorem rate	Flat-rate	Ad valorem rate
Flowering material used in the product or used in the production of the product.	$0.25/gram	2.5%	$0.75/gram	7.5%
Non-flowering Material (trim)	$0.075/gram	2.5%	$0.225/gram	7.5%
Seed Included in the cannabis or used in the production of a cannabis product.	$0.25/seed	2.5%	$0.75/seed	7.5%
Vegetative cannabis plant used in a product or used in production (seedlings)	$0.25/plant	2.5%	$0.75/plant	7.5%

The provinces that have the Sales Tax Adjustment rate are referred to as listed specified provinces. As of the date of this article the following provinces and rates were provided in the Canada Revenue Agency ("CRA") Excise Duty Notice EDN55:

1. Alberta, 16.8%;
2. Nunavut, 19.3%;
3. Ontario, 3.9%;
4. Saskatchewan, 6.45%.

The calculation of the Cannabis Duty by the Licensed Producers is a rather tricky and somewhat complicated process that the CRA has summarized in 5 steps. If you are a licenced producer you will need to follow these steps. Remember the amount of Cannabis Duty is the greater of the flat rate amount and the value amount; therefore you need to calculate the Cannabis Duty on the product using both methods.

1. Determine the flat rate duties both federal and provincial.
2. Determine the *ad valorem* duties both federal and provincial.
3. Determine which of the flat rate and *ad valorem* duties is greater (both federal and provincial)
4. Determine the adjustment to additional cannabis duty (provincial) for goods delivered into a listed specified province.
5. Determine the final amounts to be reported and remitted on form B300.

Federal GST/HST

The supply of all goods and services made in Canada is subject to the GST/HST at a

> *"The Federal Government along with the provincial and territorial governments have agreed to a tax structure to equitably share in the taxing of cannabis. This has been achieved through the* Corridinated Cannabis Taxation Agreement *("CCTA")"*

rate of 5% (13% in ON and 15% in NL, NB, NS and PE) unless the supply is specifically exempted or zero-rated. Currently there are no exempting or zero-rating provisions for cannabis, meaning that all sales of the product (including the excise duties) will be subject to the GST/HST this tax.

British Columbia

The B.C. government will be adding a 15% markup or fee to the cost (landed cost in B.C. excluding the GST/HST) of all cannabis products sold in the province. Cannabis products sold in the province will also be subject to the provincial sales tax of 7%.

Alberta

Alberta will be obtaining additional taxes through the Sales Tax Adjustment (16.8%) calculation as noted above in the Cannabis Duty calculations. At this time Alberta has not made any further announcements or statements on additional taxes or fees.

Saskatchewan

Similar to Alberta, Saskatchewan will receive additional taxes through the Sales Tax Adjustment (6.45%) calculation as noted above in the Cannabis Duty calculations. As well all sales of cannabis in the province will be subject to the retail sales tax at 6%.

Manitoba

Manitoba has taken a very different approach to the taxation of cannabis. They have not opted into the CCTA. Therefore, no additional amounts of Cannabis Duty are collected by the federal government for the province.

Manitoba has instead imposed a $0.75 per gram additional provincial charge but has also impose a 9% tax at the wholesale

“Currently there are no exempting or zero-rating provisions for cannabis, meaning that all sales of the product (including the excise duties) will be subject to the GST/HST sales tax”

level of the products and levies an annual 6% “social responsibility fee” to all licenced retailers in the province. There will be no amount of PST levied in addition to these amounts.

Ontario

Similar to Alberta and Saskatchewan, Ontario will obtain additional tax through the use of the Sales Tax Adjustment (3.9%) calculation used when calculating the Cannabis Duty.

Nunavut

In keeping in line with Ontario, Alberta and Saskatchewan, Nunavut will obtain any additional revenues through the Sales Tax Adjustment (19.3%) calculation used when calculating the Cannabis Duty.

Yukon

The Yukon territory, similar to British Columbia, will be adding a markup fee on the landed cost of the cannabis in the jurisdiction and a $0.20 per gram handling fee. The amount of the markup has not been announced as yet.

The remaining provinces and territories in Canada are still in the process of determining if they will chose to levy additional fees or taxes or if they will remain satisfied with the current structure. There

may be more details coming in the months that follow.

The calculation of taxes, excises and duties on cannabis products is complicated! If you find yourself needing to understand these requirements, it would be a very good idea for you to consult a professional such as a tax specialist, lawyer or accountant.◆

Special Report: Millennials and the Sharing Economy

Tax and the Sharing Economy

Caitlin Butler

> *"While participating in the economy, even in an informal capacity, can be a great way to earn extra money, there are significant tax issues that can arise."*

Although there is no one definition of the "sharing economy," we will view it as interactions in which individuals or less formal businesses share personal property or services with others for payment. This concept is not new: people have always had the opportunity to engage in activities such as renting out a home while on vacation or selling jam at the local market. However, over the past few years, the popularity of sharing property or services has grown significantly due to technological advancements and increased confidence with online purchases, allowing buyers and sellers to connect more easily. Such arrangements are generally booked through a website, software application or other online platforms.

With over $1.31 billion (November 2015-October 2016, Statistics Canada) in total annual spending in peer-to-peer ride services and accommodation sharing in Canada and abroad, the sharing economy not only provides a significant opportunity for individuals, but also a force with the potential to greatly transform traditional markets.

In this article we will identify a number of income tax, GST/HST and indirect tax issues, and comment on the Canada Revenue Agency's (CRA) activity to ensure compliance, and that income is earned as an individual.

In administering the *Income Tax Act*, the CRA has identified five key sectors of the sharing economy:

- accommodation sharing – renting out homes, rooms, or cottages;
- transportation – ride-sharing, bike rentals, boat rentals;
- space rentals – gardens, workspaces, laboratories;
- making and selling goods – household goods, jewelry, meal preparation; and
- providing services – esthetics services, dog walking (etc).

Income Tax

Regardless of the sale type, amount, or method, earnings from business activity in the sharing economy must be reported. Just because you do not receive a "tax slip" such as a T4, does not mean the income is not reported.

While some may consider the activity merely a hobby, if the activity is conducted with a view to profit, it is considered to be a business. The tax rules for any business, from the corner store to the large corporation earning billions of dollars, also apply to businesses involved in the sharing economy.

> *"Although there is no one definition of the "sharing economy," we will view it as interactions in which individuals or less formal businesses share personal property or services with others for payments."*

While many tax issues for smaller businesses are simpler than large multinationals, they are still complex for many.

Although it is simple to determine how much revenue to report (all of it!), the rules for claiming expenses are much more nuanced. To be deductible, expenses must be incurred to earn income, not be personal or living expenses, and not be capital in nature. Where there is a personal component to the expense, such as heating costs of your home where a portion is rented out, a reasonable portion may be claimed. In these cases, a proportion based on square footage is often permitted. Further, expenses must be reasonable in the context of the business. Certain expenses are specifically prohibited from being claimed, while others may be limited.

While there are many potential income tax issues, here are some that are particularly relevant to the sharing economy.

- **Accommodation sharing – business or rental activity?** – When sharing accommodations, you must

determine whether the earnings are business or rental. While the tax rate on both types is the same for individuals, business income is subject to Canada Pension Plan premiums, while rental income is not. Further, each requires different parts of the tax return to be completed. In differentiating business and property income, you should examine whether additional services beyond a rental space and basic services (such as light, parking and laundry facilities) are provided. Services such as meal preparation and cleaning may indicate a business. In most cases, home sharing is considered a rental activity as sufficient extra services are not often provided.

> *"Regardless of the sales type, amount, or method, earnings from business activity in the sharing economy must be reported. Just because you do not recieve a "tax slip" such as a T4, does not mean the income is not reported."*

- **Accommodation sharing – principal residence** – Also, when sharing accommodations, there is the risk an individual may lose access to their principal residence exemption when they eventually dispose of their property. This means that the individual may be taxable on some or all of the gain on the house, which could otherwise be avoided. While the rules can be very complex, the CRA generally accepts that the entire property is eligible for the exemption, provided there is no structural change to the property, the income producing use is secondary to the personal use and no capital cost allowance (depreciation for tax purposes) is claimed on the property. The CRA's interpretation in this regard also extends to other secondary income-earning uses of a residence, such as using a room as a business office.

- **Information disclosures** – If you obtain business earnings from a webpage or website (which is typical in this sector), you must provide additional information in your tax return. This includes identifying the webpages or websites that you earn income from and the approximate percentage of revenue from online sales. Failure to do so could result in penalties or even allow the CRA to dispute your taxes beyond the normal assessment period (commonly three years).

GST/HST, PST and Other Indirect Taxes

While income tax is critical to understanding tax obligations, it does not stop there. Indirect taxes, such as GST/HST can also apply, and are quite often overlooked.

Generally, if you earn more than $30,000 over 12 months, or in a three-month period from products, services or short-term rentals, you are required register for, collect, and remit GST/HST on your taxable sales. You must essentially add up the earnings from all of the businesses they control, not just the earnings from your business to determine if this threshold has been reached. In many cases, GST/HST on the costs incurred to operate the commercial activity can be recovered from CRA.

Some businesses, most notably taxi services, are required to register, collect and remit GST/HST regardless of the amount of sales. Effective July 1, 2017, legislation was clarified to ensure those in the ride-sharing industry are required to register, just like taxis. In limited cases, even if not required to register, you can choose to act as if they have met the threshold and register.

> *"While participating in the sharing economy, even in an informal capacity, can be a great way to earn extra money, there are significant tax issues that can arise."*

Where sales of tangible goods (such as a piece of jewelry) are made to customers outside of your province, care should be given to the GST/HST rate charged. In most cases, you should charge the GST/HST rate in the province to which the good is delivered.

In addition to GST/HST, numerous other local and provincial taxes may apply. This can include, for example, tourism taxes, lodging levies, and provincial sales tax (PST). The rules on these other indirect taxes vary greatly and should be reviewed based on your location. Further, those who ship to foreign countries may also face sales tax exposure outside Canada. For example, the Supreme Court of the U.S. recently upheld the ability of states to impose their sales taxes on deliveries from out-of-state locations.

What is the CRA doing?

The CRA recently identified activity in the sharing economy as one of the four largest risks of non-compliance (CRA Annual Report to Parliament 2016-17). Therefore, the CRA has allocated considerable funds and initiated projects to reduce non-compliance, which include:

- **Education Campaigns** – The CRA has released a number of Tax Tips (see here) highlighting the tax requirements for those in this sector. In addition, the CRA has released a number of webinars on various issues for small businesses, including issues related to registering for and collecting GST/HST, and deducting expenses (see here). Also, a business can request a visit from a CRA officer to discuss common tax errors and financial benchmarks in the industry, and answer tax-related questions as part of the Liaison Officer Initiative Program.
- **Partnerships with Industry** – The CRA has partnered with groups in certain industries. For example, in Quebec and Ottawa, Airbnb now collects a local lodging tax on behalf of its hosts for short term rentals. Similarly, in B.C. Airbnb announced that they reached an agreement to collect PST through its online platform.
- **Third-Party Requests for Information**– The CRA can obtain information from an individual or business about third parties, and has recently done so with more frequency. For example, in late 2017 PayPal was required to send the CRA information about all Canadian business account holders that received or sent a payment through their online account between 2014 and November 10, 2017. Also, in 2017, Square Canada was required to submit information on sellers who had

processed more than $20,000 in any calendar years 2012-2015 or January 1-April 30, 2016. Further, in 2016, a court upheld search warrants issued to Uber related to the investigation of whether drivers were appropriately collecting and remitting sales tax in Quebec. Once obtained, the CRA can compare information provided to earnings reported by the individual.

In addition, CRA undertakes education and compliance activities regularly to ensure taxpayers properly self-report their income. It is well aware of the risk of tax non-compliance. Where income has gone unreported, consider using the CRA's voluntary disclosure program to minimize penalty and interest charges. ◆

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Housing Affordability in Canada: The Vancouver and Toronto Experience

Judy Feng

Introduction

These days, you're bound to come across the issue of housing affordability in Canada, especially in Vancouver or Toronto. You have probably also heard about how housing affordability is especially difficult for Canadian millennials. Millennials, which are younger adults between the ages of 20 to 34, make up approximately 20% of the Canadian population. According to Statistics Canada's net migration data, there has been an upward trend in millennials flocking to Vancouver and Toronto.

However, living in Vancouver and Toronto comes at a steep price. If you are living in Vancouver or Toronto, chances are that most of your paycheck is being used to cover your mortgage or rent. As my fellow millennial friends living in these two cities can attest "we are house poor." Where do we start when talking about this nebulous concept of being "house poor" or more appropriately, "housing affordability"?

Well, let's first compare average home prices with average household income in these two cities. Based on the Canadian Real Estate Association's MLS Home Price Index, the average single detached home costs approximately $1.545 million dollars in Vancouver and $863,500 in Toronto as of September 2018. The average household income is $92,300 in Vancouver and $104,100 in Toronto. While there doesn't appear to be information on average household income on millennials in these two cities, there is information on *median income* for millennial families. For example, according to Statistics Canada, the median income for millennial couple families in Vancouver is $74,660 and $69,710 for millennial couple families in Toronto.

> *"In addition to the property taxation changes, both Ontario and B.C. have implemented legislative changes to their residential tenancy laws, in efforts to protect renters and temper affordability issues in the rental market."*

Even if you manage to make a 20% down payment for an average priced home in these cities, your monthly mortgage payments at the current 3.95% prime interest rate (with a 25-year amortization) would be at least $6,468 in Vancouver ($77,616 per year) or $3,615 in Toronto ($43,380 per year).

When it comes to housing affordability, the CMHC recommends that total monthly housing costs should be no more than 32% of gross household income. With the monthly mortgage figures mentioned above, a household would have to earn at least $242,550 per year in Vancouver (2.6 times the average household income) or at least $135,562 per year in Toronto (1.3 times the average household income) in order to meet the CMHC recommendation.

For the average millennial and non-millennial household, there's not much left over, if at all, at the end of the month for other potential money pits in adulthood like everyday expenses, taxes, insurance, emergencies, children and retirement. In fact, you likely have no choice but to focus on servicing your mortgage for your entire life. Now how about another fun thought experiment: imagine what those monthly payments will be with more interest rate hikes!

The picture is also not so rosy for renters in either of these cities. Vancouver and Toronto are the most expensive Canadian cities to rent in, with the average two bedroom rental going for $1,552 in Vancouver and $1,392 in Toronto according to CMHC's rental market reports. Average monthly rent for two bedrooms in the most desirable and/or central neighborhoods in both cities often exceed $2,000. High prices in home ownership and lack of rental supply have not only kept vacancy rates low at 1%, but have also helped drive rental prices upwards in both cities.

> *"The speculation tax will apply to B.C.'s largest urban centres, which include Greater Vancouver Area, Victoria, Nanaimo, and Kelowna."*

Responding to housing affordability issues: not just a millennial issue

It's no surprise that industry reports have declared the Vancouver and Toronto housing markets as reaching crises levels for millennials and non-millennials alike. In the past decade, various factors have been blamed for housing affordability issues in these two cities – ranging from population growth, low housing supply, foreign buyers, real estate speculation, low interest rates, tax loopholes and evasion, and stagnant wage growth to lack of effective government policy.

With growing political backlash, both the British Columbia (B.C.) and Ontario governments have been confronted with housing affordability issues in their respective provinces. In the past two years, legislative proposals and changes have been introduced in both provinces to help address housing affordability issues.

The B.C. Response

In 2016, the B.C. government under the B.C. Liberal Party implemented a 15% property transfer tax for foreign nationals buying real estate in the province and a luxury tax on homes selling for over $2 million dollars. Housing affordability was a top concern in B.C.'s last provincial election in 2017, where the New Democratic Party (NDP) came to power.

The B.C. government under the NDP has since released its 30-Point Plan for Housing Affordability (the "B.C. Budget") in February 2018. The B.C. Budget identified an immediate government priority to stabilize housing demand by introducing a new speculation tax, increasing and expanding the existing foreign buyer's tax and closing legal loopholes used by property speculators.

Speculation Tax

As part of the B.C. Budget, the provincial government released details in March 2018 about a proposed speculation tax on residential property (the "speculation tax"). Legislation implementing the speculation tax is expected in the fall of 2018.

The speculation tax will apply to B.C.'s largest urban centres, which include the Greater Vancouver Area, Victoria, Nanaimo and Kelowna**.** The speculation tax is meant to target non-B.C. owners of residential property who leave their properties vacant.

In 2018, the speculation tax rate will be 0.5% of the property's value in 2018. In 2019 and beyond, the speculation tax rate will vary according to a person's citizenship status and/or current residence situation, for example:

- 2% for foreign investors and "satellite families" (there is no legal definition of what is a "satellite family" but the B.C. government has referred to satellite families as "households with high worldwide income that pay little income tax in B.C.");
- 1% for Canadian citizens and permanents residents who do not live in B.C.; and
- 5% for British Columbians who are Canadian citizens or permanent residents.

There are also exemptions from the speculation tax. For example, British Columbians will be exempt if their property is their primary residence or is rented out as a qualifying long-term rental. People who report income in B.C. with a vacant second home will also be eligible for non-refundable tax credits of up to $2,000 for one property. There are also additional exemptions for special circumstances such as when an owner is:

- undergoing medical care or residing in a care facility;
- temporarily absent for work; or
- deceased and the estate is being administered

Foreign buyers' tax and other property tax changes

Other than introducing a speculation tax, the B.C. government introduced the following property tax changes in the B.C. Budget:

- Property transfer tax on homes valued at $3 million or more will increase from 3% to 5% for the portion over $3 million.
- Property transfer tax for foreign nationals will increase from 15% to 20% and will expand to cover other geographic areas such as the Okanagan and Fraser Valleys and Nanaimo.
- School taxes on homes valued over $3 million will increase, with:

- a 0.2% tax applying on the assessed value of a home that is greater than $3 million but under $4 million; and
- a 0.4% tax applying on the portion of a property's assessed value over $4 million

To illustrate the effects of these tax changes, a foreign buyer purchasing a home valued at $3.5 million in Vancouver would have to pay at least an estimated $793,000 in taxes:

- A property transfer tax equal to $93,000
- A 20% property transfer tax for foreign nationals equal to $700,000

The above example does not include the 0.2% school tax (which applies to homes with a value that is greater than $3 million but under $4 million) or the proposed 2% speculation tax which would apply if the foreign buyer is considered a "foreign investor" or is part of a "satellite family."

> *"It's no surprise that industry reports have declared the Vancouver and Toronto housing markets as reaching crises levels for millennials and non-millennials alike."*

Land Owner Transparency Act and the Information Collection Regulation

In June 2018, the B.C. Ministry of Finance released draft legislation, the *Land Owner Transparency Act* (*LOTA*), which will require reporting of beneficial ownership of land in BC. This means that corporations, trusts and partnerships will have to disclose the names of individuals who hold beneficial interests in land directly, or through corporations or partnerships.

The proposed law is part of the government's efforts to establish a public registry, with the intention to help end hidden ownership of real estate, as well as prevent tax evasion, fraud and money laundering.

Under the proposed *LOTA*, there will be administrative penalties and criminal offences for failure to meet those reporting obligations. For example, the administrative penalty would be up to $25,000 for individuals, $50,000 for corporations while the fine for a criminal offence is $50,000 for individuals and $100,000 for a corporation.

In the meantime, the B.C. government has recently enacted the *Information Collection Regulation* (effective September 17, 2018) as part of its mandate to increase transparency in property purchases. The *Regulation* requires corporations and trustees acquiring property in B.C. to identify all individuals with a significant interest on their property transfer tax returns.

Empty Homes Tax

In July 2017, the City of Vancouver also passed Vacancy Tax By-Law No. 11764, which introduced an Empty Homes Tax ("EHT"). The EHT is an annual tax on empty or under-utilized "Class 1" residential properties such as single-family residences, multi-family residences, duplexes, apartments and condominiums.

Under the bylaw, a residential property is considered vacant if it has been unoccupied for more than 180 days during the tax year. When EHT applies to a property, owners are required to pay 1% of the property's assessed taxable value. There are certain exemptions from the EHT,

for example, if an owner of the property is deceased or the property is undergoing redevelopment or major renovations.

Owners of Class 1 residential properties must complete an annual property status declaration to determine if the EHT applies. If an owner does not make a property status declaration, then the property is considered vacant and is subject to the EHT.

> *"When it comes to housing affordability, the CMHC recommends that total monthly housing costs should be no more than 32% of gross household income."*

The Ontario Response: The Non-Resident Speculation Tax

In April 2017, the Government of Ontario under the Liberal government released the Fair Housing Plan, which included actions such as protecting renters through expanding rent control and implementing Land Transfer Tax refunds for first time home buyers.

The cornerstone of the plan was the introduction of a Non-Resident Speculation Tax (NRST). The NRST requires "foreign entities" to pay a 15% tax when purchasing residential property. "Foreign entities" are defined as foreign corporations or foreign nationals. For example, a foreign national is a person who is not a Canadian citizen or permanent resident of Canada.

Similar to B.C.'s foreign buyers tax, the NRST applies to all transfers of residential real estate located in certain geographic areas. In the case of Ontario, the tax would apply to residential property transfers in the "Greater Golden Horseshoe", which includes highly populated areas such as the Greater Toronto Area and its surrounding areas such as Kawartha Lakes (which apparently is known to Ontarians as "cottage country").

Rebates for the NRST are available for certain foreign nationals, for example, foreign nationals who become permanent Canadian residents, full-time international students and foreign nationals legally working full-time in Ontario.

Rent control in B.C. and Ontario

In addition to the property taxation changes, both Ontario and B.C. have implemented legislative changes to their residential tenancy laws, in efforts to protect renters and temper affordability issues in the rental market. For example, both B.C. and Ontario have rent controls in place that set the maximum amount that landlords can increase rent –in 2019, the allowable increase is 4.5% in B.C. and 1.8% in Ontario.

Conclusion: What's next?

Recent developments will keep housing affordability issues at the public forefront in the coming years. In Ontario, housing affordability was a top electoral concern when the former provincial Liberal government was in power and continues to be a top concern among Ontarians under the newly elected Progressive Conservative government. However, the Progressive Conservative government in Ontario has expressed their openness to dropping the NRST tax and letting the market regulate itself. It remains unknown whether this was campaign rhetoric, or will turn into something more.

In the meantime, B.C.'s foreign buyers' tax is currently being challenged by Jing Li, a lead plaintiff in a civil class action claim against the B.C. government. While a summary trial is currently underway, some legal experts are expecting that the case will likely make its way up to the Supreme Court of Canada.

> *"Millennials, which are younger adults between the ages of 20 to 34, make up approximately 20% of the Canadian population."*

Since the implementation of the foreign buyers' tax and other property tax changes in B.C., the sales of single family homes, especially in the high end of the market, has slowed down in Vancouver. Similarly, the sales of real estate in the Greater Toronto Area have decreased since the NRST was implemented in Ontario. The average price of a single detached home in Vancouver has decreased by about 7% from a high of $1.6137 million dollars in September 2017. Likewise, the average price of a home in Toronto has decreased by about 11% from a high of $972,500 in May 2017. However, overall housing prices continue to remain high in Vancouver and Toronto.

Many questions remain about the effect of the various property taxes. For example, will the taxes necessarily stop foreign buyers and other non-resident buyers (such as out of province buyers) from purchasing in Vancouver and Toronto? Are the drops in home prices a result of local homebuyers refraining from buying and selling? Have other factors, such as tighter mortgage lending rules and increased interest rates, contributed to the recent drops in home prices? How will the various property taxes affect other housing markets in Canada – for example, will buyers move their money elsewhere and drive up housing prices in other cities?

Despite the implementation of rent control measures in B.C. and Ontario, some real estate industry experts and commentators are questioning whether such rent control is effective in curbing soaring rents in cities such as Vancouver and Toronto. Changes in taxation and rent control are important pieces of the housing affordability housing puzzle but other issues still need to be addressed, for example, the lack of affordable housing supply and transparency in real estate transactions. As legal and industry experts have pointed out, it is still too soon to come to a conclusion on whether such measures are effective in cooling the market to an affordable level.

Concerns about housing affordability are not just restricted to B.C. and Ontario, or Vancouver or Toronto alone. Nor is housing affordability just a millennial problem. For example, a recent survey done by Abacus Data indicates that housing affordability is a top concern amongst Canadian millennials. With the exception of Quebec, the majority of millennials in every province cited affordable housing as a top priority for the federal government to focus on. As the recent provincial and municipal elections in Ontario and B.C. have shown us, housing affordability is top of mind for voters in general. Various industry reports also indicate that overall, Canadian housing affordability has been getting worse in almost every city across the country. With further potential interest rate hikes on the horizon, it is expected that housing affordability will likely get worse for most Canadians – millennials and non-millennials included. ◆

ViewPoint

Much of the Criticism of Bill C-69 is Demonstrably False

Martin Olszynski

Martin Olsynski is an associate professor at the University of Calgary's faculty of law. This article was first published by the Calgary Herald on Septemeber 26, 2018 and it is reprinted with the author's permission. The opinions expressed are those of the author.

> *"So destructive … (it) must die," claims Licia Corbella ("Corbella: Bill C-69 is Trudeau's bookend to his father's disastrous NEP," Calgary Herald, Sept. 14).*
>
> *A "grave danger to the Trans Mountain pipeline … This beast should be ritually slaughtered," implores Don Braid ("Braid: Liberals' own bill could kill Trans Mountain pipeline," Calgary Herald, Sept. 15).*

One would think that they were describing the second coming of Moby Dick (perhaps as a southern resident killer whale?). Alas, Corbella's and Braid's focus is Bill C-69, the Liberal's environmental law reform bill that proposes a new *Impact Assessment Act* and the replacement of the current National Energy Board with a Canadian Energy Regulator. Both columnists rely heavily on the opinions and analysis put forward by Canada West Foundation CEO Martha Hall Findlay and former Conservative party leadership contestant Rick Peterson.

Unfortunately, almost all of their claims about Bill C-69 are demonstrably false. Hall Findlay complains that project assessments will take longer but a comparison of the relevant provisions shows that they would be shorter (300 days versus 365 days for standard assessments; 600 days versus two years for panel reviews).

> *"Anyone following this process for the past three years, which included an expert panel on the modernization of the NEB, will know that the minister of natural resources and his department have been involved throughout."*

She also complains about the "arbitrary political power the legislation would give to ministers and the government," and yet the current regime is even more discretionary and arbitrary; at least under the IAA, the government will have to give detailed reasons for their decisions following the consideration of certain mandatory factors.

Peterson's arguments are equally dubious. His top 10 list of concerns kicks off with the fact that the legislation was introduced by the minister of environment and climate change. Anyone following this process for the past *three years*, which included an expert panel on the modernization of the NEB, will know that the minister of natural resources and his department have been thoroughly involved throughout. Second on Peterson's list is the inclusion of gender and other identity analysis, the implication being that it would be crazy, for example, for government to want to know about — and perhaps even mitigate — the well-documented gendered effects that a sudden influx of workers can have in remote northern communities.

The great irony in all of this is that Bill C-69 is the direct result of former prime minister Stephen Harper's apparent overreach in 2012. I am referring to Bill C-38, the infamous omnibus budget bill that repealed the original *Canadian Environmental Assessment Act* and replaced it with the current *CEAA, 2012,* radically reducing the scope of the federal environmental assessment regime. Nearly 3,000 environmental assessments were terminated when *CEAA, 2012* came into force, while today there are just 75 active assessments. Bill C-38 also drastically reduced the scope of Canada's *Fisheries Act*, especially the protections for fish habitat, as well as the federal *Navigable Waters Protection Act*. Finally, it was the Harper government that amended the *National Energy Board Act* to give cabinet, rather than the NEB, the power to make final determinations with respect to pipelines, thereby "politicizing" the process.

All of these changes did not go unnoticed. They were met with strong opposition by Indigenous peoples (Idle No More), environmental groups, scientists and former politicians — both liberal and conservative. Ultimately, "restoring lost protections" became a key plank of the federal Liberal campaign in 2015. Having won that election, and following nearly three years of study by both parliamentary committees and expert panels, the exceedingly democratic result is Bill C-69 and an *IAA* that, frankly, is best described as a CEAA, 2012-*plus* and whose transitional provisions make clear that it poses no litigation threat to the Trans Mountain pipeline.

Could Bill C-69 be improved? Absolutely. That — not ritualistic slaughter — is the proper role for what is supposed to be the chamber of sober second thought.

For a longer version of Martin Olszynski's column:

https://ablawg.ca/2018/09/25/bill-c-69s-detractors-can-blame-harpers-2012-omnibus-overreach-blog-edition/

Teresa Mitchell

Important Limit to the Duty to Consult

Alberta's Mikisew Cree First Nation took the federal government to court over its omnibus budget bill of 2012. This bill made significant changes to Canada's environmental protection regime. The Mikisew were not consulted at any stage of the legislative process and they argued that the bill had the potential to adversely affect their treaty rights to hunt, fish and trap. The Supreme Court of Canada rejected their appeal. It ruled that the development of legislation by cabinet ministers does not trigger a duty to consult with aboriginal people. The Court wrote: "The duty to consult is ill-suited for legislative action. It is rarely appropriate for courts to scrutinize the law-making process, which includes the development of legislation by ministers…Recognizing that a duty to consult applies during the law-making process may require courts to improperly trespass onto the legislature's domain." The Court noted that the separation of powers is an essential feature of Canada's *Constitution* and applying the duty to consult as the Mikisew requested would lead to a significant intrusion of the courts into parliamentary sovereignty.

> Mikisew Cree First Nation v. Canada (Governor General in Council), 2018 SCC 40
>
> https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17288/index.do

This Toronto Maple Leaf is a Winner!

Nikolay Kulemin was a forward with the Toronto Maple Leafs from 2008 and 2014. In 2014, he and his wife applied for Canadian citizenship, stating that they had a long – held desire to be Canadian citizens, their two children were born in Canada, they had extensive business and investment ventures in Canada, and had integrated into Canadian society. However, in 2017 a citizenship judge rejected their application, ruling that they failed to meet the required

number of residency days in Canada, traveled "wherever hockey took them" and no longer lived in Canada because Mr. Kulemin had been traded to the New York Islanders. Madame Justice Kane of the Federal Court of Canada gave them another chance. She decided that the Citizenship judge's decision was not reasonable on the face of the evidence. She wrote that while the Applicants' absences from Canada were significant, they should be considered in light of the *Papadogiorgakis* case, which allows for absences from Canada when they are temporary and the applicant can establish a centralized mode of living in Canada. Madame Justice Kane ruled that the applicants should have another hearing before a different decision-maker.

Kulemin v. Canada (Citizenship and Immigration) 2018 FC 955

https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/346256/index.do

Financial Advisor Goes to Jail

The Ontario Securities Commission charged Daniel Tiffen with three offences under the Ontario *Securities Act*. He and his firm had been selling promissory notes to clients at a time when they were under an order prohibiting them from trading in securities. The issue at trial was whether or not these notes were "securities" as defined by the *Securities Act*. The Ontario Superior Court of Justice found that the notes did fall within the definition of securities under the Act. At the sentencing hearing, the judge reviewed the aggravating and mitigating factors and determined that restitution was not sufficient. He noted that Mr. Tiffen was a repeat offender and had taken advantage of his position of trust with his clients. He sentenced him to six months in jail and 24 months probation.

Ontario Securities Commission v. Tiffin, 2018 ONSC 5419 (CanLII)

http://canlii.ca/t/gt7zf

Do Cats Have Privacy Issues?

Sundae, an orange and white shorthair cat went missing. After a few days of searching, the Boucart family registered their cat as missing with the Societe Protectrice des animaux (SPA) A month later, the family was shocked to see that Sundae was listed on the SPA website as "adopted". Axel Boucart asked the SPA for the name of the adoptive family so he could see about getting Sundae back but the SPA refused, citing privacy issues. It claimed that Quebec confidentiality laws prevented it from releasing private information about the adoptive family without permission. A Quebec judge ordered the SPA to turn over the information immediately but the SPA appealed. A Court of Appeal judge refused to hear the SPA's appeal, stating that the confidentiality laws were not relevant in this case. He ordered the SPA to turn over the name and contact information of Sundae's new owners within 5 days. No word yet on where Sundae is residing these days.◆

SPA Mauricie c. Boucart, 2018 QCCA 1612

http://canlii.ca/t/hvcnb

Columns

Words Matter

Peter Bowal

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

Introduction

Several decades ago, in my first summer job during university, I washed dishes and performed other unskilled labours in the kitchen of a large government seniors' nursing home in rural Alberta. While the work itself was not particularly memorable, I observed in that workplace of 15 men, the manager obviously decided to discriminate against women to maintain his male-only staff and felt justified for doing so. My co-workers at times spoke and acted in ways that would have made it uncomfortable for women to work there.

I have also been the only male in some work scenarios. For example, on one book project I recall the female editor consistently greeting us with "Hi Ladies" – a salutation that stubbornly persisted even after I pointed it out its error. The interaction between women at work, I discovered then and since, presented its own challenges for me and was … well, very different than the interaction between the men working in the nursing home kitchen.

"Gender carries high emotions and extreme sensitivity in all workplaces. One or two words uttered, even in an attempt at humour or conversation, can have a major impact on lives."

Not too much has changed in the intervening years despite best intentions. There are still male-dominated workplaces and female-dominated workplaces. While employers try to create more balance, employee behaviours must change for the workplace to be more hospitable to the under-represented gender.

This 2012 story of a male-dominated workplace – the City of Calgary firefighters – shows how a few careless, throw-away words from a manager with a long record of good service can lead to serious consequences.

The Calgary Fire Fighters Case

In March 2011, a fire captain was covering a neighbouring station which had three female firefighters assigned to it. On the ride back to the station in the fire truck the visiting captain asked his male colleagues why there were so many "gashes" at this fire hall. Someone asked him what he meant. He replied with words to the effect of "cunts, I mean cunts." When the captain realized a female firefighter was sitting at

the back of the cab he turned to her and said "I'm sorry, I forgot you were here." He apologized several times and privately to her again at the station. She and other colleagues at the time did not consider that disciplinary action was necessary.

Somehow, management was informed about the incident. The Fire Chief sought to make a forceful statement that such conduct would not be tolerated. He dismissed the captain.

The escalation continued. There was a sense of backlash against the three female fire fighters at that station for getting the captain fired. The Chief had to intervene with more support. Those few words from the captain had sparked several fires in the department.

After termination, the captain issued a heart-felt written apology to his colleagues and to management (unedited below):

> *I cannot tell you how horrible I feel about my senseless and very unprofessional conduct on March 1 on [#x] engine.*
>
> *I never could have imagined the pain I would cause my CFD family, and my personal family, with my hurtful, thoughtless comments. If I could take away the pain, I have caused, believe me I would.*
>
> *I have relived that day over and over in my head, I never meant to hurt anyone or damage the CFD's reputation in any way. To face the reality I have hurt people makes me sick, and I am ashamed.*
>
> *To say I am sorry seems to be to little, but it is a very serious and heartfelt apology that I would say to every C FD employee if I could.*
>
> *I am sorry that I caused pain and embarrassment to the C FD family. I am sorry that I put Chief Burrell and the administration in the possition that I did, I know it was my actions that forced them to discipline the way they did. I am sorry that my senseless words and actions have caused internal fighting, within the C FD family.*
>
> *Please do not be angry with each other, no one is to blame for this except me. Please come together to help each other through this, band together as one, and do not ever allow anyone or anything to come between you. You are to valuable to ever allow a senseless act to rip you apart.*
>
> *If I could go back in time, I would and the only lasting memory of that day, would be working with a very talanded, professional crew, and the great lunch we had together. There would be no memories for anyone, of a stupid, thoughtless act, that has caused pain and continues to cause pain. I really wish I could take away all the pain and anger, you all feel.*
>
> *Please forgive me, and go forward as a very proud, professional C FD family, the one I was once a proud member of, and truly wish I could be again.*

The captain grieved this discipline and his dismissal was replaced with an eight-week unpaid suspension and a further four-month demotion to Firefighter 3 with reduction in pay. He grieved that amended discipline. The three-member arbitration panel released its decision in July 2012: *Calgary v Calgary Fire Fighters Association (International Association of Fire Fighters, Local 255)*

Outcome

The Arbitration Panel upheld the discipline in this case. All sides agreed that some discipline was in order, but what was appropriate in this case? The Calgary Fire Department wanted its leaders to create an inclusive work environment and increase the number of women, who only number 30 out of about 1300 firefighters. Captains are role models for the crews they lead.

On the other hand, this captain had a 32-year discipline-free employment history, including 6 years as captain.

> *"There was a sense of a backlash against the three female fire fighters at the station for getting the captain fired. The Chief had to intervene with more support. Those few words from the captain had sparked several fires in the department."*

The Panel found the words "repugnant and demeaning towards women [which would] justify a significant disciplinary response." Two arbitrators said the captain implied that the fire station "… was very unfortunate to get stuck with having 3 women firefighters at their station, [which] would have been demoralizing to [the female firefighter]."

The panel said the initial apologies also missed the point because they did not apologize for the statement itself but for the female firefighter having heard it.

One of the three arbitrators dissented in part. He did not infer the worst from the captain's comments, writing "one could equally infer that his comments were simply directed at the paucity of females in the Calgary Fire Department."

Conclusion

A few gutter words by the captain at work turned into an expensive lesson. Gender carries high emotion and extreme sensitivity in all workplaces. One or two words uttered, even in an attempt at humour or conversation, can have a major impact on lives. It counts for little that offending words are not directed at anyone in particular, and that sincere apologies and retractions follow.

Employers remain under a duty of progressive discipline. Long, unblemished work records and apologies are mitigating factors. Employers should also be wary of making things worse. Every offender is a fallible human being, not a monster. One should not always attribute to workers the worst of intentions, even in sensitive scenarios.◆

Important Concepts in Environmental Law – the Idea of "Sustainable Development"

Jeff Surtees

Jeff Surtees B. Comm., JD, LLM is the Executive Director of the Centre for Public Legal Education.

In the next few columns I am going to talk about some concepts that are important to understanding environmental law. The first is the idea of sustainable development. A quick search of the CANLII website shows the phrase appears in Canadian federal and provincial legislation 359 times and in published court decisions 237 times.

In 1987 an important United Nations commission (the "Brundtland Commission") defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." This definition is often used more or less word for word in legislation (in federal statutes it appears in the *Sustainable Development Act*, the *Auditor General Act*, the *Department of Natural Resources Act* and the *Canadian Environmental Protection Act* among others).

> *"Another aspect of sustainable development is the idea of promoting "inter-generational equity" - making sure that enough of the earth's resources are left to allow future people to meet thier needs."*

What sustainable development means to a regulator, to an industry or to a member of the public depends to a great deal upon whether the emphasis is on the first word or the second. One view is that there is meant to be a great deal packed into the simple phrase. The other view is that the phrase is malleable to the point of being meaningless because it tries to achieve an impossible balance between anthropocentric (people come first) and ecocentric (the natural world comes first) visions for the world.

The definition emphasizes that there is a relationship between sustainability and development. Early on, discussions

were often about trade-offs and about whether striking a balance between economic and environmental goals was even possible. More recently, discussions have emphasized the complex and interconnected nature of everything on earth. If fish populations disappear because of overfishing or destruction of habitat, then the tourism industry will suffer. If we farm in ways that ruin the soil, farmers will fail, and people won't be fed. If even the more modest climate change predictions come true, many economies will suffer. The Brundtland Commission report states, "the 'environment' is where we live; and 'development' is what we all do in attempting to improve our lot within that abode. The two are inseparable". One of the purposes of using the language of sustainable development is to remind us of that inseparability. Those seeking to use the earth's resources are reminded that they are not infinite. On the other side, people are reminded that economic activity is needed for human survival.

What is to be developed and what is to be sustained? One early study titled "Our Common Journey: A Transition Toward Sustainability" identified development possibilities such as child survival, life expectancy, education, equity, equal opportunity, wealth, production, consumption, societal institutions and society. Things to be sustained included the earth, biodiversity, ecosystems and the services they provide, resources, our communities and cultures. In 2000 the United Nations marked the millennium by adopting eight goals (the "Millennium Goals") including ensuring environmental sustainability (goal 7) and developing a global partnership for development (goal 8). In Canada, federal (and some provincial) departments must have regularly updated sustainable development strategies. There have been many other efforts to develop general goals, specific targets and methods of measurement. Some have been very local (for example, reducing water use in a community) and some have been on a grand, world-wide scale, such as eliminating hunger.

> *"What sustainable development means to a regulator, to an industry or to a member of the public depends to a great deal upon whether the emphasis is on the first word or the second."*

Another aspect of sustainable development is the idea of promoting "inter-generational equity" – making sure that enough of the earth's resources are left to allow future people to meet their needs. This is a quite profound idea – creating obligations to human beings who don't yet exist and thereby giving them rights. For many people in society, this feels like the proper thing to do, especially thinking about our own children or grandchildren. It is, however, philosophically complex. Thinking about sustainable development gives us the opportunity to think about what rights are, where they come from and who can hold them. There are no easy answers.

An obvious link between sustainable development and environmental law is that implementing policies, strategies, goals and targets most often requires legislation or regulation of some sort. There are many different views about how much should be done by regulation and how much should be left to market forces, but it is probably

safe to say that no one would seriously suggest that sustainable development will just happen on its own.

A somewhat less obvious link is the role that environmental lawyers can and do play in creating the kind of world we want to have. Society and the environment are both infinitely complex systems. Creating regulation that has the intended impacts and minimizing unintended impacts is a difficult task. Whether they are working in government, at universities, for non-profit environmental organizations or in industry, highly skilled people trained in environmental law are important players in debating and creating policies, laws and regulation for sustainable development.

Next time, we will explore another concept that is important to environmental law – the "precautionary principle". ◆

Resolving Family Law Disputes: Alternatives to Court

John-Paul Boyd

"Earlier this year, the Canadian Research Institute for Law and the Family published the results of a study of family law lawyers' opinions about resolving family law disputes through mediation, arbitration and litigation."

When adults leave a serious relationship, they have a lot of decisions to make. Sometimes these are small decisions, about who can keep the dishes or the books, but more often they are big decisions. Things like where the children should mostly live, how their time will be divided, who should pay how much in support and whether the family home should be kept or sold. Decisions like these, and a few more besides, all fall under the umbrella of family law.

People are often able to resolve these decisions on their own, but when they can't, they have a problem. Walking away from difficult family law disputes is rarely a good idea, as these disputes involve the most sensitive, most personal and most consequential legal issues there are, and the stakes are usually very, very high.

Assuming you're not going to walk away, there is yet another decision to make. How are you going to handle the legal issues you and your spouse or partner can't resolve on your own?

Most people say that legal disputes are handled in court. That's fair. Court is pretty much the only way you see legal disputes being resolved in the media. You can watch *Judge Judy*, *Divorce Court* and *The People's Court* during the day, lawyer dramas like *Suits*, *Law & Order* and *Boston Legal* in primetime, or *The War of the Roses*, *Kramer vs Kramer* and *Irreconcilable Differences* if you want to go to the theatre. If you'd rather curl up in a reading chair, you can pick up Scott Turow's *Presumed Innocent*, Michael Connelly's *The Lincoln Lawyer* or pretty much anything ever written by John Grisham.

The usual alternatives to court include negotiation, mediation and arbitration. *Negotiation* is a bargaining process in which the people involved in a legal dispute, the *parties*, try to find ways they can each compromise and settle their differences. *Mediation* is a bargaining process in which a neutral third-

party, a *mediator*, helps the parties talk to each other and identify possible solutions. *Arbitration* is a process in which a neutral third-party, an *arbitrator*, listens to each party's evidence and arguments, and makes a decision resolving the dispute. Handling disputes in court is called *litigation*.

Court isn't the only way to handle family law disputes. And, to be frank, it's pretty much the worst way to handle most family law disputes.

> *"Walking away from difficult family law is rarely a good idea, as these disputes involve the most sensitive, most personal and most consequential legal issues there are, and the stakes are usually very, very high."*

Litigation is a complex, formal process in which disputes are resolved by the order of a judge, following a public trial. Litigation is governed by elaborate rules of procedure that are often written in language that is hard to understand and require the parties to fill out difficult forms that are also hard to understand. Fees are charged for almost every step in the litigation process, from starting a law suit to filing court forms, and include a special fee that is charged for each day of trial. Despite this, Canadian courts are very busy. It's not unusual for family law cases to take two to four years to wrap up.

Negotiation, mediation and arbitration are informal, private processes that take place out of the public eye, in an office, a boardroom or a coffee shop. They're also speedy, since scheduling a meeting for negotiation or mediation, or a hearing for arbitration, is just a matter of picking a day that works for everyone's calendars. And since they're speedy, they're also usually cheaper than litigation.

Earlier this year, the Canadian Research Institute for Law and the Family published the results of a study of family law lawyers' opinions about resolving family law disputes through mediation, arbitration and litigation. Although almost all of the lawyers it surveyed used litigation to resolve family law disputes, almost all of them preferred not to litigate. The lawyers said that:

- litigation costs more than mediation and arbitration, even in high-conflict disputes;
- the results they achieve through mediation and arbitration were much more likely to be in the interests of their clients, and their clients' children, than the results they usually achieve through litigation;
- their clients are more satisfied with the results they achieve through mediation and arbitration than through litigation;
- the results they achieve through mediation and arbitration last longer than the results they usually achieve through litigation;
- resolving disputes through mediation and arbitration makes it easier for their clients to cooperate with each other in the future than litigation; and,
- litigation takes more than twice as long to wrap up a family law dispute than mediation and arbitration, and can cost up to twice as much.

Almost four-fifths of the family law lawyers surveyed agreed that mediation is usually cost-effective for their clients, and more than three-fifths said that arbitration is usually cost-effective. On the other hand, almost all of the lawyers surveyed, 87.1% of them to be exact, said that litigation is *not* cost-effective!

Although litigation has its place — you may have no choice but to go to court, at least at the beginning, if someone is making threats to destroy property or leave the country with the children — it's not necessarily the best option. If you're concerned about the length of time it will take to get into court and the amount of money litigation will cost, you owe it to yourself and to your children to think about another option.

I'll write about mediation and arbitration, and a process called parenting coordination that uses elements of each, in more detail in future articles. ◆

John-Paul E. Boyd is a family law arbitrator and mediator, working in Alberta and British Columia, and is the former executive of the Canadian Research Institute for Law and the Family.

One's Trash May be Police Treasure: *R v Patrick*

Peter Bowal, Joelle Wong and Charles Crossman

"Location is not the litmus test for determining the expectation of privacy."

R v Patrick, 2009 SCC 17, para 6

Introduction

In Canada, our home is our castle, at least in legal terms. We enjoy the greatest constitutional protection of privacy in our homes. What happens when our private personal information from our homes is set outside as trash? We expect it will go straight to the waste disposal system. Are we entitled to privacy for our garbaged personal information? In 2009, the Supreme Court of Canada answered this question in *R v Patrick*.

Facts

In 2003 Russell Patrick was in his late twenties, a university graduate in physics and a former champion swimmer. He had represented Canada at the 1994 Commonwealth Games and held the Canadian men's 100-metre breaststroke record from 1995 until 2001. Patrick was also successful in the narcotics industry, at the top of a sophisticated criminal organization targeting young people. He operated an ecstasy lab in his house.

Picking through abandoned garbage is a common police practice in criminal investigations. Six times in December 2003, without a warrant, Calgary police went to the lane behind Patrick's house in the early morning, reached into the airspace across the fence line into Patrick's garbage cans, pulled out the garbage bags, and seized many items that they found inside, including receipts for the purchase of chemicals, torn-up chemical recipes and instructions, gloves, used duct tape and packaging for a scale. They put the bags back in the cans. The police officers did not step foot onto his property.

> *"... garbage collectors do not promise to keep the trash confidential."*

These garbaged items were used to obtain a warrant to search his house and garage, which in turn yielded further evidence. Patrick was charged for unlawfully producing, possessing and trafficking in an illegal drug.

Unreasonable Search and Seizure?

Section 8 of the *Canadian Charter of Rights and Freedoms* guarantees freedom from unreasonable search and seizure by government agents. At his 2005 trial, Patrick argued that by taking his garbage bags from his property, the police had breached this right. He argued that all evidence obtained from his garbage should be inadmissible in any trial against him.

Supreme Court of Canada Analysis

The Supreme Court unanimously found no *Charter* violation. Section 8 protection is limited to a *reasonable* expectation of privacy. Did Patrick have a reasonable expectation of privacy in his discarded garbage bags and their contents?

The subject matter of the search here was not merely 'garbage'. It was information of the householder's activities and lifestyle. The Court said "people generally have a privacy interest in the concealed contents of an opaque and sealed 'bag of information.'"

In assessing the reasonableness of a claimed privacy interest, the Court looks at the totality of the circumstances. Did Patrick have an *objectively* reasonable expectation of privacy in his abandoned garbage? The garbage bags were placed at Patrick's property line, accessible to anyone passing by. The Court said the police reaching through Patrick's airspace to retrieve them was "relatively peripheral." This was not a "perimeter search" since police did not walk onto private property. They were entitled to be in the public alley behind Patrick's home.

> *"Did Patrick have a reasonable expectation of privacy in his discarded garbage and thier contents?"*

The Court concluded Patrick abandoned his original privacy interest in the contents of the garbage bags as soon as he placed the bags out for collection. He retained control over the garbage until he placed it within reach of his lot line. Once he placed the bags at the lot line, Patrick had sufficiently abandoned his interest and control to eliminate any *objectively* reasonable privacy interest." At that point, he had "done everything required of him to commit his rubbish to the municipal collection system." The bags were unprotected in an open container, and easily accessible by anyone walking by. The bags were not yet collected by the garbage collectors. Even if they had been collected, garbage collectors do not promise to keep the trash confidential it would be unreasonable for a homeowner to expect ongoing confidentiality in their trash. An independent observer would not think an expectation of privacy was reasonable in the circumstances.

Patrick had abandoned the garbage bags, so there was no existing privacy interest when the police retrieved them. The Court said the police technique was objectively reasonable. Patrick's surrender of his lifestyle and biographical information in his trash tipped the balance in favour of the legitimate demands of law enforcement. Patrick was sentenced to four years imprisonment for trafficking ecstasy and fined $48,000.

The Law Post-*Patrick*

After *Patrick,* the Supreme Court continues to emphasize that expectations of privacy will be assessed by the totality of the circumstances. Yet, the numerous considerations are cumbersome and subjective. Last year, the Court restated and slightly simplified the inquiry whether one's expectation of privacy is *objectively* reasonable in *R v Marakah,* a case involving cell phone text messages.

A homeowner who has no remaining interest in physical possession of property cannot claim a strong interest in its privacy, specifically the information embedded in one's garbage. Canadians should think about this before discarding personal and private information in their trash. The police may be reading it.◆

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Effects of the Notwithstanding Clause on Human Rights

Linda McKay-Panos

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Recently, there has been much discussion of the use of the notwithstanding clause, which is section 33(1) of the *Canadian Charter of Rights and Freedoms (Charter*). Section 33(1) reads:

> *Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.*

Section 33(3) provides that a declaration made under section 33(1) shall cease to have effect after five years and section 33(4) states that a declaration may be re-enacted by Parliament or the legislatures.

Ontario's Premier Doug Ford recently said he would use the notwithstanding clause to reduce the number of Toronto's wards for the October 2018 municipal election. The Ontario Superior Court had struck down the legislation (Bill 5) as an unjustified *Charter* infringement on freedom of expression (See*: City of Toronto et al v Ontario (Attorney General),* 2018 ONSC 5151). The Ontario Court of Appeal granted a stay of the ruling, thus allowing the election to proceed without Premier Ford invoking the notwithstanding clause—at least until after the appeal is heard.

Also, after the CAQ (Coalition Avenir Québec) won the provincial election in Québec, newly elected Premier François Legault stated that he would invoke the notwithstanding clause to address *Charter* concerns with legislation that bans anyone in a position of authority (e.g., teachers, police officers, judges) from wearing any

"conspicuous" religious symbols at work. If they do, they will be dismissed from their jobs.

These two examples raise the important issue of "What was the intended purpose of including the notwithstanding clause in the *Charter* and do these situations merit its use?"

Most agree that section 33 was intended as a safety valve to be used only rarely. Commentators thought that section 33 would be relied on to preserve our basic social and political institutions and to enable legislatures to overcome "unacceptable judicial determinations where there was popular support for doing so" (Marc-André Roy and Laurence Brosseau, The Notwithstanding Clause of the Charter (May 7, 2018) Library of Parliament (Roy and Brosseau)).

> *"Most who favour the inclusion of section 33 believe it is intended to be used only in exceptional circumstances. In addition, they assert that the five-year limit on any use of the notwithstanding power limits the threat to individual rights."*

Section 33 has not been invoked very often. Québec was the first province to seek to use the notwithstanding clause. An *Act respecting the Constitution Act, 1982*, SQ 1982, c 21, re-enacted all Québec legislation that had been adopted before the *Charter* came into force, with a standard override clause being added to each statute. The SCC held in *Ford v AG Quebec*, [1988] 2 SCR 712 that while section 33 could be relied on in relation to several *Charter* rights in multiple laws, it could not be used retroactively (backdated). Québec subsequently passed Bill 178, which used the notwithstanding clause to restrict the posting of commercial signs in languages other than French. After the new law was criticized by the United Nations Human Rights Committee, then Premier Bourassa instructed the National Assembly to rewrite the law to conform to the *Charter* and the notwithstanding clause was removed.

The Saskatchewan government invoked the clause in 1986 as a preventive measure during a labour dispute with provincial government workers. More recently, Saskatchewan passed the *School Choice Protection Act* SS 2018, c 39, in which the legislature invoked the notwithstanding clause to effectively overrule the Court of Queen's Bench ruling in *Good Spirit School Division No 204 v Christ The Teacher Roman Catholic Separate School Division No 212*, 2017 SKQB 109, which held that the government could not provide funding for non-Catholic students to attend Catholic separate schools.

The Legislative Assembly of Alberta in 2000 amended the province's *Marriage Act* to define marriage as heterosexual and inserted the notwithstanding clause to override the *Charter*. It was widely thought that this bill was outside of Alberta's jurisdiction because the federal government has jurisdiction over the capacity to marry. In any event, the government of Alberta did not renew the invocation of the notwithstanding clause after five years.

Section 33 is also seen as a safety valve preventing courts from acting as

legislators, and thus compromising judicial independence and impartiality (Roy and Brosseau). Because political decisions are made by elected representatives, this removes politicization from the courts (Roy and Brosseau). Further, because *Charter* rights and freedoms are stated quite generally, and are susceptible to varying interpretations, courts could render judgments unforeseen by the drafters of the *Charter,* and section 33 could assist in those circumstances (Roy and Brosseau).

> *"Ontario's Premier Doug Ford recently said he woud use the notwithstanding clause to reduce the number of Toronto's wards for the October 2018 municipal election."*

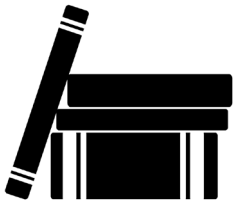
Critics of the notwithstanding clause argue it is inconsistent with the entrenchment of human rights and freedoms and fear that the majority may impose upon or limit minority rights unconstrained by the Constitution (Roy and Brosseau). In addition, section 1 of the *Charter* already provides an opportunity for governments to impose reasonable limits on rights if the limits can be "demonstrably justified in a free and democratic society" and permits courts to accommodate legislative goals that infringe on a guaranteed right or freedom (Roy and Brosseau). Finally, some argue that the notwithstanding clause will be invoked in cases where rights are most in need of protection. For example, Eugene Forsey argued that if the notwithstanding clause and the *Charter* were in force during World War II, it could have allowed the Canadian government to continue to forcibly inter Japanese-Canadians regardless of any fundamental rights they might have had (Roy and Brosseau).

Premier Ford followed the usual route for invoking the clause—after a court ruling. Former Prime Minister Jean Chretien, former Saskatchewan premier Roy Romanow, and former Ontario attorney general Roy McMurtry—all present at the negotiation of the notwithstanding clause in 1981—released a statement that condemned Ford for using the notwithstanding clause improperly. Most critics were particularly concerned about the timing—the reduction in seats occurred in the weeks prior to the election. Ford's invocation of the notwithstanding clause has created concern that this will embolden other governments to use it. Once seen as a politically dangerous decision, using the notwithstanding clause may now be politically popular.

The Quebec situation is very theoretical. Legislation banning authority figures from wearing religious symbols would need to be introduced and passed. A court would have to declare the legislation as violating the *Charter,* and then Premier Legault would have to pass amended legislation using the notwithstanding clause. This would take at least two to three years. This proposal seems problematic. It appears to go to the very heart of rights that the *Charter* seeks to protect—minority religious rights.

It will be very interesting to see what occurs after the Ontario Court of Appeal rules on Bill 5 and whether the new Québec government will wade, once again, into the issue of invoking the notwithstanding clause. Further, Ontario's, and possibly Québec's use of the notwithstanding clause could spark discussions about amending the *Charter* to exclude the notwithstanding clause altogether.◆

The Book That Didn't Bark: Forster's Maurice



Rob Normey

You have no doubt heard the expression "the dog that didn't bark – a wonderful phrase emanating from an old Sherlock Holmes story by Arthur Conan Doyle. I would like to conduct a little touch of literary sleuthing and ask why E.M Forster, eminent English novelist, declined decade after decade to publish the one and only novel that deeply explored the truth of his nature as a gay man. His literary executor published *Maurice* in 1971, one year after Forster's death. In exploring the decision to refrain from publishing a book first completed in 1914, we can also ponder the question of if and when a writer has a duty as citizen and public intellectual to enter the public arena and adopt a clear position on a contentious issue. I suggest that publishing the novel in the late 1950s would have been an ideal intervention on Forster's part in the debate over whether to decriminalize homosexuality.

E.M Forster was one of the century's truly great novelists. Following a string of elegant comic novels, Forster penned an ambitious Condition-of England novel, *Howard's End*, in 1910. Fourteen years elapsed before he wrote his masterpiece, *A Passage to India.* He then clearly struggled, publishing no novels at all for the last 46 years of his life. Yet all the while, he had another novel that he circulated to those close friends he thought would be sympathetic to his attempt to depict a positive gay relationship in Edwardian England. The legal context to his decision to refuse to "let his novel bark" is critical. Homosexual relations between men was against the criminal law. Harsh punishments could be meted out. Further, obscenity laws prohibited works that depicted gay or lesbian relationships from being published, or at least created a risk of prosecution. While all of this is true, it certainly does not provide a full explanation for Forster's unwillingness to take a public stand. In the 1950s attitudes began to change in English society, particularly amongst writers and their readers. Mary Renault forged ahead with her novel *The Charioteer* in 1953. Even earlier, Angus Wilson wrote his remarkable novel *Hemlock and After*, in 1952. This tale of

> *"In 1960, despairing of witnessing a substantial change in the law notwithstanding the Report's clear recommendations for a more enlightened approach, Forster penned a "Terminal Note" to Maurice, to be published after his death."*

an aging novelist and bisexual who journeys through the homosexual underworld calls into question certain liberal pieties and the potential pitfalls of liberal humanism. It also brought squarely into the open areas of British life –homosexuals making assignations that were illegal and subject to harsh punishment. Forster was sufficiently impressed by the debut novel that he wrote to Wilson to congratulate him but also to express a degree of unease about the plot.

A series of prosecutions of gay men, some of them high-profile and extensively covered in the press, ushered in debate in the House of Commons about the problematic state of the law, at least as progressive politicians and their constituents saw it. The landmark Wolfenden Report was published in 1957, recommending decriminalization. It paved the way for more enlightened attitudes to gain ground and legal reform finally took place in 1967. Yet, through this period Forster the novelist remained silent.

Perhaps it is more correct to say, as his biographer Wendy Moffatt does, that he made a few small feints in the direction of public advocacy. But really, the emphasis has to regrettably be on the limited nature of his role.

In 1960, despairing of witnessing a substantial change in the law notwithstanding the Report's clear recommendations for a more enlightened approach, Forster penned a "Terminal Note" to *Maurice*, to be published after his death. He indicated that, because homosexuality remained a crime, it would have to remain in manuscript. He suggested that the guardians of public morality in England could not accept such a book. Perhaps it would lead to a prosecution for obscenity. His "Terminal Note" parallels dialogue found in the novel. Maurice, the

> *"The legal context to his decision to refuse to "let his novel bark" is critical. Homosexual relations between men was against the criminal law. Harsh punishments could be meted. Further, obscenity laws prohibited works that depicted gay or lesbian relationships from being published, or at least created a risk of prosecution."*

stockbroker who dares to live according to his heart's desires, consults a hypnotist who acts as his "reality teacher." He suggests to the outcast that he leave England for France or Italy, where homosexuality is no longer illegal. Asked if the law might not change in England, he tells Maurice that he doubts England will change, as it has always been disinclined to accept human nature. The entire chapter is both humorous and moving, as the novel adroitly reveals both the absurdity and the rigidity of the conservative society that is willing to repress and punish so many gifted men.

At the end of the "Terminal Note" Forster laments that, notwithstanding Wolfenden, police prosecutions will continue and Clive on the bench (Maurice's platonic lover from university, now an establishment figure in the legal profession) will continue to sentence gay men in the dock. But this prognosis was unduly bleak. A strong advocacy group, the Homosexual Law Reform Society, was effectively making the case for sensible

legal reform. More and more writers and politicians were willing to enter the public fray to offer eloquent protests against the many injustices that the status quo represented. The Labour Party was voted into power in 1964, following, ironically, a sex scandal involving a very embarrassing heterosexual affair between a government minister, Profumo, and a young woman. Prime Minister Harold Wilson appointed a well-know liberal reformer, Roy Jenkins, as Home Secretary. Jenkins worked with others in the party to make the case for compassion and understanding and engineered a remarkable breakthrough in Parliament. Homosexual relations between consenting adults ceased to be criminal.

Looking back on this period, though, it is vital to recognize that major reform was not inevitable. There were many conservative voices crying out that it was dangerous to make such far-reaching changes. Therefore, the actions of authors like Forster could indeed have helped to make a difference. In any event, he did make the imaginative effort to write this book that didn't bark, and for that we can be grateful. ◆

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

Back to the Future on Registered Charities and Political Activities

Peter Broder

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.

Regulation of registered charities' "political activities" has long been a bugbear of both the sector and governments. My last column dealt with an Ontario Superior Court decision that ruled parts of the current *Income Tax Act* (*ITA*) provisions governing charities' political activities unconstitutional as in violation of the *Canadian Charter of Rights and Freedoms*. Much has happened since then.

In mid-September, the government announced that it would both be appealing the ruling (which has implications for other parts of the *ITA* that feature conditional preferential tax treatment) and introducing legislation to reform the impugned sections of the current legislation.

Later in September, the proposed reform legislation was released. It essentially removed the "substantially all" element of the old provisions and returned to a model where political activities of registered charities are assessed based on the purposes they further, rather than having in-and-of-themselves a charitable or non-charitable character. The new measures also retained the prohibition on partisan political activities that was part of the old provisions.

As parts of the proposed measures are retroactive, both the government and Canada Without Poverty (the party that brought the Superior Court application) have agreed that the appeal of the decision should be postponed pending enactment of the new legislation.

Historically, courts and regulators in most jurisdictions have relied on an analysis of purposes – and the furtherance through activities of those purposes – to determine whether

the entity qualifies as a charity. In this context, it is well established that purposes that are partisan are a bar to being a charity.

However, the case law around purposes that are not explicitly partisan, but entail work that overlaps with positions held by parties or candidates, is inconsistent and difficult to reconcile. It is also rooted in doctrines and worldviews that are at odds with many contemporary values. For example, if a court held as charitable a group advocating for changes in law or policy, it would be usurping the roles of other branches of government to determine what laws ought to be in place and how they ought to be administered. A more modern take on this is that a dynamic and consultative process is the preferred way to develop and implement law and policy.

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In the 1980s this whole matter came to the fore in Canada when a Toronto legal clinic sought federal registration as a charity. In *Scarborough Community Legal Services v. Minister of National Revenue,* the Federal Court of Appeal upheld a decision by Revenue Canada – later the Canada Revenue Agency (CRA) – to deny registration to a community-based legal clinic. It found that the group's participation in a rally at the provincial legislature and involvement in legal reform efforts related to certain statutory policy matters constituted impermissible political activity. The government responded by enacting legislation intended to deem as charitable limited non-partisan political activity by registered charities, but later administered as placing a hard limit on the amount of such activity that charities could undertake.

The approach taken to enforcing these measures effectively rendered unnecessary any reference to purposes in characterizing the political activities of charities. The same enforcement approach was continued notwithstanding the 1999 judgment of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, in which the majority opinion clearly and unequivocally endorsed looking to purposes to determine the nature of an activity undertaken by a charity.

Guidanace was developed guidance in the early 2000s to help charities navigate through the provisions and the approach taken by CRA. That guidance acknowledged the legitimate role of charities in assisting government to develop and implement public policy. It created a fairly stable environment around the issue for a number of years, although board members of charities often remained fearful of mandating any policy engagement with government lest their organizations be found to have violated the hard cap on political activities that the *ITA* provision required.

With the Political Activities regulatory initiative of the 2012 Budget, that equilibrium was lost. The audits that were part of that initiative, and the related media attention on the issue, re-ignited confusion and controversy around charities' role in public policy.

Happily, the new measures offer an opportunity to return to a strictly purpose-based analysis of political activities. However, there will be two principle challenges if they are enacted as proposed. First, they retain a provision in the current definition of a charitable organization that requires that all its resources "are devoted to charitable activities", which could open the door to administration of the provision characterizing the nature of an activity in-and-of-itself as charitable or not. This could mean that (as there is no longer any deeming as charitable of such activity) a small non-partisan action of a charity might jeopardize its status. Given various other provisions of the *ITA* that prohibit non-charitable conduct, this aspect of the definition could be dropped without creating undue risk.

Secondly, the measures retain the prohibition on both "direct" and "indirect" partisan support. There is no indication of what constitutes "indirect". The wording could target:

- implicit rather than explicit support;
- use of resources rather than an articulated endorsement;
- social media partisan commentary by stakeholders who have no official connection with a charity;
- coinciding policy between a charity and a political party; or
- some other harm.

Preliminary indications from CRA are that it does not intend to enforce the measures in that way. Still, clearer language in the statute, or dropping the word "indirect" altogether would be preferable.

All in all, the measures are welcomed. The back to the future approach of making purposes the touchstone of whether an activity is acceptable or not is, so to speak, a step forward. Let's hope that it presages wider reform of federal charity regulation that is badly needed.◆

New Resources at CPLEA

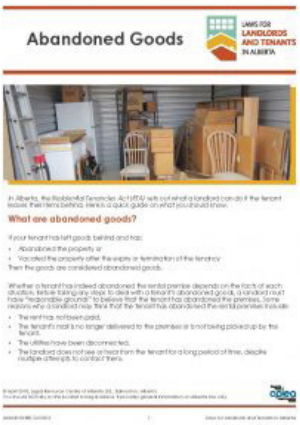
The following resources were funded by Alberta Real Estate Foundation.

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

In this issue of LawNow we are highlighting 3 new publications of interest to renters and landlords in Alberta. These resources can be found on CPLEA's topic specific landlord and tenant website. LandlordandTenant.org offers plain language information for Albertans on renting law in Alberta.

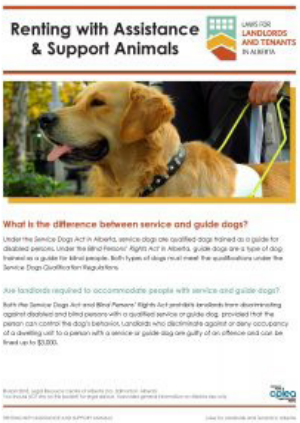
Minimum Housing and Health Standards

Under the *Residential Tenancies Act*, the landlord must ensure that the rental property meets minimum housing standards under the *Public Health Act* and its regulations such as the *Housing Regulation* The *Housing Regulation* requires that owners maintain housing premises in compliance with the *Minimum Housing and Health Standards*. The *Minimum Housing and Health Standards* sets out specific conditions that are essential to making a place safe and healthy to live in. Landlords must follow both the *Housing Regulation* and corresponding *Minimum Housing and Health Standards* for the upkeep and condition of their rental properties. This tipsheet provides an overview of what landlords and tenants should know about the Standards.



Abandoned Goods

Abandoned goods are any property a tenant leaves behind after they move out of the rental property. In Alberta, the *Residential Tenancies Act* (RTA) sets out what a landlord can do if the tenant leaves their items behind. This is a quick guide on what you should know.



Renting with Assistance & Support Animals

This publication looks at the differences between service and guide dogs as well as companion, therapy and emotional support animals. It addresses the question "Are landlords required to accommodate people with companion, therapy or emotional support animals in their rental units." It also provides information for landlords on how they can determine if an animal is certified and covered under the *Service Dogs Act* and the *Blind Persons' Rights Act*.

For a listing of all CPLEA publications see: www.cplea.ca/publications/

Thank You

Thank you to all of our volunteer contributors
for their continued support.

We would also like to thank the Alberta Law Foundation and
the Department of Justice Canada for providing operational
funding, which makes publications like this possible.

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