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LawNow

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Protecting Privacy

Privacy For Children

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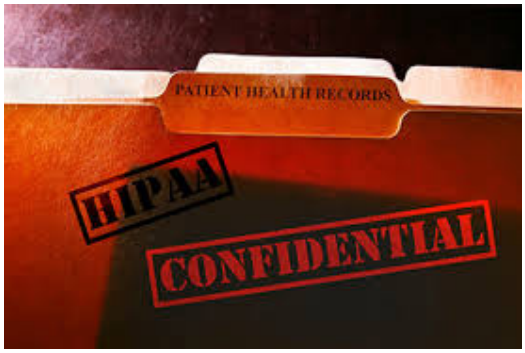

Myrna El Fakhry Tuttle

Requesting medical information from employees may raise privacy issues. Employees have the right to keep their medical information confidential and private. But employers also have the right to know about their employees' illness or disability, and have the right to seek medical information in order to provide appropriate accommodation. So, how can we balance the two?

In Alberta, the *Freedom of Information and Protection of Privacy Act (FOIP)* section 17 provides that the disclosure of some personal information, including medical information, is presumed to be an unreasonable invasion of privacy. Without consent, such information would only be released in exceptional circumstances.

Section 3 of the *Personal Information Protection Act (PIPA)* covers the collection, use, and disclosure of personal information. *PIPA* balances an individual's right to have his or her personal information protected, and an organization's need to collect, use or disclose personal information for purposes that are reasonable. Under *PIPA*, while you may need to collect, use and disclose certain personal information, you must, according to privacy legislation, explain the reason for collecting the information and how it may be used or disclosed (see: *A Guide for Businesses and Organizations on the Personal Information Protection Act*).

The *Health Information Act* also governs the disclosure of health information in Part 5.

An employee's personal medical information is generally acknowledged to be private and confidential. However, it is well established (and should be obvious) that an employer is entitled to access sufficient information for legitimate purposes. This includes assurance that the employee is able

> *"Except where required or permitted by law, an employer cannot seek and a doctor cannot give out any patient medical information without the patient's freely given informed specific authorization and consent."*

to continue or return to work, or to provide necessary appropriate accommodation to ensure that the employee can work without jeopardizing his or her safety, or that of other employees. An employer is entitled only to the least such information necessary for the purpose and an employee should generally not be required to disclose their medical files, or even diagnosis or treatment. However, exactly what is required will depend on the circumstances and purpose – and may very well include diagnosis, or treatment, or other information (*Complex Services Inc v Ontario Public Service Employees Union, Local 278*, 2012 CanLII 8645 (ON LA) at para 84).

Employers may seek medical information in a variety of circumstances, including to support:

- a request for short-term sick leave;
- extended sick leave, or partial medical leave;
- an application for benefits;
- a request to return to work; or
- a request for accommodation (see: Devins, Jewell & Sartison, *Medical Information in the Accommodation Process*, (December 2013)).

> *"An employer is not entitled to request an Independent Medical Examination (IME) in an effort to second-guess an employee's medical expert."*

An employer has a legitimate interest in seeking information related to employee's prognosis and ability to attend work on a regular basis. The employer is entitled to request that the employee provide medical information and then to consider what, if any, impact the information had on its duty to accommodate the employee in the workplace. There is nothing inherently discriminatory for an employer to request a doctor's note from employees to substantiate a request for sick leave (*Stewart v Brewers Distributor and another*, 2009 BCHRT 376 at para 48).

The Human Rights Tribunal of Ontario stated that an employee who seeks workplace accommodation has a duty to cooperate in the accommodation process by providing his or her employer with a reasonable amount of information about their physical and/or mental work restrictions and disability-related needs so that the employer can assess whether and how the employee's needs may be accommodated without undue hardship (*Bottiglia v Ottawa Catholic School Board*, 2015 HRTO 1178 (CanLII) at para 99, affirmed 2017 ONSC 1517 (CanLII)).

The duty to accommodate requires persons seeking accommodation to make available to their employer such details of their medical circumstances as are necessary to prove the disability and to design and achieve the accommodation. In some cases, this can include diagnosis or treatment information, but each case depends upon its own circumstances (*Peace Country Health v United Nurses of Alberta*, 2007 CanLII 80624 (AB GAA)).

The duty to accommodate extends to employees who use medical marijuana, supported by a medical certificate, in the workplace. Can employers remove

> *An employee's personal medical information is generally acknowledged to be private and confidential. However, it is well established (and should be obvious) that an employer is entitled to access sufficient information for legimate purposes.*

employees who use medical marijuana from safety-sensitive positions? In *Calgary (City) v Canadian Union of Public Employees*, the arbitration board stated that if there was no evidence that the grievor's use of marijuana for medical purposes had any impact on his or her ability to perform safety-sensitive duties in a safe manner, then the employer cannot transfer the grievor to a non-safety-sensitive position (*Calgary (City) v Canadian Union of Public Employees (Cupe 37)*, 2015 CanLII 61756 (AB GAA)). However, an employer who terminated an employee working in the logging industry for smoking marijuana without having a medical authorization to lawfully possess and use marijuana for medical purposes and without informing his employer, did not discriminate against its employee (*French v Selkin Logging*, 2015 BCHRT 101 (CanLII)).

In the purely technical sense of the term, an employee has an "absolute" right to keep their confidential medical information private. But if the employee exercises that right in a way that thwarts the employer's exercise of its legitimate rights or obligations, or makes it impossible for the employer to provide appropriate necessary accommodation, there are likely to be consequences. This is because an employee has no right to sick leave benefits or accommodation unless the employee provides sufficient reliable evidence to establish that they are entitled to benefits, or that they have a disability that actually requires accommodation and the accommodation required. Although an employer cannot discipline an employee for refusing to disclose confidential medical information, the employee may be denied sick benefits, or it may be appropriate for the employer to refuse to allow the employee to continue or return to work until necessary such information is provided (*Complex Services Inc.* at para 86).

In certain circumstances, the procedural aspect of an employer's duty to accommodate will permit, or even require, the employer to ask for a second medical opinion where the employer had a reasonable and *bona fide* reason to question the adequacy and reliability of the information provided by its employee's medical expert. An employer is not entitled to request an Independent Medical Examination (IME) in an effort to second-guess an employee's medical expert. An employer is only entitled to request that an employee undergo an IME where the employer cannot reasonably expect to obtain the information it needs from the employee's expert as part of the employer's duty to accommodate (*Bottiglia v Ottawa Catholic School Board*, 2017 ONSC 2517 (CanLII) at paras 76-77).

> *The duty to accomodate extends to employees who use medical marijuana, supported by a medical certificate, in the workplace.*

However, employers need to have the employee's authorization in order to collect and use personal information. Thus, an employer cannot contact an employee's doctor without the consent of the employee. There is nothing in the mere existence of an employment relationship that gives the employer any inherent right to compel its employees to compromise their legitimate right to keep personal medical information confidential. An employer only has a right to an employee's confidential medical information to the extent that legislation or a collective agreement or other contract of employment specifically so provides, or that is demonstrably required and permitted by law for the particular purpose. Except where required or permitted by law, an employer cannot seek and a doctor cannot give out any patient medical information without the patient's freely given informed specific authorization and consent (*Hamilton Health Sciences v Ontario Nurses' Association*, 2007 CanLII 73923 (ONLA) at para 21).

In addition, there are some restrictions on the employers' right to seek medical information. Employers are not allowed to use and disclose the medical information that they receive any way they want. The improper disclosure of the employee's medical information can constitute a breach of *PIPA*. An employer discussing an employee's medical information with other employees is inappropriate. Employees who have disclosed their medical information in order to be accommodated have the right to confidentiality. Medical information that they share with their employer should be kept private, unless they give their consent to the employer to disclose the information. Within the workplace, those who need access might include the employee, the employee's supervisor and other staff handling accounting, payroll, deductions, benefits or related issues (see: An Employer's Guide to Employment Rules).

> *"There is nothing inherently discriminatory for an employer to request a doctor's note from employees to substantiate a request for sick leave."*

Employees have the right to keep their medical information private. But in order to be accommodated in the workplace, they are required to provide relevant medical information. Employers have a duty to accommodate employees to the point of undue hardship, therefore they have a right to seek medical information when necessary.◆

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Privacy in Judicial Decisions

Peter Bowal

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Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.
– Lord Acton (1834-1902)

Introduction

The legal protection of personal information that is collected and held by government is a relatively recent social development. It did not take long for government bodies to create protocols to minimize collection, use, disclosure and storage of personal information.

On the other hand, governments and courts need to be transparent and accountable. In *Vancouver Sun*, the Supreme Court of Canada said, in the context of the court system:

> *Public access to the courts guarantees the integrity of judicial processes by demonstrating 'that justice is administered in a non-arbitrary manner, according to the rule of law'. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.*

> *"Names have been on cases without incident since the country's founding. To my knowledge, no other country redacts parties' names from cases."*

The challenge with a new social development like privacy, is to balance it against other competing social interests like transparency in the legal system. What should be the limits of personal privacy? When should government disclose personal information collected?

This article introduces and briefly explains the recent issue of whether individuals who bring a civil lawsuit or appeal to an administrative body should be able to demand their identities be removed from those public court and administrative decisions.

Privacy Is Not An Absolute Right

Canadians may possess a broad understanding of rights, but they are also remarkably uninformed about the limits and nuances of those rights. For example, even without choosing to share something on social media, one's personal information is passively disclosed in the regular coming and going in one's day. People are observed and photographed in public. Communications are overheard and captured. Certain salaries, for example, must be disclosed annually by law. Sealing orders and publication bans of court proceedings are exceptional and courtrooms are virtually never closed to the public. The comparable freedom of the press is an essential constitutional right in our free and democratic society.

Privacy legislation governing the public sector also carves out numerous exceptions. The Alberta *Freedom of Information and Protection of Privacy Act*, section 4 states that it covers "all records in the custody or under the control of a public body, including court administration records", but then it goes on to list records which are exempt from the *Act*. Exemptions include information in a court file and judges' records, including their (and quasi-judicial administrative tribunal members') "personal notes, communication or *draft* decisions". This suggests that final decisions *might be* embraced by the *Act* and, accordingly, should be scrubbed to avoid disclosure of personal information.

Judges set out enough material personal information to establish the essential factual foundation of the case. Where an employee, for example, sues the employer for wrongful dismissal, the judge must analyze the evidence and determine the facts of the case. She will outline what the employee's role was and what s/he and others did or said that gave rise to the legal dispute. If damages are awarded, that employee's salary and benefits, as well as mitigation efforts, will be relevant. Adjudicating always takes place in a living and true fact-specific context.

> *"Proponents of removing names from judicial decisions argue that this is merely further application of the law that prohibits disclosure of personal information collected and held by public bodies - in this case, the courts and their public servants, the judges."*

The question is whether employees are entitled to complete anonymity so that no one reading the decision would know their identities and they would be referenced by initials only in the case name.

Arguments in Favour of Privacy

The Internet and social media are agents of good as well as harm. Today, anyone can access personal information contained in online full text judicial decisions anywhere in the world at any time at no cost. Indexation and cache storage make this information unintentionally available on search engines like Google even when the purpose of the search is not to find judicial decisions. Court records and court attendance disclose parties' and witnesses' identities but these are not online. The principle of practical obfuscation intentionally builds in higher expenditures of time, effort and cost to

access the information, so that the few who persevere will most likely have a legitimate interest in obtaining it.

Consider the impact of public disclosure about one's job, marital status and struggles, debts, human rights complaints, and employment status. Information on finances, immigration status, residence, health, and children are some examples of sensitive personal information that – if publicly disclosed – could have negative reputational and security impacts.

Individuals sometimes say they can be personally harmed when they are publicly identified in judicial decisions. In this way, the government's compelled disclosure of one's personal information can be – in addition to illegal – embarrassing, prejudicial and dangerous. It can expose individuals to greater risk of identity theft, data mining, stalking, and discriminatory practices, among other things. Personal information can be taken out of context and used for nefarious purposes.

> *" Consider the impact of public disclosure about one's job, marital status and struggles, debts, human rights complaints, and employment status. "*

Judicial decisions are public but all personal information contained in them, including parties' and witnesses' identities does not need to be. This information is not always freely volunteered in the legal process. Disclosure in the litigation process is required to obtain legal recourse and consent to further publication is not granted.

If people must identify themselves for merely vindicating their legal rights, a chilling effect might set in and few might seek to do so. As a former federal Privacy Commissioner stated in a 2011 speech, "If people are deterred from going to courts or tribunals to enforce their rights or seek justice, we, as a society, need to be extremely concerned about access to justice."

Proponents of removing names from judicial decisions argue that this is merely further application of the law that prohibits disclosure of personal information collected and held by public bodies – in this case, the courts and their public servants, the judges. Accordingly, publishing names in judicial decisions *prima facie* offends privacy legislation.

Arguments Against Privacy

The issues of de-indexation and anonymization are separate, albeit related, privacy issues. De-indexation keeps judicial decisions out of general searches. One must find caselaw databases and then purposefully search them (this further required step is called "practical obfuscation"). Judicial decisions and virtually all administrative decisions are voluntarily de-indexed on the Internet (such as Canlii.org) and are out of the reach of external search engines such as Google.

While privacy commissioners and courts continue to order the few holdout administrative tribunals to de-index, this is likely to become a futile, unenforceable game of "whack-a-mole" as new, indexed databases launched all over the world continue to pop up. Media coverage of court cases mentions parties' names and remains fully indexed by search engines.

Removing parties' names from cases is technically easy to do in the clerk's office in Canadian courts. However, judges and administrative tribunal adjudicators, as a matter of practice, do not insert unnecessary personal information about any private individual in their decisions.

There are several reasons why parties' names *should* remain on judgments.

The venerable "open courts" principle, a cornerstone of the common law, enjoys quasi-constitutional status in Canada. The public interest favours transparency and accessibility in the development of the law to ensure public confidence in, and integrity of, the court system. Full access to information generates feedback and public debate which ensures accountability of institutions. Understanding the administration of justice and ensuring proper judicial behaviour demand full access to legal records.

Names have been on cases without incident since the country's founding. To my knowledge, no other country redacts parties' names from cases. If there has been a recent trend at all in this area, it is to further enlarge publication through televisions in courtrooms and live-streaming cases over the Internet.

Worst case scenarios of what hypothetically *could* happen cannot outweigh the value of open courts. Removing case names would be the start of the slippery slope. Court files would close and all evidence would have to be given under aliases. Then judges' names could be removed from their decisions. Elected officials might ask that their names be removed from debates and votes in the legislature. Once the redaction starts, we know not where it will end.

" There are several reasons why parties' names should remain on judgments. "

Personal embarrassment or financial prejudice to an accused, party or witness are generally not valid grounds for publication bans. It simply is not practical or feasible to police information on the Internet. In addition to courts, the media and everyone else would also have to be restrained from using names. With an emerging independent *Charter* right to a free press, this restriction on coverage is unlikely to happen.

Justice is a public good but there are limited judicial resources. Sometimes, it is necessary to limit access to the courts in cases of abuse and to bar vexatious litigants from bringing cases. Frivolous lawsuits waste valuable resources and harm the parties they target. The public has an interest in knowing who persistently makes unfounded allegations or fabricates evidence, and who abuses the legal system. Attaching names to cases provides necessary incentive for accountability and responsibility. Removing names from judicial decisions may serve as cover for troubling behaviour.

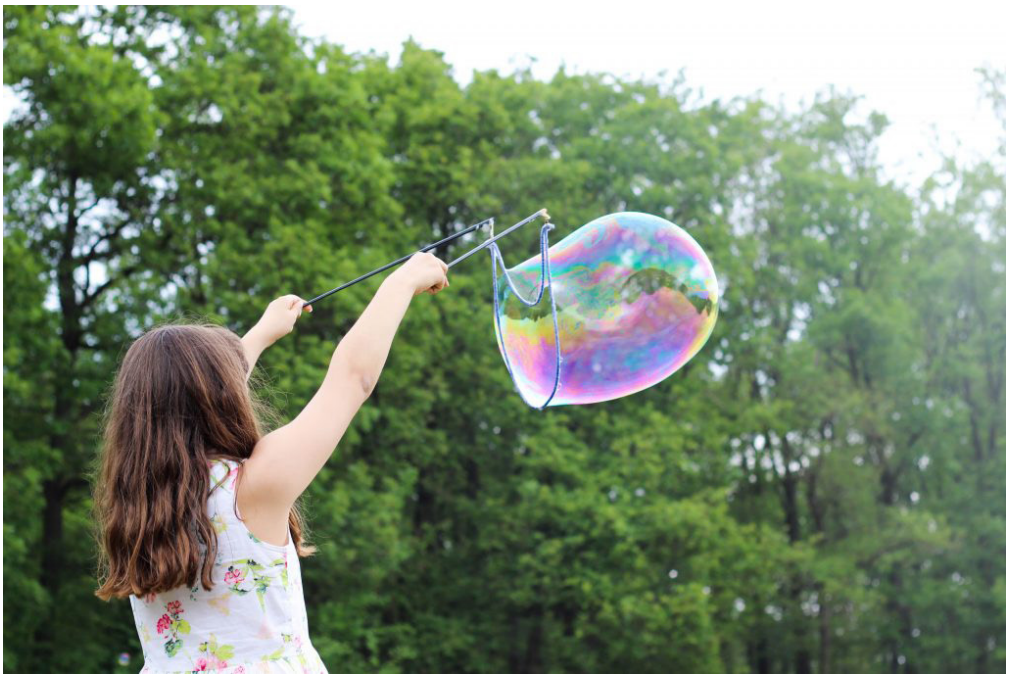
Parties could be notified at the outset that they will be identified in the judicial decision available online. Parties would then consent through continuing participation in the lawsuit to the disclosure of their identity.◆

Privacy Rights of Children

Khadija Zeeshan

Introduction

There is an ever-increasing concern for privacy rights of children. Privacy has many different dimensions and involves many different actors. The Oxford dictionary describes it as: "a state in which one is not observed or disturbed by other people". Privacy may be sought from the government, business and private individuals. Legislation and common law in Canada recognizes the different dimensions and actors involved in privacy. The international *Convention on the Rights of the Child ("Convention")*, *Canadian Charter of Rights & Freedom* ("*Charter*"), legislation including *The Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"), Alberta's *Personal Information Protection Act* ("*PIPA*"), the *Privacy Act, Alberta's Freedom of Information and Protection of Privacy Act* ("*FOIP*"), and actions in tort all protect the privacy rights of children. In combination, these laws, among other legislation such as the *Young Offenders Act* and the *Youth Criminal Justice Act*, directly and indirectly protect minors and their right to privacy. However, unlike the U.S., Canada has no single piece of legislation specifically protecting the privacy rights of children with the exception of the international UN *Convention,* binding Canada and its provinces.



> *"Alberta has yet to recognize any tort of privacy and lacks legislation on the matter as well."*

UN *Convention on the Rights of the Child*

Canada has signed and ratified the UN *Convention on the Rights of the Child*. Article 16 of the *Convention* specifically protects children's privacy. Although Canada is bound by the *Convention* to protect the privacy rights of children, the enforceability of the law is a process that has to be undertaken by the Government of Canada and its provinces. The international law has to be incorporated into domestic law in order for the international law to be enforceable. This also means when Canada ratifies a convention, it has to ensure that its domestic laws are in accordance with the treaty it is signing to avoid conflict.

The protection of privacy of children is a very broad provision. It reads as follows: "Children have a right to privacy. The law should protect them from attacks against their way of life, their good name, their families and their homes". The Supreme Court of Canada in the 2005 case of *R v. R.C.* explicitly refers to the *Convention* and its incorporation into the criminal justice system for youth. It wrote:

> *"In creating a separate criminal justice system for young persons, Parliament has recognized the heightened vulnerability and reduced maturity of young persons. In keeping with its international obligations, Parliament has sought as well to extend to young offenders enhanced procedural protections, and to interfere with their personal freedom and privacy as little as possible: see the United Nations* Convention on the Rights of the Child*… incorporated by reference in the* YCJA."

The Court goes on to to say that it cannot be presumed, as in the case of adult offenders, that "there will be minimal impact on a young person's privacy and security of the person."

> *"Canada has signed and ratified the UN Convention on the Rights of the Child. Article 16 of the Convention specifically protects children's privacy."*

However, this is not a blanket right. Section 24(2) of the *Charter* states the evidence still may be admissible if it can be proven that the right to privacy and security under question "would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice". Thus, there may be a breach of section 8 but evidence breaching section 8 (and the privacy of individuals) may still be admissible if it can be determined that it passes under section 24(2) of the *Charter*.

Canadian Charter of Rights and Freedoms

The *Charter* is part of the *Constitution*. It protects the reasonable expectation of privacy of individuals in Canada from the Government of Canada, its provinces and its agents under section 8, which reads as follows: "Everyone has the right to be secure against unreasonable search and seizure." This section applies in investigatory and

prosecutorial functions. In the 1984 Supreme Court of Canada case of *Hunter v Southam,* the Court stated that, in order to conduct searches, there must be reasonable and probable grounds there is evidence for an offence at the premises. (This is qualified by section s. 24(2) of the *Charter*, which may still permit evidence that is obtained unlawfully and in breach of section 8).

'Unreasonable' is a very flexible term, with variation on what it may entail. In the 1998 landmark case *R. v. M. (M.R.)*, the Supreme Court of Canada stated that the reasonable expectation of privacy for students significantly diminishes. The Court stated:

> *"It is lower for a student attending school than it would be in other circumstances because students know that teachers and school authorities are responsible for providing a safe school environment and maintaining order and discipline in the school. Students know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items."*

The Court took the following approach for searches by teachers and principals:

1. A warrant is not essential in order to conduct a search of a student by a school authority.

2. The school authority must have reasonable grounds to believe that there has been a breach of school regulations or discipline and that a search of a student would reveal evidence of that breach.

3. School authorities will be in the best position to assess information given to them and relate it to the situation existing in their school. Courts should recognize the preferred position of school authorities to determine if reasonable grounds existed for the search.

4. The following may constitute reasonable grounds in this context: information received from one student considered to be credible; information received from more than one student; a teacher's or principal's own observations; or any combination of these pieces of information which the relevant authority considers to be credible. The compelling nature of the information and the credibility of these or other sources must be assessed by the school authority in the context of the circumstances existing at the particular school.

The Court also set out the test for whether the search is reasonable.

1. The first step is to determine whether it can be inferred from the provisions of the relevant *Education Act* that teachers and principals are authorized to conduct searches of their students in appropriate circumstances. In the school environment such a statutory authorization would be reasonable.

2. The search itself must be carried out in a reasonable manner. It should be conducted in a sensitive manner and be minimally intrusive.

3. In order to determine whether a search was reasonable, all the surrounding circumstances will have to be considered.

The right of privacy on elementary and secondary school campuses is thus compromised, but for reasons of the safety and health of other students.

> *"However, unlike the U.S., Canada has no single piece of legislation specifically protecting the privacy rights of children with the exception of the international UN Convention, binding Canada and its provinces."*

There is another dimension to search. Social media posts, website comments, text message and recordings are all very prevalent in society today and are very popular among younger generations. The Supreme Court of Canada in the 2017 case of *R. v. Marakah* stated, if the "subjective expectation of privacy was objectively reasonable the claimant will have standing to argue that the search was unreasonable". The reasonable expectation of privacy is set by the totality of circumstances. In light of that test, the Court found there is a reasonable expectation of privacy in text messages. However, the Court did not extend this to social media posts, online public forums and public chat groups.

Privacy Legislation

The *Privacy Act* protects privacy of individuals from the federal government and its agencies. It allows an individual to access and correct the information that the Government of Canada holds about them. Alberta's equivalent is *FOIP,* for provincial government agencies.

The Office of the Privacy Commissioner of Canada defines privacy as, "personal information is data about an identifiable individual. It is information that on its own or combined with other pieces of data, can identify you as an individual" The federal *Personal Information Protection and Electronic Data Act PIPEDA* and *the Privacy Act* both have this as their basic definition.

Another dimension to privacy is the right to privacy from businesses. Many businesses target their audience online. Oftentimes, companies gather, examine and sell a person's online history, and fine tune their advertisements and products this way. This may compromise an individual's privacy. Thus, there are laws protecting individuals from the prying eyes of businesses as well.

> *"The Office of the Privacy Commissioner of Canada conducts its own investigations of businesses related to kids' privacy and has provided guidance for businesses collecting information on minors."*

PIPEDA has the goal of protecting individuals' privacy from businesses engaged in the private sector set up for commercial and for-profit purposes. It also applies to federally regulated businesses, including banks, airlines and telecommunications companies which are incorporated under the federal jurisdiction. *PIPEDA* "sets the ground rules for how private-sector organizations collect, use, and disclose personal information in the course of for-profit, commercial activities across Canada". Alberta's equivalent is the *Personal Information Protection Act (PIPA)*.

It serves to protect provincial private-sector, for profit businesses that are operating only within the borders of Alberta. If the business handles personal information that crosses provincial or national border, *PIPEDA* applies.

The Office of the Privacy Commissioner of Canada conducts its own investigations of businesses related to kids' privacy and has provided guidance for businesses collecting information on minors. It states:

> *"While the Personal Information Protection and Electronic Documents Act (PIPEDA) does not differentiate between adults and youth, the Office of the Privacy Commissioner of Canada (OPC) has consistently viewed personal information relating to youth and children as being particularly sensitive and must be handled accordingly. We have also taken the position that in all but exceptional cases, consent for the collection, use and disclosure of the personal information of children under the age of 13 must be obtained from their parents or guardians."*

Tort of Privacy

There are many instances where one person's privacy is invaded by another individual. To address privacy concerns between private parties, there is a unique development in tort law in Ontario. There are four tort actions under the umbrella of invasion of privacy or right to privacy as stated in the 2012 Ontario Court of Appeal *Jones v Tsige* decision. Those are:

1. intrusion upon the plaintiff's seclusion or solitude;
2. public disclosure of embarrassing private facts about the plaintiff;
3. publicity which places the plaintiff in a false light in the public eye; and
4. appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

The Ontario Court of Appeal set out a test for the first tort, of intrusion upon the plaintiff's seclusion or solitude, as follows:

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

The tort is simply based on the intrusion of privacy of the individual. It is irrelevant whether there is any material damage. However, the test does include safeguards. The intrusion into privacy has to be highly offensive from a reasonable person's perspective. In order to avoid a flood-gate of cases, the Court decided to keep the scope of the tort narrow and applicable to specific matters. The four matters included are:

- financial or health records;
- sexual practices and orientation;
- employment; and
- diaries or private correspondence

that, viewed objectively on the reasonable person standard, can be described as highly offensive.

The Ontario Superior Court also recognized the second tort of the public disclosure of embarrassing private facts about the plaintiff in the 2016 case of Jane *Doe*

> *"In the 1998 landmark case R. v. M (M.R.), the Supreme Court of Canada stated that the reasonable expectation of privacy for students significantly diminishes."*

464533 v ND (Jane Doe). Other provinces, including British Columbia, Manitoba and Saskatchewan have all addressed this through legislation. Alberta has yet to recognize any tort of privacy and lacks legislation on the matter. However, this interest may be protected in Alberta by other recognized torts, such as defamation (libel and slander), nuisance, trespass, harassment, breach of confidence, intentional infliction of emotional distress, etc. and these may, in combination, protect the privacy rights of children. The Ontario Court in the 2006 case of *Somwar v. McDonald's Restaurants of Canada Ltd.* ruled that these other torts are not adequate and perfectly summarized the need for the tort of privacy.

> *"With advancements in technology, personal data of an individual can now be collected, accessed (properly and improperly) and disseminated more easily than ever before. There is a resulting increased concern in our society about the risk of unauthorized access to an individual's personal information. The traditional torts such as nuisance, trespass and harassment may not provide adequate protection against infringement of an individual's privacy interests. Protection of those privacy interests by providing a common law remedy for their violation would be consistent with Charter values and an "incremental revision" and logical extension of the existing jurisprudence…"*

Conclusion

This is the current landscape of privacy rights of children in Canada. Despite the lack of laws specifically addressing the privacy needs of children, children are protected under legislation and the common law from provincial and federal governments and businesses in Alberta. However, there is still a concern for intrusion on children's privacy by private parties in Alberta. To date, other tort claims may protect the privacy rights of children but there is still a gap. Perhaps Alberta will follow suit of other provinces in time. ◆

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R v Reeves: Shared Computer? Don't Fret—Your Secrets are Safe

Devon Kapoor

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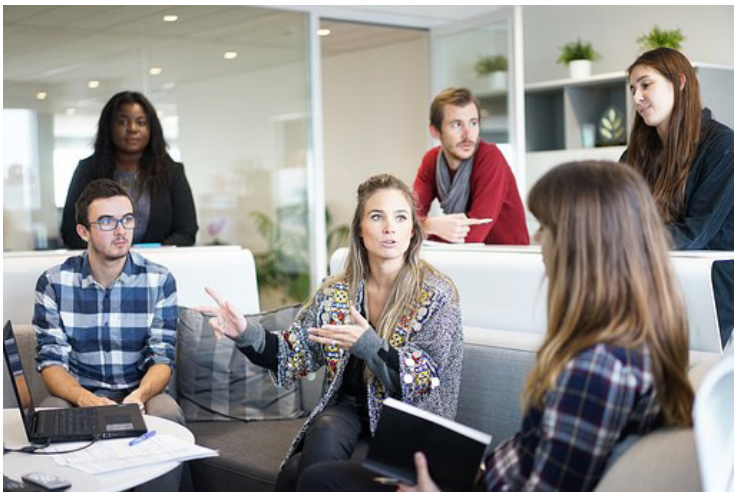
People share things. They share rooms, apartments, and wi-fi passwords. They share socks, Netflix accounts, and leftovers. But what does this sharing entail, exactly? As a shared owner, what rights do you actually have? Does shared ownership allow one to unilaterally decide what happens to the shared object or thing?

In *R v Reeves*, 2018 SCC 56, the Supreme Court of Canada dealt directly with this issue. More specifically, the Court addressed the issue of whether and to what extent the sharing of a computer impacts one's reasonable expectation of privacy in that computer. And, in keeping with the Supreme Court's recent trend of ensuring heightened privacy rights in computers and other electronic data (see *e.g.* *R v Marakah*, *R v Fearon*, *R v Vu*, *R v Cole*), a majority of the Court held that even while a person's reasonable expectation of privacy in a shared computer will be limited, "it still suffices to trigger the protection of s[ection] 8 of the *Charter*" (*Reeves*, para 47). Put more plainly, "[b]y assuming the reasonable risks of shared living, a person does not assume the risk that police can enter a shared home and seize its contents at the sole discretion of a co-resident" (para 16).



Facts and Issues

Thomas Reeves and his common-law spouse, Nicole, shared a computer. In 2012, Nicole reported to police that the computer contained pornographic videos that "obviously involved children" (*R v Reeves*, 2017 ONCA 365, para 9 [*Reeves* ONCA]). The police arrived without a warrant and seized the computer with the signed consent of Nicole. Reeves, who was already in custody on unrelated charges, was later charged with possessing and accessing child pornography (*Reeves*, paras 7-8). In response, Reeves brought a pre-trial *Charter* application, claiming his section 8 rights had been violated and that, as a result, the evidence from the computer should be excluded pursuant to section 24(2) of the *Charter*. The application judge agreed, holding that although Nicole had "freely consented to the search and seizure" of the computer, a third party cannot "validly consent to a search or otherwise waive a constitutional protection on behalf of another" (*Reeves* ONCA, para 38). On

appeal, however, a unanimous panel of the Court of Appeal for Ontario overturned the application judge's decision, holding instead that Reeves' right to privacy was not infringed due to the fact that "Reeves' expectation of privacy in the shared spaces of the family home and in the family computer was greatly diminished" (*Reeves* ONCA, para 59). (For a more in-depth analysis of the decision of the Court of Appeal, see "*R v Reeves*: The Impact of Joint-Residence on One's Reasonable Expectation of Privacy").

Before the Supreme Court, then, two matters were at issue: First, did the police violate Reeves' section 8 rights when they entered the shared home without a warrant? And second, did they violate his rights when they seized the computer without a warrant?

Can Police Enter a Shared Residence Without a Warrant?

The police have the power to do a great many things. Some of these powers seem relatively obvious, such as the power to respond to a 911 call (see *e.g. R v Godoy*, [1991] 1 SCR 311), and the power to arrest (*Criminal Code*, RSC 1985, c C-46, s 495). Oddly, however, the power of police to enter a shared residence with the consent of a cohabitant has not yet been definitively established by the Supreme Court (although it has been by "several provincial appellate courts" (*Reeves*, para 25)). The reason this is strange is that "police officers routinely seek to make contact with individuals within their homes" in order to interview them (para 80).

Unfortunately for the police, however, the majority in this case decided to leave this issue for another day. Given the concession by Reeves' counsel that the entry was lawful (as well as the "complex questions" the issue raises) the Court held that it is best dealt with "in a case that directly turns on th[e] issue, with the benefit of full submissions" (*Reeves*, para 26). For the purposes of this case, Justice Karakatsanis and the majority simply "proceed[ed] on the assumption that the entry was lawful" (para 22). In separate concurring opinions, however, Justices Moldaver and Côté took on the challenge of tackling the issue.

First, Justice Moldaver argued that "the police conceivably had the authority to enter the shared residence at common law under the ancillary powers doctrine" (*Reeves*, para 75). Advancing on the basis that Reeves had a reasonable expectation of privacy in the common areas of his jointly-owned home, Justice Moldaver argued that the police entry was a "search" within the meaning of section 8 and therefore was only valid if it "was authorized by law, if the law was reasonable, and if the search was carried out in a reasonable manner" (para 76). Justice Moldaver then found that the power to enter into shared residences with consent undoubtedly "falls within the scope of police duties" to investigate crime, and that it was a justifiable practice where it was limited by certain constraints (paras 79-87). The constraints are as follows: first, "the police must query whether conducting the interview in the person's home is necessary"; second, "the scope of the entry power would be narrowly tailored to its purpose"—to "take one or more statements in connection with a criminal investigation"; third, the police would only be permitted to enter the common areas of the home"; fourth, "the police can only enter if invited by an occupant with the authority to consent"; and fifth, "the entry would only be for a limited duration" (paras 88-94). In assessing the constitutionality of the proposed power, Justice Moldaver found that, while the "presumptive

constitutional benchmark" of "reasonable grounds to believe that the search would uncover evidence of an offence" would be unworkable (as the police would then have no need to conduct an informational inquiry), a lower standard of justification, such as reasonable suspicion, may be appropriate (paras 97-99).

Justice Côté offered a different route. For her, "not only do the police have a common law power to enter a shared residence for the purpose of taking a statement," there can be no violation of section 8 "because Mr. Reeves' expectation of privacy was not objectively reasonable in a context where a cohabitant, Ms. Gravelle, provided her consent for the police to enter common areas of the home" (*Reeves*, para 109). Put another way, "it is not objectively reasonable for a cohabitant, who shares a residence with others, to expect to be able to veto another cohabitant's decision to allow the police to enter any areas of that home that they share equally" (para 112). At the crux of this position, then, is the notion that it would be "unworkable" and "would substantially undermine effective law enforcement" for a co-resident to lack the authority to unilaterally permit police entry into shared spaces of their shared home (para 114). In other words, the police entry was lawful because to require the consent of all residents would be unreasonable.

Overall, then, while the issue remains technically live, it appears that there are strong arguments to support such a police power and that it is likely only a matter of time before the Court provides formal recognition.

Do You Have a Reasonable Expectation of Privacy in a Shared Computer?

The second and primary issue in this case was whether Reeves (or any other person in Canada) had a reasonable expectation of privacy in a shared computer. The analysis here involves four stages: First, a determination as to the subject matter of the seizure; second, a determination as to whether the claimant had a direct interest in that subject matter; third, whether the claimant had a subjective expectation of privacy in the subject matter; and fourth, whether that subjective expectation was objectively reasonable (*Reeves*, para 28).

Contrary to the judges of the Court of Appeal, Justice Karakatsanis and the majority held that "the subject matter of the seizure was the computer, and ultimately the data it contained about Reeves' usage, including the files he accessed, saved and deleted" (*Reeves*, para 30). This conclusion differed from the analysis of Justice LaForme in that it took a more expansive view of the seizure, seeing it not simply as seizure of property, but as a seizure of the data and the "intimate" details contained within it (paras 30, 34). Justice Côté, however, disagreed with this formulation, arguing instead that the subject matter of the search was simply the "physical computer" (para 126).

Next, Reeves "undoubtedly had a direct interest and subjective expectation of privacy in the home computer and the data it contained" (*Reeves*, para 32).

The final consideration, then, was whether Reeves' subjective expectation of privacy was objectively reasonable. On this point, the issue of control was central. If someone shares a computer, and thus has reduced

control over it, how reasonable can their expectation of privacy be? Shouldn't someone expect that shared control means no control? For the majority, this line of thinking (reminiscent of a risk analysis, which the Supreme Court has expressly rejected; see *R v Duarte*, [1990] 1 SCR 30) is to be rejected—"control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest" (*Reeves*, para 37, quoting *Marakah*, para 38). In other words, simply because someone has chosen to share a computer with others does not mean that they relinquish their right to be protected from unreasonable seizure of it—"[s]hared control does not mean *no* control" (*Reeves*, para 37, emphasis in original). Building on the principles outlined in *Marakah*, the majority's position here establishes a strong foundation for the protection of digital information. And, as society continues its shift toward a more digital (and inherently less controllable) landscape, such a position will be essential in ensuring a robust and meaningful zone of privacy for individuals.

In her concurring opinion (which might be more aptly characterized as a dissent, despite its agreement on the facts of the case), Justice Côté disagreed. From her perspective, the majority's focus on informational privacy was irrelevant to the issue of the seizure as "the police could not actually search the data until they obtained a warrant" (*Reeves*, para 125, quoting the majority, para 30). This is a valid critique, and raises a potential question: If we allow police to seize computers (but not to search them without further judicial authorization) from houses where a search warrant for the house does not specifically authorize the search of computers (see *Vu*, para 3), then why would we not allow police to do the same on the basis of consent from a shared owner? Further, as Justice Côté held, given this particular context—the computer was jointly owned and used, and Reeves was not present since he was in custody and barred from being at the home due to a no-contact order—it was not objectively reasonable for Reeves to expect privacy (*Reeves*, paras 127-28).

Reflections

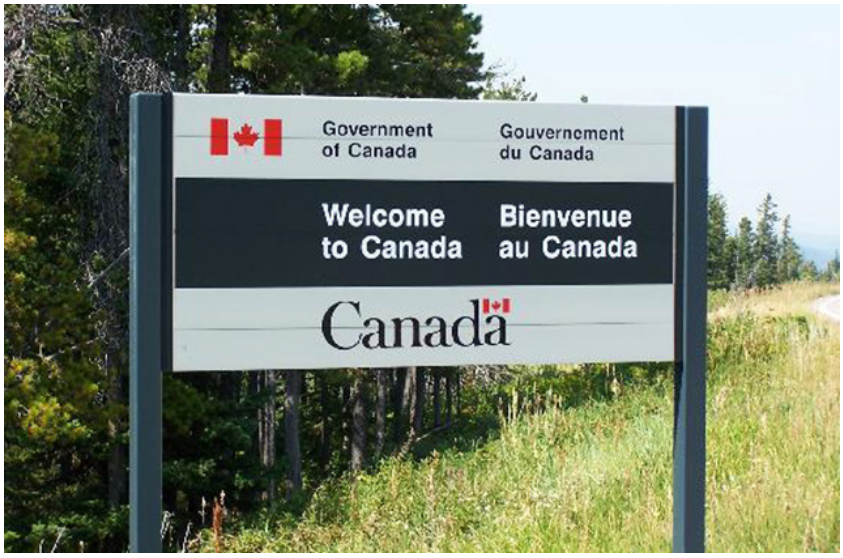
The latest installment in a seemingly endless stream of novel search and seizure cases dealing with informational privacy, *R v Reeves* appears to further solidify the section 8 jurisprudence bent on maintaining robust privacy for individuals. This is a good sign for the law in Canada.

And, would we really be willing to accept the alternative? Computers are uniquely private—they are "portals" into the very depths of our private lives and contain vasts amount of information, much of which we are likely unaware is even present (*Reeves*, para 34). Is there a single one among us who would not balk at the idea of someone permitting the police to seize our personal computer? And does shared ownership really change any part of our reaction? I think not. Moreover, people share things for a variety of reasons. Sometimes because they want to, and sometimes because they have to. To penalize someone's decision (or need) to share by jeopardizing their privacy rights would be shortsighted and unfair. Thankfully, the Supreme Court's decision makes clear it understands this.

The post R v Reeves: Shared Computer? Don't Fret—Your Secrets are Safe appeared first on TheCourt.ca on January 10, 2019 and is republished under the Creative Commons License. ◆

Special Report: Immigration Law

A Brief Overview of Canadian Immigration Law



Christopher Gallardo-Ganaban

Immigration law in Canada can seem daunting and confusing to understand. It would certainly be difficult to condense all immigration-related concepts within a single article. This article serves as a basic overview to provide an understanding of common terms and immigration programs in Canada. It will address what immigration is and who deals with it, common terminology, and different programs available for immigration applicants.

What is immigration and who deals with it?

Generally speaking, immigration law addresses the rules and processes governing who can enter Canada, and who can stay in Canada. The legislation that outlines these processes and requirements is the *Immigration and Refugee Protection Act*. Other legislation and case law may be applicable depending on different situations, but immigration law is generally governed through this *Act*.

The administration and decision-making of immigration law is assigned to various entities, such as the Minister of Citizenship and Immigration, Immigration Officers, Citizenship and Immigration Canada, the Canada Border Services Agency, and the Immigration and Refugee Board. They each have different responsibilities in governing immigration, and it is through administrative law that Canadian courts hold these government bodies accountable. They ensure that the government bodies act within their authority outlined in legislation, which includes acting in a manner that is just and procedurally fair.

> *"There are different pathways under economic immigration. They include the Express Entry pathways, such as the Federal Skilled Worker Program, Federal Skilled Trades Program, Canadian Experience Class, and Provincial Nominee Program."*

Common Terminology

When discussing immigration, there are some terms that are useful to know.

- Immigrant: An immigrant is someone who moves from their country of origin to another. There is usually at least some intention for this move to become long-term or permanent. Many times, the individual might also come with the intention of becoming a permanent resident or citizen.
- Citizen: A citizen is defined in the *Citizenship Act*, and is an individual who is afforded certain rights based on their status as a citizen. Generally speaking, becoming a citizen can be achieved either by birth or through naturalization. Certain rights of citizens include the ability to enter, remain in, and leave Canada.
- Permanent Resident: A permanent resident is also afforded rights based on their status as a permanent resident, and is defined in the *Immigration and Refugee Protection Act*. A permanent resident is someone who has been given permanent resident status by immigrating to Canada, but is not a Canadian citizen. Permanent residents are citizens of other countries. Unlike Canadian citizens, permanent residents can be deported based on certain grounds.
- Alien: Some statutes refer to an immigrant or any individual who comes from a foreign nation as an alien. For example, it is referred to in the *Constitution Act, 1867* under Section 91(25), which is the section that provides Parliament with powers regarding immigration. However, in an everyday context, the use of the term "alien" can be contentious and may be sometimes considered inappropriate.
- Refugee: A refugee is a certain type of immigrant. They immigrate to another country due to a well-founded fear of being persecuted in their home country for reasons of race, religion, nationality, membership of a particular social group, or political opinion.
- Foreign National: A foreign national is any person who is neither a citizen nor a permanent resident of Canada.
- Temporary Resident: A temporary resident is someone who is allowed to stay in Canada for a limited amount of time and for limited purposes. This can include temporary workers, students, and visitors.
- Port of Entry: This is a prescribed place where a person may seek entry into Canada, such as airports, land or marine border crossings. Every person is subject to examination to determine whether that person is allowed to enter Canada. The examinations are usually done by the Canada Border Services Agency.
- Irregular border crossing: An irregular border crossing occurs when an individual crosses the border at some place other than an official port of entry.
- Visa: A visa is an endorsement from the government to show that an individual has met the requirements for admission to Canada as a temporary resident. The visa is placed in a person's passport.

" A foreign national may qualify for permanent residency based on thier relationship to a Canadian citizen or permanent resident. This applies to the Canadian citizen's or permanent resident's spouse, common-law partner,child, parent, or other allowed family members."

Some Entry Programs in Canada for Permanent Residency

There are numerous programs available for individuals wishing to enter Canada, depending on the purpose of entry and the circumstances of the applicant. If you are someone exploring this as an option, or you require legal advice on an immigration matter, it is always best to contact a lawyer about your personal circumstances.

The entry paths for permanent residency can be divided into three categories:

- family reunification;
- economic immigration; and
- refugees

Family reunification

A foreign national may qualify for permanent residency based on their relationship to a Canadian citizen or permanent resident. This applies to the Canadian citizen's or permanent resident's spouse, common-law partner, child, parent, or other allowed family members.

This entry path looks at both the eligibility of the foreign national and also the eligibility of the family member who is a Canadian citizen or permanent resident, also known as their sponsor. The eligibility of the foreign national can be dependent on their relationship to their sponsor. The eligibility of the sponsor to bring their family member to Canada depends on different factors, including age, residence, and their willingness and ability to support the applicant.

Economic immigration

A foreign national may qualify for permanent residency based on their ability to become economically established in Canada. The purpose of this entry path is to meet Canada's economic and social needs for Canada's benefit. Generally, the foreign national would be assessed depending on their professional background, education, and their impact on Canada's economic and social needs.

" Permanent residents are citizens of other countries. Unlike Canadian citizens, permanent residents can be deported based on certain grounds. "

There are different pathways under economic immigration. They include the Express Entry pathways, such as the Federal Skilled Worker Program, Federal Skilled Trades Program, Canadian Experience Class, and Provincial Nominee Program.

Refugees

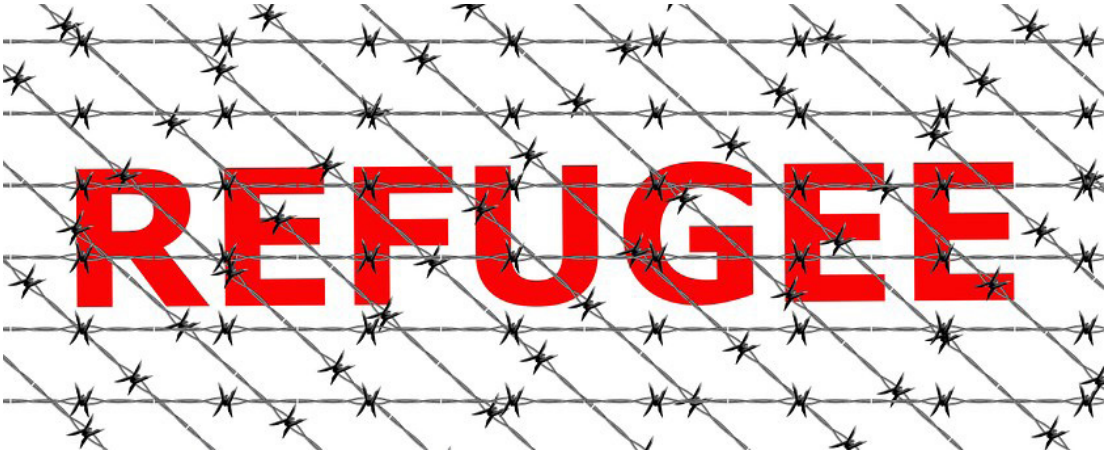
A foreign national who is either inside or outside Canada may qualify for permanent residency based on their personal circumstances as a refugee. To qualify for this entry path, the government will consider humanitarian grounds among other factors.

Final Thoughts

Immigration issues, processes and requirements for immigration in Canada can get very complex. This article provides an overview of various immigration terms and programs in Canada. However, the best way to find a solution to an immigration issue you may personally be facing is to contact a lawyer who specializes in Canadian immigration law. ◆

"There are numerous programs avaliable for individuals wishing to enter Canada, depending on the purpose of entry and the circumstances of the applicant."

Christopher Gallardo-Ganaban is a student at the University of Alberta's Faculty of Law and a member of Pro Bono Students Canada. Pro Bono Students Canada is a student organization. This document was prepared with the assistance of PBSC University of Alberta law student volunteers. PBSC students are not lawyers and they are not authorized to provide legal advice. This document contains general discussion of certain legal and related issues only. If you require legal advice, please consult with a lawyer.



Refugee Protection and the Canada-U.S. Safe Third Country Agreement

Myrna El Fakhry Tuttle

The right to be protected from persecution is an international human right. Under Canada's immigration laws, a person in Canada can claim status as a Convention Refugee or as a Person in Need of Protection.

Article 1(2) of the United Nations 1951 *Convention Relating to the Status of Refugees* (the *Convention Refugee*) defines a refugee as:

> *"a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*

"Individuals who cross irregularly are allowed to enter the country and are given the right to start the refugee claim process. However, they get that right after making dangerous journeys and putting thier lives at great risk, especially in the winter."

Article 97 of Canada's *Immigration and Refugee Protection Act (IRPA)* defines a Person in Need of Protection as "a person who faces a danger of torture, risk to life or risk of cruel and unusual treatment or punishment, if he or she returns to their country of nationality or country of residence."

Canada is a signatory to the *Convention Refugee* which has been incorporated by Part 2 Divisions 1&2 of the *IRPA*. There are two ways to seek refugee protection in Canada: either at a port of entry **(**airport, seaport or land border) or at an Immigration, Refugees and Citizenship Canada (IRCC) office (see: Claiming Refugee Protection – 1. Making a Claim, online: Immigration and Refugee Board of Canada).

In 2002, Canada and the U.S. signed an agreement called the Safe Third Country Agreement (STCA) allowing both countries to work together on managing refugee claims. STCA came into effect in 2004. Article 1 of the STCA defines a **refugee status claim** as "a request from a person to the government of either Party (Canada or the U.S.) for protection consistent with the *Convention Refugee*, the *Torture Convention*, or national laws of each Party."

The STCA does not apply to Canadian or U.S. citizens or those who, not having a country of nationality, are habitual residents of Canada or the United States.

Article 4 of the STCA provides that the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a **land border port of entry**. According to Article 1, country of last presence means that country, being either Canada or the U.S., in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry.

According to the provisions of the STCA, individuals who seek to enter Canada across the United States land border can no longer make a refugee claim. Since refugees have access to the U.S. immigration system, they do not need to apply for refugee status in Canada.

Individuals are required to seek refugee protection in the first safe country in which they arrive, unless they qualify for one of the exceptions mentioned in the STCA. Article 4 mentions four types of exceptions:

- refugee claimants who have a family member in Canada;
- unaccompanied minors under the age of 18;
- individuals holding a valid Canadian visa; and
- those who have been charged with or convicted of an offence that could subject them to the death penalty in the U.S. or in a third country.

Under the terms of the STCA, refugees who first arrive in the U.S. and then seek entry to Canada at a land border of entry, will basically be rejected and will be sent back to the United States. They must ask for protection in the **first safe country** they reach, which is the U.S. in this case.

A safe third country is a country where individuals, passing through that country, are deemed safe and are allowed to make refugee claims. Subsection 102(2) of the *IRPA* outlines the criteria for designating a country as a safe third country.

> *...individuals who come from the U.S. and cross the border outside an official port of entry, will be considered for refugee status because Canada is a party to the Convention Refugee.*

Section 102 of the IRPA allows the designation of safe third countries for the purpose of sharing responsibility for the consideration of refugee claims. A country that is a Party to and complies with the *Convention Refugee* (particularly Article 33) and the *Convention Against Torture* (particularly Article 3) and that maintains a good human rights record may be designated as a safe third country.

The United States is the only designated safe third country. It was designated by the Governor-in-Council. According to section 159.3 of the Immigration and Refugee Protection Regulations, SOR/2002-227 [Regulations], the U.S. was designated as a country that complies with the *Convention Refugee* and the *Convention Against Torture*, and is a designated country, and therefore is a safe country.

The *IRPA* in section 102(3) requires the continuing review of the designation of the United States as a safe country, to ensure that it complies with its international obligations.

> *A safe third country is a country where individuals, passing through that country, are deemed safe and are allowed to make refugee claims.*

Usually, individuals come from the United States to Canada through an official port of entry, but in recent years thousands of people have come from the U.S. by land, crossing at places other than official ports of entry to avoid being sent back under the STCA. The reason for the irregular crossing is that they believe the United States is not a safe country anymore.

In order to be returned to the United States, individuals should seek entry to Canada at an official port of entry. Article 4 of the STCA talks about refugee claims made at a land

> *In 2002, Canada and the U.S. signed an agreement called the Safe Third Country Agreement (STCA) allowing both countries to work together on managing refugee claims. STCA came into effect in 2004.*

border port of entry between Canada and the U.S. Therefore, it does not apply to those who arrive from the United States and enter Canada at a location other than a port of entry.

The STCA only applies to people entering from the United States at official ports of entry. That means that those who cross through an official port of entry usually are returned to the U.S., while those who cross irregularly have the right to seek refugee protection. They are not denied entry to Canada and they are not sent back. Moreover, individuals who come from the U.S. and cross the border outside an official port of entry, will be considered for refugee status because Canada is a party to the *Convention Refugee*.

Article 31 of the *Convention Refugee* states that receiving countries may not penalize refugees for illegal entry or presence, as long as they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Section 133 of the *IRPA* provides that someone who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, can't be charged with an offence under the *IRPA* and the *Criminal Code of Canada*, pending disposition of their claim for refugee protection or if refugee protection is conferred.

Article 27(2) of the Regulations states that a person who seeks to enter Canada at a place other than a port of entry must appear without delay for examination at the port of entry that is nearest to that place.

Individuals who cross irregularly are allowed to enter the country and are given the right to start the refugee claim process. However, they get that right after making dangerous journeys and putting their lives at great risk, especially in the winter. Since it is the only way that they can enter Canada without being sent back to the United States, many individuals are taking the risk of crossing unsafe borders. If people know that they will be returned to the U.S. once they arrive at an official point of entry, then they are going to cross irregularly between points of entry, even if there is a risk, in order to avoid that from happening.

> *"The United States is the only designated safe third country. It was designated by the Governor-in-Council"*

Critics of the STCA have been calling on the government to repeal, suspend or even expand it in order to provide more protection to those who are trying to cross the border irregularly.

According to Article 10 of the STCA:

- either Party may terminate this Agreement upon six months written notice to the other Party;
- either Party may, upon written notice to the other Party, suspend for a period of up to three months application of this Agreement. Such suspension may be renewed for additional periods of up to three months; and
- the Parties may agree on any modification of or addition to this Agreement in writing.

If the STCA was terminated or suspended, individuals would have the chance to seek refugee protection at regular ports of entry without risking their lives by crossing between ports of entry. If individuals are using unofficial places to cross in order to be allowed to enter the country without being sent back to the U.S., then what is the purpose of having the STCA? ◆

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Governments' use of AI in immigration and refugee system needs oversight

Petra Molnar and Institute for Research on Public Policy (IRPP)

In an effort to bring innovations to its immigration and refugee system, Canada has begun using automated decision-making to help make determinations about people's applications.

A report released in September 2018 by the University of Toronto's International Human Rights Program and the Citizen Lab at the Munk School of Global Affairs and Public Policy finds that Canada is experimenting with using artificial intelligence (AI) to augment and replace human decision-makers in its immigration and refugee system. This experimentation has profound implications for people's fundamental human rights.

Use of AI in immigration and refugee decisions threatens to create a laboratory for high-risk experiments within an already highly discretionary system. Vulnerable and under-resourced communities such as noncitizens often have access to less robust human rights protections and fewer resources with which to defend those rights. Adopting these technologies in an irresponsible manner may only serve to exacerbate these disparities.

The rollout of these technologies is not merely speculative: the Canadian government has been experimenting with their adoption in the immigration context since at least 2014. For example, the federal government has been developing a system of "predictive analytics" to automate certain activities currently conducted by immigration officials and to support the evaluation of some immigrant and visitor applications. The government has also quietly sought input from the private sector in a 2018 pilot project for an "Artificial Intelligence Solution" in immigration decision-making and assessments, including for applications on humanitarian and compassionate grounds and applications for Pre-Removal Risk Assessment. These two application categories are often used as a last resort by people fleeing violence and war who wish to remain in Canada. They are also highly discretionary, and the reasons for rejection are often opaque.

In an immigration system plagued with lengthy delays, protracted family separation

and uncertain outcomes, the use of these new technologies seems exciting and necessary. However, without proper oversight mechanisms and accountability measures, the use of AI can lead to serious breaches of internationally and domestically protected human rights, in the form of bias or discrimination; privacy violations; and issues with due process and procedural fairness, such as the right to have a fair and impartial decision-maker and being able to appeal the decision. These rights are internationally protected by instruments that Canada has ratified, such as the *United Nations Convention on the Status of Refugees* and the *International Covenant on Civil and Political Rights* among others. These rights are also protected by the *Canadian Charter of Rights and Freedoms* and accompanying provincial human rights legislation.

> *"As Canada experiments with using artificial intelligence (AI) in its immigration and refugee systems, we must ensure the system protects human rights."*

We already know that algorithms make mistakes. For example, 7,000 students were wrongfully deported from the UK because an algorithm wrongly accused them of cheating on a language test. Algorithms also discriminate, and they are by no means neutral. They have a particularly bad track record on race and gender, equating racialized communities with higher risks of recidivism, or reinforcing gender stereotypes by automatically associating "woman" and "kitchen."

Indeed, the potential impact of these systems on individuals' physical safety, human rights and livelihoods is far reaching. Bias, error or system failure can result in irreparable harm to individuals and their families. For people navigating Canada's immigration system, extensive delay, substantial financial cost, interrupted work or studies, detention (often for months or years at a time), prolonged family separation and deportation are all possibilities. For refugee claimants, the consequence of a rejected claim on an erroneous basis can be persecution on the basis of an individual's "race, religion, nationality, membership in a particular social group, or political opinion," as described in the UN refugee convention. Error or bias in deciding upon their applications for protection may expose them to torture, cruel and inhumane treatment or punishment, or risks to life.

As a result, immigration and refugee law sits at an uncomfortable legal nexus: the impact on the rights and interests of individuals is often very significant, even where the degree of deference is high and the procedural safeguards are weak. There is also a serious lack of clarity about how courts will interpret administrative law principles like natural justice, procedural fairness and standard of review where an automated decision system is concerned.

Before Canada commits to the use of AI in immigration and refugee decision-making, there is a pressing need to develop research and analysis that responds to the Canadian government's express intention to pursue greater adoption of these technologies. As these systems become increasingly normalized and integrated, it is crucial that choices related to their adoption are made in a transparent, accountable, fair

and rights-respecting manner. Canadian academic and civil society must engage on this issue.

Ottawa should establish an independent, arm's-length body to engage in all aspects of oversight and review for all automated decision-making systems used by the federal government, making all current and future uses of AI public. Ottawa should also create a task force that brings key government stakeholders together with people from academia and civil society to better understand the current and prospective impacts of automated decision-making technologies on human rights and the public interest more broadly.

The global experiences of migrants and refugees represent a grave humanitarian crisis. In response to issues like migration, even well-intentioned policy-makers are sometimes too eager to see new technologies as a quick solution to tremendously complex and intractable policy issues. Artificial intelligence, machine learning, predictive analytics and automated decision-making may all seem promising.

Technology also travels. Whether in the private or public sector, a country's decision to implement particular technologies can set an example for other countries to follow. Canada has a unique opportunity to develop international standards that regulate the use of these technologies in accordance with domestic and international human rights obligations. It is particularly important to set a clear example for countries with more problematic human rights records and weaker rule of law, as insufficient ethical standards and weak accounting for human rights impacts can create a slippery slope internationally. Critical, empirical and rights-oriented research into the use of AI should serve not only as an important counterbalance to stopgap responses or technological solutionism but as the central starting point from which to assess whether such technological approaches are appropriate to begin with.

The challenge, then, is not how to use new technology to entrench old problems, but instead to better understand how we may use this opportunity to imagine and design systems that are more transparent, equitable and just.

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

Citizens in the West should care about discriminatory immigration policies

Antje Ellermann and Agustin Goengana

An executive order banning citizens from several Muslim-majority countries from entering the United States ushered in the first major policy conflict of U.S. President Donald Trump's administration.

Demonstrations quickly spread across airports as prominent Democrats, some Republicans and American diplomats publicly condemned the order.

The so-called Muslim ban evoked a disturbing history of discrimination in immigration policy that many had believed was a thing of the past.

But even though the Muslim ban was unusual in its explicitness, our research shows that discriminatory immigration policies remain fairly common among liberal democracies.

Discriminatory policies range from the selective requirement of language tests and minimum income levels for family unification to admission restrictions against people with disabilities. These policies produce patterns of discrimination that not only harm prospective immigrants, but also many citizens.

Racist immigration policies common

From the late 19th century to the aftermath of the Second World War, western democracies enacted openly racist policies of immigrant selection. Most famously, the Chinese Exclusion Act of 1882 prohibited all immigration from China to the United States. Similar bans targeting people with disabilities and the poor were not uncommon.

It was only with the geopolitical changes that followed the Second World War and the rise of the Civil Rights movement in the U.S. that those policies were repealed and replaced by those based on meritocratic values and respect for human rights.

But was the era of discriminatory immigration policy truly over? Unfortunately, liberal democracies continue to discriminate, intentionally and unintentionally, in ways that often have severe impacts on the lives of citizens. Let us cite a few examples from our recent research.

Income, language requirements

Some European countries impose high income and language requirements for family unification that can cause long periods of forced family separation.

In the Netherlands, these requirements have added an average of 15 months to the separation of families. In Britain, an estimated 15,000 children with British citizenship are separated from one of their parents or forced to live outside of the U.K. as a result of high income requirements.

Income requirements are particularly burdensome for certain groups.

In Britain, the income threshold to bring in a foreign spouse is £18,600, or about US$24,100, and adding a dependent child, £22,400 (US$29,300). While the median income of a white British man is £24,000 (US$31,000), the median income of a woman of Pakistani origin is £9,700 (US$12,500).

In Germany and the Netherlands, foreign spouses have to pass a written and oral language tests before they are allowed into the country. However, many applicants fail the test, especially those with poor formal education or learning disabilities.

Target specific groups

The disparate impact of these policies is not only the result of broader inequalities present in society. In some cases, these policies are strategically used to target specific groups. In Germany and the Netherlands, pre-entry language tests were designed to reduce the immigration of young and poorly educated Muslim women from Turkey and Morocco.

To add insult to injury, certain kinds of immigrants are exempt from these requirements. In Norway, foreign skilled workers — but not Norwegian citizens with foreign spouses — are exempt from the income requirement in order to sponsor their husband or wife.

In Germany, the family members of highly qualified foreign workers — but not the foreign family members of German workers — are exempt from the language tests, as are nationals from 13 mostly western countries.

As a result of these policies and their exemptions, certain groups of law-abiding, tax-paying citizens are more likely to be separated from their spouses and children. This is one way in which immigration policy can discriminate not only against prospective migrants, but also against citizens.

Similarly, most countries have in place "excessive demand" restrictions to exclude potential immigrants who are likely to impose a high demand on public services. Citizens with disabilities and medical conditions are particularly affected by these policies.

Some restrictions eased

Several recent reforms have lowered the severity of excessive restrictions in countries like Canada.

However, advocacy groups such as the Council of Canadians with Disabilities continue to argue that anything short of a complete repeal of this policy is based on prejudiced views that deny the contributions that people with disabilities make to society. These policies certainly discriminate against some groups of prospective migrants, and that in itself could be enough to criticize them. However, contrary to popular opinion, a country's immigration policy affects its own citizens in both good and bad ways. Policies that discriminate against immigrants on the basis of their race, gender, class, religion, sexual orientation or nationality infringe on civil rights and stigmatize many citizens.

In the past, legal and political activism by citizens has been crucial for the repeal of explicitly racist policies. Citizens have been able to push back some of the more heinous aspects of the Muslim ban, for example.

It is precisely for this reason that it's important to unearth how forms of discrimination that may be invisible to the general public undermine citizens' rights and position in society.

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Teresa Mitchell

1. A series of cases decided in January 2019 highlight the ongoing problems with solitary confinement within Canada's corrections system.

The British Columbia Court of Appeal ruled on a challenge filed by the John Howard Society and the B.C. Civil Liberties Association against the Attorney General of Canada on the issue of inmate segregation. The Court of Appeal gave the Attorney General more time to come up with new policies for holding prisoners in solitary confinement, but in the meantime set out new conditions to help protect inmates' constitutional rights. The Court of Appeal ordered:

- Inmates must be given 2 ½ hours a day outside of their cells, including an opportunity to be outdoors for at least 1 ½ hours each day, including weekends and holidays;
- Inmates should receive a daily visit from a health care professional;
- Indigenous Elders must be allowed to visit segregation units and provide one-on-one counselling to Indigenous prisoners;
- A senior official must give authorization before a prisoner can be kept in segregation for more than 15 days, and that person cannot be the head of the institution where the prisoner is kept; and
- Inmates must be allowed to have legal counsel at hearings to determine their placement in solitary confinement.

British Columbia Civil Liberties Association and the John Howard Society of Canada v. Canada (Attorney General), 2018 BCSC 62 (CanLII)
http://canlii.ca/t/hprxx

In Edmonton, a Court of Queen's Bench Justice ruled that an inmate kept in solitary confinement for over a year suffered cruel and unusual punishment. He was moved out of segregation only after he brought a writ of *habeas corpus* to challenge his placement. Justice Pentelechuk gave inmate

Ryan Prystay 3.75 days credit towards every one day he spent in segregation. The Justice wrote: "Arguably, it is the lack of meaningful human contact that is the most pernicious consequence of placement in segregation. Human beings are not meant to be isolated, particularly for extended periods."

R. v. Prystay – 2019 ABQB 8 (CanLII)
http://canlii.ca/t/hwt62

Finally, at the end of January, 2019 the Ontario Superior Court granted a stay of proceedings in the murder prosecution of Adam Capay, the young Aboriginal man who came to national attention after he was kept in solitary confinement for over four years, in a cell where the lights were kept on 24 hours a day. Usually, courts remedy unacceptable behaviour such as this by crediting time against the prisoner's ultimate sentence, as in the *Prystay* case. So, the Order for a stay of proceedings in this case is unusual. Justice Fregeau wrote: "In my opinion, this is the clearest of cases in which no remedy short of a stay is capable of redressing the prejudice caused to the integrity of the justice system as a result of the multiple and egregious breaches of the accused's *Charter* rights. "

R. v. Capay 2019 ONSC 535
http://canlii.ca/t/hx7xk

2. New Moms Get A Class Action Settlement

The Federal Court of Canada recently approved a class action settlement worth between $8.5 to 11 million for as many as 2000 expectant mothers denied Employment Insurance benefits when they became sick during their parental leave. Jennifer McCrea, a Calgary mother led the action. She developed breast cancer while on maternity leave but was turned down when she applied for additional EI sickness benefits. EI officials maintained that a woman who was ill during maternity leave was not available for work and so was not eligible for sickness benefits. The federal government changed the law in 2013 but refused to pay people who claimed between 2002 and 2013.

The class action funds will be available to parents who were sick during the parental leave portion of their combined maternity/parental leave. Justice Catherine Kane wrote that it would have been better if the women had received their benefits when they were ill but that this was "nevertheless… a very good result. They will receive their benefits, albeit years later, and they will have witnessed both a change in the legislation to benefit others like them and improvements in the manner that information is shared by Service Canada about such benefits." Jennifer McCrea received an honorarium for her efforts and said she was grateful to the Liberal government for living up to its 2015 election promise to settle the case, "albeit not as quickly as we had hoped."

McCrea v. Canada 2019 FC 122
http://canlii.ca/t/hx99f

3. Henson Trusts and Tenancies

A Vancouver woman living with disabilities was denied help with her rent because, after her father died, she began to receive some money set aside for her in a Henson Trust. This is a kind of trust for people with disabilities that is structured in such a way that it tries to avoid interfering with government benefits. In this case, the Metro Vancouver Housing Corporation said that Ms. A's trust counted as an asset and wanted to know the details. Ms. A

refused and so the Housing Corporation would not process her application for rental assistance. Both the B.C. Court of Queen's Bench and the Court of Appeal ruled that her trust was an asset that could disqualify Ms. A from rental assistance. The Supreme Court of Canada disagreed. It ruled that the Metro Vancouver Housing Corporation had a duty to consider her application for rental assistance and sent the case back to the trial judge to assess her compensation. The majority ruled that Ms. A's Henson Trust was not an asset as the word is usually understood because she had no control over it and could not count on it to pay her rent. This case is the first time the Supreme Court has looked at Henson Trusts. It commented that it was not the situation that a Henson Trust could never be considered an asset but only that it would depend on the facts in each particular case.

S.A. v Metro Vancouver Housing Corp., – 2019 SCC 4 (CanLII)
http://canlii.ca/t/hx61p

4. **Dealing with Orphans**

The Alberta Energy Regulator will not issue a licence to a company to extract, process, or transport oil and gas unless the company assumes end-of-life responsibilities. These include plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface of the land to its previous condition. Redwater, an Alberta oil and gas company, went into bankruptcy and Grant Thornton Limited (GTL) was named as trustee. Since it would cost millions of dollars more to clean up the wellsites than the company was now worth, GTL decided it would "disown" the wells and not clean them up. The Regulator argued that GTL must do so under both the federal *Bankruptcy Act* and the provincial Regulations. The legal issues were whether the *Bankruptcy Act* allowed a trustee to just walk away from certain sites and whether provincial orders to clean up the sites were provable claims under the *Act* and payable according to the rules of bankruptcy.
The majority of the Supreme Court of Canada ruled that the trustee couldn't simply walk away from the sites and that Redwater could not avoid its environmental responsibilities. It also ruled that the costs were not debts under the *Bankruptcy Act* but rather they were duties to the public and nearby landowners. Therefore, the costs of dealing with abandoned wells did not fall under the *Act*. The Court ordered that money held in trust from the sale of Redwater's assets must now be used to deal with the wells and reclaim the land before all other creditors under the *Bankruptcy Act* were paid. This decision was very good news for Alberta landowners who had been stuck with environmentally dangerous non-operative oil wells on their lands.

Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5
http://canlii.ca/t/hx95f ◆

Columns

Convicted On Sexism: How Does Sexist Reasoning In Favour Of The Complainant Work In Today's #Metoo Culture?

Melody Izadi

In *R. v. J.L. 2018 ONCA 756*, The Ontario Court of Appeal allowed the appeal of an accused who was convicted of sexual assault. The trial judge convicted the accused because he felt that the complainant would not engage in the acts as described by the accused because she was a young woman. The alleged incident happened during a school dance, where the accused testified that the complainant engaged in consensual sexual activity.

" Simply believing someone for the sake of believing someone, or because you have sexist notions of what young woman will consent to, has no place in the courtroom."

As the Ontario Court of Appeal noted, the trial judge said aloud: "I cannot accept that a young woman would go outside wearing a dress in mid-December, lie down in dirt, gravel and wet grass and engage in consensual sexual activity."

In response and in review of this decision, the Court of Appeal found the following:

> *"In other words, the trial judge could not accept, or even have a doubt arising from, the appellant's evidence because the trial judge was of the view that young women would not do what the complainant was said to have consensually done. There is a real danger that this reasoning contributed to the trial judge's assessment of whether, on the whole of the evidence, the Crown had proven the appellant's guilt beyond a reasonable doubt. I do not share the trial judge's view that it can be taken as a fact that no young woman would consensually engage in the alleged behaviour."*

The trial judge clearly had an impression and bias about how young women would act and what types of sexual activity a young woman would consent to. This type of reasoning is the antithesis to the very core of feminism: that women cannot be painted by a standardized oppressive paintbrush. All women do not *do* or *refrain from* certain things because of how *ladylike* something is. So too does the Me Too movement serve as a cautionary disclaimer that all women experiencing sexual assault do not behave in a cookie cutter fashion. The very point of this reality is that women, in all forms and ways, are challenging the social construction of what women ought to do: what all women must do, according to society.

For these reasons and in the climate of social awareness around these issues, the reform of the recent sexual assault laws has fallen into place. They allow complainants to know what records the defence plans to use to impeach their credibility (i.e. the Ghomeshi complainants would have had a chance to review their emails prior to their testimony, instead of being surprised at trial).

" The trial judge clearly had an impression and bias about how young women would act and what types of sexual activity a young woman would consent to. "

What's unfortunate and perplexing is the fact that the very point of the Me Too movement, to believe women at all costs when they allege sexual assault in any form, is advanced in a courtroom by a jurist who reasons that, because the complainant is a young woman, she would not have engaged in the sexual activity as described. This type of reasoning (in addition to being offensive, sexist and riddled with patriarchal ideas of gender binary norms), is counter intuitive to the enormous shift happening now in our social awareness, but yet gives this movement what its supporters want: a conviction.

The correction and analysis of this reasoning by the Court of Appeal is significant. This decision serves as an important reminder of the logical fallacies that exist in even the most learned justice actors in the court room. Simply believing someone for the sake of believing someone, or because you have sexist notions of what a young woman will consent to, has no place in the courtroom. Our *Constitution* is one that requires all of us to presume the innocence of those who are accused, and to give them a fair trial by holding the Crown to its onus of proving a charge beyond a reasonable doubt. Without this, our justice system will fall from its pillar and land on shaky ground where we are all at risk of facing the swift hammer of "justice" coming down upon us. ◆

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What is 'Self-Dealing' in Employment?

Peter Bowal and Malhar Shahani

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Introduction

While they have human bosses, most employees work for corporations, which are legal fictions with no physical existence. That renders employers technically vulnerable to their own employees who might want to take advantage of them. It is both impossible and undesirable to scrutinize every employee during every minute on the job.

There are many ways in which employees can put their own interests ahead of their employers' interests. This "self-dealing" may include taking the employer's business opportunity, using corporate funds or equipment for personal use, purchasing company stock on insider information, and working in a competing business. Employees can lie, steal and act dishonestly and disloyally to their employers in uncountable ways to gain personal advantage. They can use knowledge, processes and relationships gained from their employer in ways that injure the employer.

To offset this vulnerability and to ensure an alignment of interests, the common law imposes a general duty of fidelity, good faith and loyalty on all employees. They must be honest and cannot let their personal interests conflict with those of the employer.

Senior managers and those in special positions of trust and authority are called "fiduciary employees". They must not use their positions to gain a personal advantage, profit or opportunity. They are held to the highest standard in advancing the employer's best interests, and they face the strictest scrutiny in that regard.

Policies and Codes of Conduct

Employers should enact and publicize Codes of Conduct to prohibit self-dealing. Policies and Codes of Conduct are enforceable obligations in the employment contract if they

are brought to employees' attention when they are hired. One such clause in a large Calgary employer's Code of Conduct prohibits:

> *Influence, or seeking to influence, a corporate decision in a manner that favours another individual or organization in the expectation of realizing personal gain for yourself, a related person, or others with whom you have or have had an association.*

> *"There are many ways in which employees can put their employers' interests. This "self-dealing" may include taking the employer's business opportunity, using corporate funds or equipment for personal use, purchasing company stock on insider information, and working in a competing business."*

The *UPM-Kymmene* Case

Steven Berg was a corporate director and largest shareholder of the forestry company Repap. He sought the Senior Executive Officer role and an enhanced employment contract with renewable five-year terms and benefits such as a signing bonus of 25 million shares and stock options. If he was terminated, the new contract would have to pay him out the remainder of his five-year term.

Repap, meanwhile, was cash-strapped and thought Berg did not bring any special skills or expertise to justify adding to the three existing executive officers. Repap did not need – nor could it afford – his new contract. Nevertheless, Berg persisted and the newly appointed members of the Board of Directors relented.

Repap was sold to another company and the new management terminated Berg's employment. By that time, he had only worked for seven months and had been paid $200,000. He sued for $27 million. The employer counterclaimed to set aside Berg's employment contract on the basis of his breach of fiduciary obligation.

The trial judge found the generous package Berg had secured for himself was detrimental to the company's interests and created a massive liability it could not afford. Berg had failed to act honestly, in good faith and in the best interests of the company. His actions, motivated by greed and self-interest alone, were the opposite of what was required of him as a fiduciary. The dismissal was upheld and the enriched employment contract set aside. The Ontario Court of Appeal dismissed the appeal, noting that the trial judge concluded Berg:

> *"made false allegations … his motive … was entirely improper, that he threatened to collapse the company's capital structure if his wishes were not carried out, that he completely lost sight of his obligations to the company, that he 'failed utterly' in his duties to the company, that his conduct was 'exactly opposite to the conduct that the law required of him as a fiduciary', and that he was 'greedy and overreaching and failed miserably in his duties to Repap'."*

Self-Dealing is Ultimately About Money

Self-dealing may involve gaining a promotion, prestige or a good reputation with the employer. In *Poirier v Wal-Mart Canada*, Poirier was appointed manager of a new Wal-Mart store in 2003 due to his performance as a manager at another store which conducted $60 million in yearly sales. After announcing his appointment, Wal-Mart discovered that Poirier had manipulated payroll to keep his store within budget. This involved deleting workers' hours and paying them cash, and entering worked hours as sick time. Poirier's manipulations did not cost Wal-mart an extra penny but his store performance looked better than it was. Poirier was terminated. He sued for wrongful dismissal.

The judge noted that Poirier did not gain financially from his manipulations, which served only to enhance his own reputation and standing in the company. What he gained was not directly monetary. The judge upheld the termination, stating (para 68):

> *"… enhanced reputation from this type of activity, in terms of appearing to be a better manager than one actually is, though clearly a personal benefit and not a financial one, may over time translate into monetary gain through advancement."*◆

Important Concepts in Environmental Law – "Polluter Pays"

Jeff Surtees

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Your parents may have told you: "If you make a mess, you have to clean it up." In a nutshell, that is the basis of the "polluter pays" principle. There is a lot wrapped up inside the simple principle of polluter pays. The roots of the principle come from economics rather than from environmentalism.

The idea is that an organization that damages the environment should pay to fix the damage it causes. In some cases the polluting organization might also be required to pay money to people that it has harmed. Since all costs that a commercial organization pays eventually get passed on to its consumers, cleanup costs will raise the prices of the goods they are selling. If the laws of economics hold true, those higher prices will cause rational consumers to seek substitute goods and then the demand for the polluting goods will fall. In theory, the rational profit maximizing organizations that had been causing the harm will respond by finding ways to produce their goods that don't pollute. Their costs will come down, the price of their goods will fall and the organization will become more competitive. If they don't react in this way, they might find themselves out of business.

This idea of 'cost internalization' is part of international environmental law. It was recognized in Principle 16 of the 1992 United Nations *Rio Declaration* which said "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment." Member states need to pass 'enabling legislation' at home before the *Declaration* has any effect within their borders.

> *"The "polluter pays" principle helps us recognize the true costs of things."*

Canada has done that. Many Canadian laws that protect our air, water and land incorporate the polluter pays principle. As just one of many possible examples, section 2 of the Alberta *Environmental Protection and Enhancement Act* says that one of the purposes of the *Act* is to recognize "the

responsibility of polluters to pay for the costs of their actions". It puts that purpose into action in sections 108 and 109 by stating that that no one is allowed to release substances into the environment at a rate greater than what they have permission to do or at a rate that causes "significant adverse effect". If they do, then section 112 says they have a duty to repair, remedy and confine the effects of the substance, remediate, manage, remove or otherwise dispose of the substance to prevent an adverse effect, and then to restore the environment.

> *" Markets work best when people can base their purchasing decisions on the true costs of things. "*

The polluter pays principle helps us recognize the true costs of things. "Externalities" are costs of producing goods that are paid by someone other than the producer and consumers of the goods. Environmental externalities might be paid by identifiable groups; for example a pulp mill that is allowed to pollute a river shifts the cleanup costs to the municipalities downstream that are forced to increase spending on water treatment and to cover that spending by increasing taxes paid by residents. The price of the pulp and paper being produced does not reflect its true costs. Environmental externalities might also be spread more broadly to society as a whole. For example, if production of a certain kind of product increases disease or leads to climate change, costs go up for society as a whole. Again, the price of the goods being produced does not recognize their true costs. The cost of externalities may also be spread to future generations when environmental cleanup work is not done while the companies producing the harm are still in business. Externalities provide a subsidy, often hidden, to the producers and consumers of some goods at the expense of someone else.

Markets work best when people can base their purchasing decisions on the true costs of things. Sometimes, there may be valid political reasons to openly subsidize the production of goods. We may want to protect jobs in an important industry or we may want to encourage certain types of behaviour. But where pressing social justifications for subsidies do not exist, externalities let some people benefit at the expense of others. The people paying some of the hidden costs of the goods may not even be aware of what is happening.

It is interesting to think about the polluter pays principle in the context of the never-ending debate about "How much regulation is too much?" The principle on its own is not something that can be directly applied by the courts. It has to be brought to life through statutes and regulations. Acceptable levels of release of substances into the air, water or onto land must be set and then tracked. That requires reporting, scientific monitoring, record keeping and enforcement, all of which must be based on regulation. This sort of protective regulation protects people and allows economic decisions to be made by producers and consumers on the basis of true costs. It should not always be thought of simply as "red tape". There is a balance to be struck and different politicians would draw the line in different places.

Principle 16 of the *Rio Declaration* also mentions promoting the use of economic instruments. That is what I am going to cover next time. ◆

Alternatives to Court: Arbitration

John-Paul Boyd

In our first column in this series, I introduced the basic alternatives to resolving family law disputes in court – negotiation, mediation and arbitration – and talked about some of the surprising research on lawyers' views about litigation. In the second column, Sarah Dargatz wrote about collaborative negotiation, a cooperative kind of negotiation in which the lawyers and their clients work together to reach a settlement resolving a dispute. In this column, I'm going to talk about arbitration.

Arbitration and litigation

Arbitration looks a lot like litigation at first glance. Whether you're going to court or using arbitration, a neutral third-party –a *judge* in litigation and an *arbitrator* in arbitration – makes a final decision that binds the parties involved in the family law dispute. Both processes are adversarial, meaning that the parties are not expected to cooperate with each other or reach a settlement. Both processes follow the principles of fundamental justice, which is a fancy way of saying that they are designed to be fair to both parties and that both parties have the right to make their case, and reply to the case against them. But that's where the similarities end.

> *"In my view, the most important benefits of arbitration are its privacy, being able to hire a decision-maker who is an expert in the subject of your dispute and the flexibility of the rules that guide the process."*

Litigation is a public process. Hearings and trials happen in an open courtroom, and in many provinces and territories, anyone walking in off the street can review court files. Judges' decisions can be found online, although some jurisdictions try to anonymize the names of the parties.

Each dispute is resolved by applying a blend of statute law and case law, and according to the rules of court. Hearings and trials are scheduled when there's room in the court calendar, which might be several months for hearings and several years for trials. The evidence presented must comply with the statute and common law rules of evidence. The judges who deal with hearings and trials are randomly selected and may or may not be experts in family law.

Arbitration, on the other hand, is a private process. Hearings occur behind closed doors, no one has access to the

arbitrator's files and the parties agree to keep everything that happens confidential. Arbitrators distribute their decisions to the parties only and never post them online.

Disputes may be resolved by applying the law or by applying another standard, like fairness, and the parties pick the rules for themselves. Hearings can be scheduled as soon as the arbitrator and everyone else is available. The rules and legislation about evidence do not govern arbitrations. The witness' oath or affirmation is not necessary and evidence will usually be allowed if the information is relevant to an issue in the dispute.

Best of all, in arbitration the parties can choose their arbitrator, which means that they can pick someone who isn't just an expert in family law but is an expert in the specific family law problem that's at the heart of their dispute.

Starting arbitration

It's easy to get into arbitration. First, you need to talk to your ex and make sure that he or she is willing to try it. Second, you need to pick an arbitrator. Doing an Internet search for "family law arbitrator" and the name of your town will give you some names to choose from. Contact two or three of the arbitrators **and** tell them about your situation without getting into too much detail, and ask about their experience with family law disputes. Be sure to ask about their fees and availability.

Once you and your ex have found someone you're interested in working with, your arbitrator will send you a participation agreement. This is a contract that talks about how the arbitration will work, your role and your arbitrator's role in the arbitration process, and the arbitrator's payment expectations.

After you've signed the participation agreement, (some arbitrators will ask you to get legal advice about the meaning and consequences of the agreement), the arbitrator will schedule a date for an initial planning conference and perhaps a date for the arbitration hearing itself. The conference is the arbitrator's opportunity to get a more detailed understanding of legal issues in your family law dispute, set dates for the exchange of information and documents, and work with you to select the rules for how your arbitration will run.

Designing the rules that will govern your arbitration

In my view, the most important benefits of arbitration are its privacy, being able to hire a decision-maker who is an expert in the subject of your dispute and the flexibility of the rules that guide the process. The speed of arbitration is also important, since getting a decision quickly almost always makes arbitration cheaper than litigation. I'm going to focus on the rules of arbitration, however, because the many ways they can be changed are often overlooked and some changes can dramatically increase the efficiency of arbitration while dramatically reducing its cost.

" Best of all, in arbitration the parties can choose thier arbitrator, which means that they can pick someone who isn't just an expert in family law but is an expert in the specific family law problem that's at the heart of thier dispute."

In litigation, the rules of court that apply to family law disputes are the same rules that apply to all civil disputes, from motor vehicle accidents to wrongful dismissals. Even in those jurisdictions that have separate set of rules for family law disputes, like British Columbia, or a special rule for family law disputes, like Alberta, the difference between rules for family law disputes and the ordinary rules for civil disputes can be hard to spot.

In arbitration, the parties can design the process to suit their issues, needs and finances. While litigation processes provide a one-size-fits-all service, almost every aspect of the arbitration process can be tailored to the specific needs of the specific people involved in a specific dispute, giving those individuals the opportunity to create a process that is genuinely proportionate to the complexity, significance and value of their issues.

This is especially important because family law disputes are fundamentally different than other kinds of civil disputes. Most civil disputes involve people who may have no relationship with each other except that which gave rise to the dispute. They concern events that ended long before trial and tend to involve concrete evidentiary questions that can be measured, like the length of the skid marks and the condition of the road. They determine responsibility, and, where responsibility is found, the amount of money necessary to restore the plaintiff to the position she would have been in but for the bad act.

Family law disputes, on the other hand, concern family members whose relationship with one another will continue into the indefinite future. They concern events taking place over a lengthy span of time continuing through trial. They involve difficult, ambiguous evidentiary questions about things like the quality of a child's relationship with a parent, the impact of substance abuse, mental health disorders or cognitive impairments on a party's parenting capacity, or whether a child will be better off living in a new town rather than the town in which the child grew up. They concern, not restitution for past events, nor even "winning" and "losing", but the parenting, support and property arrangements that will best provide for the future functioning of families living apart.

If settlement isn't likely and you can have a dispute-resolution process that's custom-designed for your family law dispute, rather than an all-purpose process that also handles motor vehicle accidents and wrongful dismissals, shouldn't you?

Arbitration options

Here are some of the ways that arbitration processes can be adjusted. They cover most aspects of the arbitration process, including exchanging documents and information, deciding how evidence will be presented and how and when someone can appeal the arbitrator's award. These and other changes should be discussed with the arbitrator in detail as early in the process as possible, usually at the planning conference held before the arbitration hearing.

Disclosure: You could agree that you will exchange all of the documents that you would exchange if you were going to court before the arbitration hearing, or you could agree that you will only exchange certain documents or certain types of documents. You could agree that the parties will be questioned out of court before the hearing, or you could agree that they won't. You could agree that each person can require

the other to make admissions about the facts of the dispute before the hearing, or you could agree that they won't.

Mediation: You could agree that the person who is your arbitrator will try to help you reach a settlement through mediation first, or you could agree to go straight to arbitration if settlement seems unlikely. If you decide to try mediation first, you could agree that the arbitrator will be strictly neutral when serving as a mediator, or you could agree that the arbitrator will take a directive or evaluative approach to the mediation. This means that the arbitrator will express her opinion about the strengths and weaknesses of each persons' case as a part of trying to reach settlement.

Hearings: You could agree that hearings will be held in person, by videoconference or by telephone. You could even agree that there will be no hearings at all, and that the arbitrator will make her decision based only on written information and written arguments. (I can even imagine circumstances when it might be appropriate to have hearings though a group text, using an application like WhatsApp or Messages.)

The rules of evidence: You could agree that the court rules of evidence will apply, or you could agree that they won't. You could agree, for example, that hearsay – what someone else told someone – will be admitted and that the test to admit evidence will be relevance to a factual or legal issue.

Written evidence: You could agree that all evidence will be provided though documents, like income tax returns and bank records, or that all evidence will be provided through documents and through the written statements of witnesses. You could also agree that no evidence at all will be presented at the hearing.

Oral evidence: If you are going to have witnesses provide oral evidence, and you don't have to, you could agree that their main evidence will be given in writing and that the other side will be able to cross-examine them on their written statements. Or, you could agree that the number of witnesses will be limited to a certain number, that they will give their main evidence for a limited amount of time, and that the other side will be able to cross-examine them for a limited period of time. Or you could agree that some witnesses will give their main evidence orally and that others will give their main evidence only in writing.

Hearing from children: You could agree that the views of the children will be presented through a short views of the child report or a full parenting assessment, through letters from the children to the arbitrator, or through an interview between the children and the arbitrator. You could also agree that the children will be represented by a lawyer of their own.

Arguments: You could agree that all arguments will be presented orally, in writing, or both orally and in writing. It's possible that you might agree to let the evidence speak for itself and that no arguments will be presented.

The arbitrator's decision: You could agree that the arbitrator will make an oral decision, a written decision with only a short, summary explanation of the arbitrator's decision, or a written decision with full reasons for the arbitrator's decision. (It can take a long time to prepare a decision with full reasons, and the longer it takes to complete a decision the higher the arbitrator's bill will be.)

For example, say your dispute concerns only one or two legal issues, like whether a particular asset is shareable family property or not. That dispute might be addressed over the telephone, with oral arguments only and no evidence at all. The arbitrator's decision might be made over the telephone, without a formal written decision. Or say your dispute concerns figuring out someone's income for support. That dispute might be addressed with limited documentary evidence and limited oral evidence from the parties alone, and so you might opt for a written decision with only summary reasons.

Planning your arbitration

As you consider your options, try to keep your choice of process as simple and streamlined as possible. This can mean making some difficult decisions, like agreeing to present only three witnesses instead of ten or agreeing to limit the length of time for the cross-examination of witnesses instead of exploring every possible detail. Remember that the longer an arbitration takes to complete, the more money it will cost.

Do your best to think outside the box and challenge your assumptions about the kind of process you need. Remember that a successful arbitration can consist of nothing more than oral argument over the telephone, it can be an in-person hearing that includes all of the processes and procedures available in court, or it can be something in between these extremes. In general, most people who are planning an arbitration should try to balance speed and efficiency and the complexity, importance and value of the issues in their dispute.

Our next column in this series will talk about mediation, including neutral mediation and directive or evaluative mediation. ◆

John-Paul E. Boyd is a family law arbitrator, mediator and parenting coordinator, providing services throughout Alberta and British Columbia, and counsel to the Calgary family law firm Wise Scheible Barkauskas. He is the former executive of the Canadian Research Institute for Law and the Family at the University of Calgary.

Human Rights and Extradition

Linda McKay-Panos

Recently, extradition has been front and centre in our news cycle (see: CBC, January 22, 2019 "China accuses U.S., Canada of abusing extradition in Huawei case"). There are very important human rights aspects to the process of extradition. These are critical to our democracy and the rule of law. For example, if another nation involved in the extradition seeks to punish or otherwise persuade Canada by imprisoning Canadians, this is not respectful of the rule of law and cannot affect how we perform the extradition process.

Canada has entered into international extradition treaties with many nations across the world. When one nation requests that a person in another nation be turned over to the requesting nation's law enforcement system, the process to be followed is dictated by the applicable extradition treaty and Canada's domestic extradition law.

> *"There are very important human rights aspects to the process of extradition. These are critical to our democracy and the rule of law."*

Once the other nation (e.g., the United States) makes a formal extradition request, Canada will usually arrest the person and subject him or her to our extradition process. The process is subject to the *Canadian Charter of Rights and Freedoms*, as well as international human rights laws and policies.

In Canada, the *Extradition Act*, SC 1999, c 18 provides the legal steps that must be taken. The superior court of a particular province deals with the matter (e.g., in Alberta, the Court of Queen's Bench). A person can be extradited if a formal request is provided from a state with which Canada has a treaty. Further, the following are required under the *Extradition Act*:

> **3 (1)** A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on — or enforcing a sentence imposed on — the person if

> **(a)** subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and
>
> **(b)** the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,
>
> > **(i)** in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and
> >
> > **(ii)** in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

This principle is called "dual criminality"; meaning the offence that the subject is accused of is a serious one in *both* jurisdictions. This requirement can be waived in some circumstances (*Extradition Act,* s 5). Individuals have the right to appeal to the provincial court of appeal after a negative finding by the lower court.

Canada's Minister of Justice can refuse to surrender an individual if:

> **44 (1)**
>
> > **(a)** the surrender would be unjust or oppressive having regard to all the relevant circumstances; or
> >
> > **(b)** the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.
>
> **(2)** The Minister may refuse to make a surrender order if the Minister is satisfied that the conduct in respect of which the request for extradition is made is punishable by death under the laws that apply to the extradition partner.

The extradition judge must be satisfied that the evidence provided by the other country is sufficient and reliable. These are the important human rights aspects of extradition.

There are many examples of extradition cases in Canada. For example, in *United States of America v Ferras; United States of America v Latty*, 2006 SCC 33 (*Latty*), the U.S. relied on unsworn statements from law enforcement agents. The accused argued that he could be prosecuted on inherently unreliable evidence and that this would violate *Charter* section 7. All levels of court rejected this constitutional objection and the accused was committed for extradition. The Supreme Court of Canada noted that

the principle of comity (deference, mutuality and respect) provided for a presumption that the evidence was reliable, such that a fair hearing would occur.

Because extradition is a reciprocal process, Canada is very careful to follow the procedures in the *Extradition Treaty*. There may be occasions when we would like a person delivered to Canada to face justice; we would expect to be given the same treatment as we give to other nations. At the same time, because we value the rule of law and human rights, we are very careful to follow procedures when asked to extradite a person.◆

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Believe It or Not Tenancy Questions

Judy Feng

Judy Feng, BComm, JD, is a staff lawyer at the Centre for Public Legal Education Alberta. The views expressed do not necessarily reflect those of the Centre.

Here at CPLEA, we receive hundreds of questions about landlord and tenant issues every year. While a majority of them are relatively straightforward, we occasionally receive some questions that leave us scratching our heads or in a state of disbelief (or sometimes a bit of both). In this article, we've compiled answers to some of the most memorable tenancy questions over the years. From radon testing, criminal record checks, tenants cooking crystal meth, questionable video surveillance to rent decreases (yes, you heard that right, rent decreases and *not* rent increases), we hope that the following questions and answers will be informative to you.

> *"...a landlord cannot request a criminal record check from tenants or prospective tenants. Asking for one is considered personal information beyond what is necessary to provide tenancy."*

Am I required to test for radon in my rental property?

Radon is an odorless, radioactive, cancer-causing gas that can be found in new and old buildings. In Alberta, there is no legislation currently in force that directly addresses the issue of radon or radon testing.

That said, landlords should keep an eye out for the *Radon Awareness and Testing Act* as well as any regulations associated with it. The provincial government passed the *Act* in December 2017 but the law is not yet in force. However, within one year of the law coming into force, the Minister (responsible for the *Act)* must develop educational materials that encourage homeowners to measure and take action to reduce radon levels. The *Act* also enables the Minister to make regulations establishing standards for radon testing and reduction in residential dwellings.

While there is currently no law in Alberta (at least in force) that directly addresses radon, radon may be considered a tenant health issue that falls under the *Public Health Act* and *Residential Tenancies Act*. Furthermore, Health Canada and housing industry authorities recommend that homeowners and landlords test for radon.

For more information on radon, refer to the following resources:

Government of Canada webpage on Radon www.canada.ca/en/health-canada/services/radon.html

Government of Alberta webpage on Radon myhealth.alberta.ca/Health/Pages/conditions.aspx?hwid=ty6131

Real Estate Council of Alberta Information Bulletin on Radon www.reca.ca/wp-content/uploads/PDF/Radon.pdf

I heard that a sex offender is moving into the area where I have rental properties. Can I request a criminal record check from prospective tenants? Is there a way to check if a prospective tenant is a sex offender?

No, a landlord cannot request a criminal record check from tenants or prospective tenants. Asking for one is considered personal information beyond what is necessary to provide tenancy. For more information on privacy law and landlord-tenant matters, refer to the Office of the Information & Privacy Commissioner of Alberta's resource, Privacy and Landlord: Tenant Matters FAQs, available on its website: www.oipc.ab.ca.

As for whether there is a way to check if a prospective tenant is a sex offender, the answer is no. The National Sex Offender Registry is a national registration system for sex offenders who have been convicted and ordered by the courts to report annually to police. The public does not have access to the Registry; only law enforcement agencies can access and use the Registry. For more information, refer to the Royal Canadian Mounted Police's website: www.rcmp-grc.gc.ca.

I suspect that my tenants are cooking crystal meth in my rental property. What can I do about the situation?

Under the *Residential Tenancies Act* (*RTA*), if the tenant commits any illegal acts in the property, then the tenant has committed a substantial breach of the tenancy agreement and can be evicted by the landlord with a 14-day written notice. However, in an eviction situation (where the reason for eviction is not unpaid rent), a tenant can write a letter of objection if they do not agree with the eviction. The tenant must serve the notice of objection on the landlord before the termination date. If the tenant does not serve a notice of objection, then a landlord can seek an order to remove the tenant.

You should also consider contacting Safer Communities and Neighbourhoods (SCAN), a unit of the Alberta Sheriffs. SCAN initiates investigations on properties that are suspected of being used for illegal activities and can help landlords to facilitate an eviction or resolution. For more information on SCAN, go to the Government of Alberta's website: www.alberta.ca or call the following toll-free number: 1-866-960-SCAN (7226).

My landlord started installing cameras in and around our building. I noticed that one of the cameras in the building courtyard points directly into my bedroom. Can my landlord do that?

A landlord can only install video equipment in public areas for reasonable purposes such as security concerns. The landlord

must give adequate notice to tenants and visitors that the premises are monitored by video surveillance for security purposes. Furthermore, the video should not be used or disclosed for any other purposes. If you are concerned about the placement of the camera and the use of the video, you can speak to your landlord about your concerns and try to work out a solution. For more information on privacy law or to make a privacy complaint, refer to the Office of the Information & Privacy Commissioner of Alberta's website: www.oipc.ab.ca.

My landlord recently decreased my rent. Are there rules about rent decreases? Does the rent decrease mean that the amount of my security deposit should be reduced too?

No, there are no rules about rent decreases. You and your landlord can agree on whatever amount of rent you think is appropriate. There is no law that sets pit fair rents. A landlord can offer a place at a certain rent and it is up to you as a tenant whether you take it at that price or not, or negotiate a different price. The only rent issues covered by the *Residential Tenancies Act* (*RTA*) is how and when rent can be increased, and what happens if rent is not paid.

As for the question about the security deposit, there are no rules in the *RTA* specifically addressing what happens to security deposits when rent decreases. The *RTA* only specifies that the amount of a security deposit cannot be more than one month's rent under the residential tenancy agreement and that the security deposit cannot be increased as rent increases. However, as the security deposit cannot exceed one month's rent, your landlord should return the difference between the original security deposit amount and the newly decreased rent amount.

Tip: A landlord cannot require a tenant to pay an increase in a security deposit during the term of a tenancy. For example, this means that a landlord cannot increase the security deposit during a periodic tenancy. However, if a landlord increases rent at the end of a fixed-term tenancy and enters into a new fixed-term agreement with a tenant, then the landlord can increase the security deposit. For more information on security deposit increases, refer to Service Alberta's RTA handbook section on security deposits: www.servicealberta.ca/pdf/RTA/Security_Deposit.pdf.

For more information on tenancy law in Alberta, go to www.landlordandtenant.org. ◆

Legislation By Thunderbolt: the Remarkable Career of Dave Barrett

Rob Normey

"True enough, the country is calm. Calm as a morgue or a grave, would you not say?"

– Vaclav Havel

I recall an era where progressive politics in Canada was both exciting and a little bit dangerous for the wealthy elite and the power brokers. One of the first politicians who engaged my interest as a young university student here in Edmonton was the irrepressible and courageous Dave Barrett, Premier of British Columbia from 1972 to 1975. His election in 1972 was the very first time an NDP government had taken power on the West Coast. Sadly, Dave Barrett passed away last year after a long struggle with Alzheimer's disease. An excellent way to savour his career is by reading a fascinating account of the turbulent era when Barrett and his gang of political upstarts rocked the normally staid and conservative world of B.C. politics by defeating the well-financed Social Credit juggernaut of W.A.C Bennett. It is captured in the lively history by Geoff Meggs and Rod Mickleburgh, *The Art of the Impossible: Dave Barrett and the NDP in Power 1972-1975.* The book captures the profound differences between the social worker turned politician who is the flawed hero of the tale, and his seemingly impregnable opponent. W.A.C Bennett had won the previous five elections handily, having earlier developed the Social Credit party as a loose coalition designed to thwart the aspirations of a party of the left. The notion that a democratic socialist party might take power sent shock waves through the business and political establishment (which seemed to be one and the same).

Against these considerable odds, Dave Barrett and the NDP slew the aging dragon in 1972, promising a number of progressive initiatives. Barrett certainly delivered, as his

government enacted 369 bills in a little over three years. One of the most important was B.C.'s first-ever *Human Rights Code*. Barrett had vowed to assist the most vulnerable members of the province with laws that would protect their rights and the *Code* was one of a whole raft of laws designed to accomplish just that.

> *"He was an irrepressible force of nature, a passionate and unscripted leader, who found it natural to remove his shoes and leap onto the table at his first cabinet meeting. There, he asked his team whether they thought they were there for a good time or a long time."*

Barrett and his government transformed the province with his new laws. Government in B.C. lacked transparency; his government changed that. It introduced Hansard reporting of all debates, a daily question period and increased funding for opposition parties. These initiatives made meaningful the right to vote and to proper representation for ordinary citizens. Barrett brought in laws designed to increase economic equality and minimum standards of living for all citizens – including "mincome" for those over sixty, the highest minimum wage in the land, higher pension benefits and an improved workers compensation payment structure. He substantially increased legal aid funding.

The NDP in this hurricane season also developed a landmark labour code which greatly facilitated unions' ability to organize and pursue their right to collective bargaining. The new government restored the right to sue the Crown. It established the first ministry of housing, which included a mandate to establish affordable housing. It preserved B.C. farmland for agriculture through the creation of the Agricultural Land Reserve and extended land protections in other areas, including provincial parks. The *Mineral Royalties Act* significantly increased royalties on minerals, so that citizens could better share in the province's wealth. It created a government-run insurance agency to protect motor vehicle operators by reducing insurance rates.

In the *Art of the Impossible*, Meggs and Mickleburgh set out 97 accomplishments of the Barrett government, describing their list as subjective and likely incomplete. It is important, however, to also reflect on the vision and stance of Dave Barrett in power. He was an irrepressible force of nature, a passionate and unscripted leader, who found it natural to remove his shoes and leap onto the table at his first cabinet meeting. There, he asked his team whether they thought they were there for a good time or a long time. The message was that after so many years in the wilderness, the self-described "people's party" needed to seize the day and refuse to hesitate or compromise. Their success can be measured in the number of laws and programs that remained in place even after they lost power in 1975, a result of a snap election call. The wisdom of the decision was debated by British Columbians many times in the years since.

Barrett had an unusual background for a political leader in B.C. in that era. He was Jewish, and the son of a radical mother, Isadore, and a CCF -supporting father, Sam. Barrett recalled in his memoir, *Dave Barrett: A Passionate Political Life,* the days when he

would accompany his activist parents as they marched and collected funds for worthy causes. This passion for social justice created in Barrett a burning desire to protect the unfortunate and vulnerable and to work for political change that would protect the rights of ordinary citizens. His early political hero, Tommy Douglas, exemplified the way in which one could do this while employing a sense of humour. Barrett's sense of humour, often of a self-deprecating kind, was legendary. In the unforgettable campaign of 1972, running on a shoestring budget, Barrett was able to defuse the tension caused by the inevitable warnings of doom by the incumbent with rapid-fire jokes. Attempts to brand him a dangerous "waffle" supporter (the hard left wing of the federal New Democrats) were met with the response that if he was a "waffle" then Bennett was a "pancake."

An important theme of *The Art of the Impossible* is that Dave Barrett was, ultimately, a strong force for public good but perhaps 40 years too early. Barrett maintained that his agenda and his vision for change were not "radical" but rather designed to allow all citizens to flourish. A keen student of Thomas Aquinas and a believer in the social gospel, he would have been quick to assent to the brilliant French writer, Anatole France's pithy observation that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

I recall the heady times in the 1970s when the world seemed to hold great prospects for progressive change in contrast to this century. In 1974, I travelled with good friends across Europe and encountered an amazing group of actors outside of Lisbon. This was the year of the Revolution of Carnations – the peaceful overthrow of their long-time dictator. A democratic socialist government had taken power and it was wonderful to discuss and debate late into the night the best way forward for both Portugal and Canada. Their manager, Jose, proved surprisingly knowledgeable about our Prime Minister, Pierre Trudeau, but I also put in a few words about the promising government in our western-most province. While the Barrett Revolution was to be stalled a short time afterwards, perhaps it is not too late to discover a way to build on his legacy.◆

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

Charities' Political Activities Question Quieted, If Not Fully Resolved

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.

The long tumult over registered charities' role in public policy debate appears on the cusp of being resolved, or at least being significantly quieted, in the wake of three recent developments.

First, in December, the federal government enacted legislation to amend the *Income Tax Act* (*ITA*) in response to a July 2018 Ontario Superior Court decision that held its provisions governing registered charities' non-partisan political activities are unconstitutional. That legislation, which has now been proclaimed in force, provided that charities could contribute to public policy discussions in furtherance of their charitable purposes and would not be subject to quantitative limits in doing so.

Second, in mid-January, the Canada Revenue Agency Charities Directorate released guidance (available at: https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html) that elaborated on the measures and the permissibility of participation in public policy dialogue and development activity. That guidance replaced earlier draft guidance (quickly withdrawn) on the new legislation that had seemed to limit its applicability. There remain some concerns with the January guidance, which will be discussed below, but the document clearly points toward creating an enabling environment for registered charities wanting to engage in policy work.

Lastly, at the end of January, the government announced it was dropping its appeal of *Canada Without Poverty v Attorney General of Canada*, the Ontario Superior Court case that held the *ITA* political activities provisions violated the *Charter of Rights and Freedoms.* Although the amended legislative measures would still have applied in the future,

and the appeal was thought to be largely driven by government concerns that other *ITA* provisions featuring preferential tax treatment might draw *Charter* scrutiny, the outcome of the appeal could have cast doubt on the government's move to reform the provisions.

> *" A broader concern, raised by some critics of the new measures, is that they will open the door to recognition of groups proposing law reform around a single issue - potentially around controversial social questions."*

There remain questions around the new legislation and guidance. The scope for a registered charity to carry on public policy dialogue and development – as much as 100% of its activity, according to the Department of Finance Explanatory Notes released with the legislation – has to be understood together with the continuing common law prohibition on charities having a "political" purpose.

The difficulty of reconciling devoting 100% of your activities to working on public policy development and dialogue and not having a political purpose is reflected in the CRA guidance. It suggests that public policy development and dialogue is allowed as an activity, but must not become a purpose.

Given that many of the current CRA's model purposes reference activity, it will require some subtle drafting by charities and their advisors and some nuanced interpretation by CRA examiners and auditors to thread this needle. For example, if a charity uses the CRA model object, "To relieve poverty by establishing, operating and maintaining shelters for the homeless", how does it demonstrate that its policy work on low-income housing is in furtherance of that objective?

A broader concern, raised by some critics of the new measures, is that they will open the door to recognition of groups proposing law reform around a single issue – potentially around controversial social questions. Opponents of this view argue that other common law and statutory tools are available to CRA that will prevent the registration or justify the revocation of such groups. Notably, the common law limits the bounds of charity and there are statutory requirements for accuracy in registration applications and other filings.

Another unresolved issue is the character of the new legislative measures. This is again highlighted by the January guidance. It features the following paragraph:

The rules in the Income Tax Act regarding PPDDAs (Public policy dialogue and development activities), and the flexibility they provide, do not typically apply to other types of charities' activities, such as fundraising.

One reading of the new provisions is that they simply entrench – for public policy dialogue and development activities – the Supreme Court of Canada ruling in *Vancouver Society of Immigrant and Visible Minority Women* v. *M.N.R.* (*Vancouver Society*) that the character of activities (charitable or not) is determined by the purpose(s) they further. A contrary view is that the legislation deems public policy dialogue and development activities in furtherance of charitable purposes to be charitable. New section 149.1(10.1) reads, in part:

> *…public policy dialogue and development activities carried on by an organization, corporation or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose.*

How this wording is understood won't have much impact on public policy dialogue and development activities, but it does affect how one approaches characterizing other activities. The previous political activities provisions (149.1(6.1) and (6.2)) were long seen as changing the law, even though a close reading of them and knowledge of their history suggests they were better interpreted as entrenching existing law.

If this legislation is similarly misunderstood, it will reinforce the idea that activities that are not front line work can be categorized without reference to the purpose(s) furthered – even without *ITA* provisions defining "charitable" activity. Doing so will hamper efforts to foster an appropriate regulatory environment in those areas.

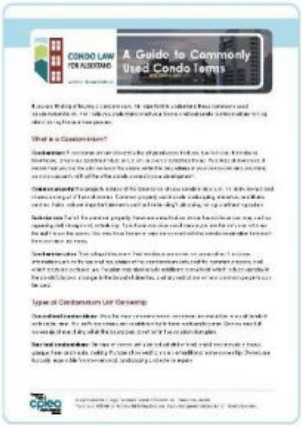
That said, much progress has been made on the political activities file and while some ambiguities remain to be clarified, an issue that has plagued both governments and charities for years appears – for the moment at least – to have been largely settled.◆

New Resources at CPLEA

All resources are free and available for download on cplea.ca. 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

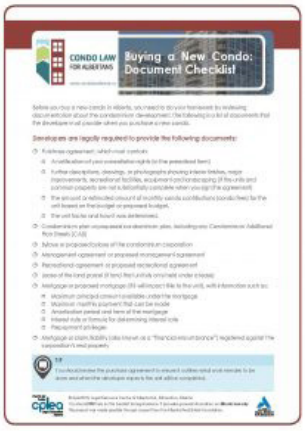
In this issue of LawNow we are highlighting four updated publications of interest to both condominium owners and prospective owners in Alberta. These resources can be found on CPLEA's topic specific condominium law website. condolawalberta.ca offers plain language information for Albertans on condominium law in Alberta.

Updated Resources:



- **A Guide to Commonly Used Condo Terms**

  A guide to commonly used condominium terms in Alberta for anyone interested in buying a condo or currently living in one

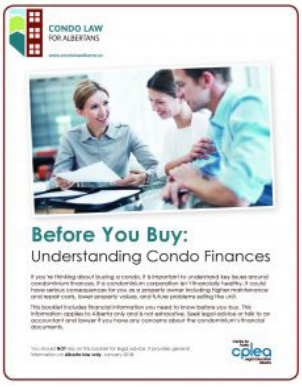


- **Before You Buy: Understanding Condo Finances**

  Information about condo finances for Albertans interested in buying a condo. Booklet features an overview of what documents to request and what to look for in the reserve fund documents, annual report, operating budget, financial statements, estoppel certificate, and meeting minutes.

- **Buying a New Condo: Document Checklist**

  Developers in Alberta are legally required to provide condo buyers with a number of documents before they sign on the dotted line.



- **Buying a Resale Condo: Document Checklist**

  A list of documents you should request and review before you buy a resale condominium.

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

Thank You

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for their continued support.

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